

Asharfi Singh and Others Vs State of Bihar

Criminal Appeal No. 539 of 1993

Court: Patna High Court

Date of Decision: Feb. 22, 2007

Acts Referred:

Arms Act, 1959 " Section 27#Evidence Act, 1872 " Section 35, 72#Penal Code, 1860 (IPC)
" Section 105, 147, 148, 149, 302

Citation: (2008) 1 PLJR 305

Hon'ble Judges: Shiva Kirti Singh, J; Dharnidhar Jha, J

Bench: Division Bench

Advocate: Vindhyakeshari Kr., Ashok Kumar Mishra No. 2, Ajay Kumar No. 1 and Md. Mushtaque Alam, for the Appellant; Ashwini Kumar Sinha, Kanhaiya Pd. Singh, Atal Bihari, Ribha Singh and Pushkar, for the Respondent

Final Decision: Allowed

Judgement

Dharnidhar Jha, J.

Nine accused persons were jointly charged for offences under sections 147, 302/149 of the Indian Penal Code by the

3rd Additional Sessions Judge, Vaishali at Hajipur in Sessions Trial No. 286 of 1990. Sidhi Singh was separately charged u/s 302 of the Indian

Penal Code and Section 27 of the Arms Act. Similarly accused Daroga Singh was also charged with Sidhi Singh u/s 302 of the Indian Penal Code.

Both accused Sidhi Singh and Daroga Singh were further charged alongwith third accused Mithilesh Singh u/s 148 of the Indian Penal Code.

Mithilesh Singh was separately charged u/s 324 of the Indian Penal Code. Four out of the nine accused namely Asharfi Singh, Awadhesh Singh,

Ram Pukar Singh and Bhagwat Singh were jointly charged u/s 380 I.P.C. The nine accused persons namely Asharfi Singh, Shalik Singh @

Shaligram Singh, Ram Pukar Singh, Bhagwat Singh, Awadhesh Singh, Kusheshwar Singh, Sidhi Singh, Mithilesh Singh and Daroga Singh were

found guilty of committing various offences by the learned Judge by the judgment and order of conviction dated 16.10.1993. Accused Sidhi Singh,

Mithilesh Singh and Daroga Singh were found guilty and convicted u/s 302 read with section 34 of the Indian Penal Code while the remaining six

accused persons namely Asharfi Singh, Awadhesh Singh, Shalik Singh @ Shaligram Singh, Bhagwat Singh, Kusheshwar Singh and Ram Pukar

Singh were found guilty and accordingly convicted u/s 302/149 of the Indian Penal Code. Sidhi Singh was separately held guilty and convicted u/s

27 of the Arms Act while accused Mithilesh Singh was found guilty u/s 148 alongwith Sidhi Singh and Daroga Singh besides being found guilty and

convicted u/s 324 of the Indian Penal Code. The remaining six accused persons were found guilty u/s 147 of the Indian Penal Code. Those who

were found guilty u/s 302 read with Section 34 of the Indian Penal Code i.e. Sidhi Singh, Mithilesh Singh and Daroga Singh directed to suffer

rigorous imprisonment for life while the remaining six i.e. Asharfi Singh, Awadhesh Singh, Shalik @ Shaligram Singh, Bhagwat Singh, Kusheshwar

Singh and Ram Pukar Singh were directed to suffer rigorous imprisonment for life for their individual conviction u/s 302/149 of the Indian Penal

Code. Sidhi Singh was directed to undergo another period of rigorous imprisonment for seven years for his conviction u/s 27 of the Arms Act and

for one year u/s 148 of the Indian Penal Code. Accused Mithilesh Singh was directed to suffer rigorous imprisonment for one year u/s 148 of the

Indian Penal Code and equal term and nature of punishment u/s 324 of the Indian Penal Code. Mithilesh Singh and Daroga Singh were directed to

undergo imprisonment for one year for their conviction u/s 148 of the Indian Penal Code. As regards the conviction of the six accused namely

Asharfi Singh, Awadhesh Singh, Shalik Singh @ Shaligram Singh, Bhagwat Singh, Kusheshwar Singh and Ram Pukar Singh they had to suffer

rigorous imprisonment for one year for their individual conviction u/s 147 of the Indian Penal Code. The four accused persons namely Asharfi

Singh, Awadhesh Singh, Ram Pukar Singh and Bhagwat Singh who had been charged together, u/s 380 of the Indian Penal Code were acquitted

of the said charge. The nine accused are the appellants in the three appeals presently being disposed of by this common judgment, Asharfi Singh,

Shalik Singh @ Shaligram Singh, Ram Pukar Singh, Bhagwat Singh, Awadhesh Singh and Kusheshwar Singh together, preferred Criminal Appeal

No. 539 of 1993 while Sidhi Singh has separately preferred Criminal Appeal No. 545 of 1993. Mithilesh Singh and Daroga Singh have jointly

filed the third appeal bearing No. Criminal Appeal No. 547 of 1993 to assail the above judgment and order of conviction as against each of them.

This may not be out of place to mention here that during the pendency of the appeal appellant Bhagwat Singh one of the six appellants in Cr.

Appeal No. 539 of 1993 died and accordingly an affidavit was filed in the said appeal annexing therewith the death certificate of the said appellant

indicating the death having taken place on 15.4.2002. By order dated 18.12.2006 his appeal was abated on account of his death thus leaving this

judgment only as against eight convicted accused and appellants.

2. The prosecution narration emerged from exhibit 3, the Fardbeyan of Sheoshankar Singh, P.W.1 recorded on 23.4.1989 at 11.30 P.M. at his

Darwaja in which he stated that he was watching a film show being telecast on Television at his Darwaja where some co-villagers of P.W. 1 had

also assembled for the purpose. Out of the villagers the informant named the nine accused persons and further stated that at about 8.30 P.M. the

electric line and the show went-off. All on a sudden, the nine accused persons, who were initially the appellants, climbed over the Verandah of his

Darwaja and some of them entered inside the house through the open door. It is stated that Shiv Narayan Singh the younger brother of P.W. 1

who was sitting there in the Verandah, was shot and killed by accused Sidhi Singh with a country made pistol. Appellant Mithilesh Singh dealt a

sword blow on Surajdeo Prasad Singh (P.W. 8) the youngest brother of P.W. 1 as a result of which one of his fingers was amputated. In the

meantime the other accused persons who had entered inside the house looted away ornaments, cash etc. of the value of Rs. 20,000/- by breaking

open boxes and ran away from the rooms.

3. It is alleged that villagers who were present at the Darwaja of P.W. 1 confronted the accused persons as a result of which accused Shalik Singh

@ Shaligram Singh, Asharfi Singh and others were injured. The informant further stated that the villagers threw stones and chased the accused

persons who while fleeing also exploded bombs. As per ex-hibit-3 the Fardbeyan the occurrence was witnessed by Laxman Singh, P.W. 2

Sanjeev Kumar, P.W. 4, Kapal Singh (not examined), Devi Lal Singh (not examined) Mishri Lal Singh (not examined) and others.

4. The informant stated that the reasons for the occurrence was that he had land dispute and other disputes with the accused persons who were

his co-sharers and in order to taking revenge upon P.W. 1, the offence had been committed. It was also stated that the list of properties looted

away by the accused would be given by the lady inmates of the house who were then not in a fit and normal condition.

5. As appears from evidence of P.W. 10, Nageshwar Sharma and D.W. 1, Neelam Kumar Singh, Inspector of Hajipur Police Station, the

fardbeyan was recorded by D.W. 1 at 11.30 P.M. and some articles were also seized from a particular place other than the darwaja of P.W. 1.

P.W. 10, S.I. Nageshwar Sharma received the Fardbeyan written by D.W 1 at the Darwaja of P.W. 1 and forwarded the same to the police

station for registering a case and accordingly the First Information Report (Exhibit-4) was drawn up on 24.4.1989 at 10 A.M. the endorsement

part of the Fardbeyan indicates that it was forwarded to the Officer-Incharge, Hajipur Sadar Police Station for investigating the case and

accordingly S.I. Nageshwar Sharma (PW 10) was directed to take charge of the Investigation who after conclusion of the same sent up the

accused persons for trial which ultimately ended in their convictions as indicated at the very outset of the present judgment and also in filing of the

three appeals before this court.

6. The defence of the accused persons was in the form of a counter case which was registered as Hajipur Sadar P.S. Case No. 75 of 1989 as

appears from paragraph-11 of the evidence of P.W. 10, S.I. Nageshwar Sharma and also from the documentary evidence adduced by the

defence in support of their stand, According to the defence the informant was drawing electric power by putting an extension line on the electric

line of the accused persons which ran through the plantin field of the accused which was objected to by the accused persons and for that there was

a Panchayati in the evening of the day of occurrence at the house of Mishri Lal Singh and there was some altercation between the parties with

exchange of abuses and it was stated that the informant and others assaulted appellant Asharfi Singh and Shalik Singh @ Shaligram Singh by

sword, dagger, Bhala and Lathi etc. for which the case was lodged and the injured persons were treated by the doctor. It was alleged in the

counter version that in fact Ram Narayan Patel fired a shot which hit Shiv Narayan Singh the deceased and as such they filed a false case.

7. In support of the charges the prosecution examined as many as 11 witnesses. The witnesses who came in support of the charges were chiefly

the family members of P.W. 1 except P.W. 2 Laxman Singh. Bina Devi, (P.W. 3) Laxmi Devi, (P.W. 5) and Shakuntala Devi (P.W. 6) are the

two daughters and wife respectively of P.W. 8, P.W. 4, Sanjeev Kumar is the nephew of the deceased. P.W. 7, Neelam Devi who was tendered

is yet another daughter of P.W. 8 besides Meena Devi and Laxmi Devi. Surajdeo Singh, P.W. 8 was the youngest brother of P.W. 1 and father of

P.Ws. 3, 5 and 7 and husband of P.W. 6. The Doctor, Sushil Kumar, P.W 9 had held post mortem examination on the dead body and issued the

report in that behalf. As pointed out earlier S.I. Nageshwar Sharma had first investigated the case and handed over the charge of investigation to

S.I. Bachhan Mishra P.W 11.

8. As regards the prosecution exhibits there is a defect in marking. I find that Ext. 1 is signature of Shiv Shankar on his fardbeyan Ext. 3. Ext. 2 is

the signature of P.W. 2 on inquest report which has been marked Ext. 5. Ext. 4 is the first information report of the case. The command for taking

the dead body to the hospital, has been marked Ext. 6. Ext. 7 is the copy of Memo No. 208 dated 25.5.89 by which S.I. Bachhan Mishra P.W.

11 sent the seized blood to the serologist for chemical analysis. The post mortem report appears bearing Ext. No. 2 which is wrong, because the

document was tendered in evidence ahead of fardbeyan which was proved by P.W. 10 after the examination of P.W. 9 the doctor holding the

post mortem examination. However, I have left undisturbed the number because the document post mortem examination report has duly been

exhibited and brought on record. Ext. 8 is the deposition of D.W. 1 Neelam Kumar Singh who was examined as P.W. 10 in the counter case.

9. The defence has examined three witnesses and produced some documents. D.W. 1, Neelam Kumar Singh was the Inspector of police on the

date of occurrence who recorded Exhibit-3 and prepared the Inquest report, Exhibit-5 after holding inquest upon the dead body of Shiv Narayan

Singh. Dr. Krishnanand Singh, D.W. 2 was the Medical Officer posted on the date of occurrence in Sadar Hospital, Hajipur and he examined the

two admitted injured patients Shalik Singh and Asharfi Singh and issued medical reports Exhibit-B and B/1, D.W. 3, Paras Nath Singh was a

witness of formal nature who proved the Fardbeyan and First Information Report of the counter case as Exhibits-C and D. The defence besides

the above documents also tendered the copy of deposition of Neelam Kumar Singh, P.W. 10 examined in Sessions Trial No. 135 of 1990 which

was probably the trial number of the counter version of the occurrence and also the deposition of P.W. 1 examined in the above noted sessions

trial No. 135 of 1990, namely, Makhan Ram. Besides the above documents the defence tendered the certified copy of the charge-sheets as

Exhibits-A and A/1 which were filed by the police after conclusion of the investigation of the counter case.

10. The learned Trial Judge after appreciating the evidence both of the prosecution and the defence concluded as indicated in the first paragraph of

the judgment and recorded the conviction of the appellants while acquitting six of them for the charge u/s 380 of the Indian Penal Code.

11. Shri Vindhyakeshari Kumar, the learned Senior counsel appearing for the appellants in all the three appeals has set up five pronged attack

against the judgment and order of conviction. It was firstly submitted that the common object of the unlawful assembly was not established and as

such the conviction of all the appellants was not proper. There was no source of identification on the place of occurrence, as admittedly, the

electric line had gone-off and it was not possible to see and identify anyone. Moreover the subsequent introduction of lantern by the witnesses

being an improvement not mentioned in the first information report nor the source of identification, that is, the lantern being not produced before the

police the learned court below erred in convicting the appellants. It was next contended that the witnesses appeared lying on the most material

point as they do not explain the injuries on the persons of Shalik Singh and Asharfi Singh. The fourth contention was that there was no seizure of

anything from the darwaja of P.W. 1 where, as per the prosecution case, the occurrence had taken place, rather the seizure of articles was from a

place as appears the probable place of occurrence from the counter case which was situated at a distance of about 200ft west off the house of

P.W. 1 and that probabilise the counter version so as to disproving the prosecution claim and charges. The last contention was that material

witnesses named in the first information report were not examined to unfold the prosecution case and as such the prosecution was guilty of

suppressing the material evidence and an adverse inference be drawn against it.

12. As against the above Shri Kanhaiya Pd. Singh, senior Advocate appearing on behalf of the informant submitted that non-examination of the

P.Ws. were fully explained by the prosecution through some of the witnesses and it was not necessary for the prosecution to examine any

particular number of witnesses. The means of identification was there and even if it was not, it could not be a fatal short coming in the prosecution

case so as to rejecting it completely. Shri Singh submitted that the evidence on record indicated that the appellants were acting in furtherance of the

common intention which they shared with each other and subsequently they acted in concert as members of an unlawful assembly with the common

object of eliminating Shiv Narayan Singh, the deceased, and as such the conviction of some of the appellants by virtue of Section 34 of the Indian

Penal Code and of some others by virtue of Section 149 of the Indian Penal Code was not against law. Shri Singh listed before this court some of

the salient features of the case like as under:--

(i) the fardbeyan disclosed the names of all the accused within three hours, that is, very shortly after the occurrence which lent assurance to the

statements made therein,

(ii) the consistency in the evidence, further being corroborated by the unimpeachable medical evidence indicated that the injuries to the deceased

was caused by firearms and, lastly, the witnesses were not inimical and were only members of the family. Both the learned counsel referred to the

evidence on record in support of their contentions and placed a huge number of decisions both of this Court and of the Supreme Court to buttress

the points formulated by them. I propose to deal with them at the appropriate stage of the present judgment.

13. Before I grapple with the arguments of the sides in the light of the facts presented before the trial court and available to us on the judicial record

of the lower court, this appears necessary to point out that the plethora of prosecution evidence presented through 11 witnesses be perused so as

to finding out as to what the prosecution has placed before the Court in support of the charges. I do not propose to go into the individual

appreciation of each and every witness examined by the prosecution or for that matter by the defence. What I propose to do is to pick up the

salient features appearing in the evidence and thereby to find out as to what deficiencies or inconsistencies are there in the prosecution case. Before

I do that I may point out that the first information report, as regards the allegations and the prosecution story, is confined to dealing of assault or

giving blows only against the two accused persons namely, accused Sidhi Singh who as per the first information report, fired the single shot at the

deceased Shiv Narayan Singh injuring and ultimately killing him. It is alleged next that accused Mithilesh Singh who was present at the P.O.

wielded a sword blow upon Suryadeo Pd. Singh (PW. 8) on his left hand and as a result thereof his finger was cut. This is the short story of assault

put into the fardbeyan.

14. As regards the witnesses, the informant (PW. 1) and the author of fardbeyan Ext. 3 appears to have put a few vital embellishments in his earlier

version while deposing in court. He did not change the allegation that it was appellant Sidhi Singh who fired a shot by a pistol killing Shiv Narayan

Singh nor did he change the initial story told by him in Ext. 3 the fardbeyan that it was appellant Mithilesh Singh who wielded a sword blow upon

PW. 8 Suryadeo Pd. Singh or Suraj Singh as some witnesses have described him when he intervened to save Shiv Narayan as a result of which his

finger was cut. What PW. 1 did was that he assigned a separate allegation of dealing knife blow upon the deceased Shiv Narayan by appellant

Daroga Singh which was completely absent in his earlier story contained in Ext. 3, fardbeyan. However, while making this improvement upon his

earlier narration, PW. 1 does not appear pointing out as to what was the part of the body of the deceased which appellant Daroga Singh struck by

his knife. The above facts appear in paragraph 3 of PW. 1. The informant was cross-examined on the above manner of occurrence in paragraphs

18, 19 and 20 of his evidence and there does not appear much to be noted so as to recording a finding that the witness has digressed in any

manner from his earlier path in putting down the narration as regards the individual acts of different appellants. However one glaring fact which was

not stated by him and which appears narrated by other witnesses as may appear from the subsequent discussion was that it was not stated by PW.

1. that Mithilesh Singh pierced his sword in the back of the deceased Shiv Narayan Singh. In fact there is no such statement in the whole evidence

of PW. 1 that Mithilesh Singh dealt a blow other than one allegedly wielded by him upon PW. 8 Suryadeo Pd. Singh so as to causing an injury and

thereby cutting his finger.

15. When one considers the evidence of the remaining witnesses such as P.W. 2 Lakshman Singh, P.W 3 Veena Devi, P.W. 4 Sanjeev Kumar,

P.W. 5 Lakshmi Devi, P.W. 6 Shakuntla Devi and P.W 8 Suryadeo Pd. Singh one could find that they appear telling the court that when the

deceased Shiv Narayan Singh was shot and injured he fell down and thereafter he was given a knife blow by appellant Daroga Singh behind his

ear and in the same position of the deceased, appellant Mithilesh Singh pierced his sword into his back. These vital improvements made by the

witnesses were very meaningful when one considers the fardbeyan and the medical evidence.

16. The medical evidence of Dr. Sushil Kumar P.W. 9 indicates that there were three injuries on the deceased Shiv Narayan Singh which were

described by the witness as under:--

(i) Lacerated punctured wound of 2/3" x 1/3" x bone deep with inverted irregular blackened margin. The eye brows were singed. On dissection of

this injury P.W. 9 found five pellets embedded in the surrounding tissues and removed them.

(ii) Sharp penetrating wound on left side on lower part of back 1.1/2"" x 1/4"" peretonial cavity deep. The weapon had pierced through all the

underlying muscles and deep fossa of back, extra-peretonial tissues and peretonium while cutting the left renal artery, the whole peretonial and

extra-peretonial space was found full of blood clots by the doctor.

(iii) Sharp cutting incised wound on back of left ear up to the posterior aspect of external ear measuring 1/2"" x 1/4"" x 1/3"".

17. In the opinion of P.W. 9 injury No. (i) was caused by firearm such as country made pistol, injury No. (ii) by a sharp penetrating weapon such

as sword and injury No. (iii) by sharp cutting weapon like a Chhura. But, when one considers the above injuries one could find that there is no

mention of the site of injury No. (i). One would further find that the death was caused by injury No. (ii) which was caused by piercing a sharp

pointed weapon into the back of the deceased.

18. As pointed out above by reference to the evidence of the witnesses examined by the prosecution during the course of trial as also by making

reference to the fardbeyan and the evidence of P.W. 1, there was initially no author of injury No. (ii) either in the fardbeyan or till the day P.W. 1

was examined and discharged by the learned Trial Judge. It has occurred to me very clearly that the prosecution realised the difficulty in proving

the charges after examination of P.W. 1 probably after it considered the post mortem examination report containing the findings and the opinion of

P.W. 9 and thereafter introduced the story of appellant Mithilesh Singh piercing the sword into the back of the deceased, firstly, through P.W. 2

Lakshman Singh in para 2 of his examination in chief. However, when one considers the cross-examination part of the evidence of P.Ws. 2, 3, 4,

5, 6 and 8, one could very clearly find out from their respective paragraphs that they have not made such statement before the police that appellant

Mithilesh Singh had pierced a sword in his back while the deceased was lying after having received the firearm injury. The attention of these

witnesses were drawn during their cross-examination and the two I.Os. namely P.W 10 S.I. Nageshwar Sharma and P.W.11 S.I. Bachhan Mishra

have proved the statements that none of the above noted witnesses had stated before them that appellant Mithilesh Singh had pierced the sword

into the back of the deceased.

19. Another glaring fact which I have found in the evidence of the prosecution witnesses and as such in its story is the introduction of story of

appellant Daroga Singh giving the blow with knife (Chaku) behind the ear of the deceased. This fact also appears vital and it was expected that it

would have been narrated by the informant in his fardbeyan which was given quite some times after, i.e., after about three hours of the occurrence

alongwith the fact that appellant Mithilesh Singh pierced his sword into the back of the deceased. All omissions are not contradictions but when

such facts and allegation as noted above are missing from the fardbeyan and the evidence of P.W. 1 and are later found introduced through the

evidence of other witnesses for the first time in court, then they turn out to be material contradictions. The reason for my above finding is that when

the prosecution specifically alleged two stories of two assailants--one of which appears the most vital co-relating it to the finding of the medical

man--then it was expected that the maker of Ext. 3, fardbeyan, and the witnesses coming to co-relate the facts contained therein ought to have

narrated those vital facts before the I.O. of the case. This appears a serious infirmity in the prosecution case. This also appears to me an attempt of

making a serious and important improvement in the prosecution case of slapping the allegation which was never appearing at any stage of the

investigation right from its inceptions. This contradiction is a major defect and a shortcoming as well in the prosecution version.

20. While reading the evidence of the witnesses in the light of the fardbeyan Ext. 3, which is the basic prosecution version what I came across was

that there is specific motive alleged in Ext. 3 on account of which the appellants were impelled to commit the offence. It was, as stated in the

fardbeyan, that the appellants were the co-sharers in properties with the informant and his family and that there were some land dispute between

the parties alongwith some other disputes and for taking revenge upon the informant and his family, the offence had been committed. The law is

trite that the genesis of the occurrence and the reason for the commission of the occurrence, that is, the motive is not of much importance in case of

direct oral evidence, but if the prosecution alleged a particular motive on account of which the accused persons were motivated to commit the

offence, then the court normally has to look for the evidence in support of the same. P.W. 1 does not say any line in his examination-in-chief as to

what was the motive for committing the offence. However paragraph 8 of P.W. 1 as also the last line of paragraph 13 of his evidence indicates as

if there had been some land dispute between the parties in respect of 16 dhurs of land and that was settled at the stage of consolidation

proceedings. The other paragraphs like prs-9, 10 and 13 of P.W. 1 contain one line or a few lines as regards the relationship between the two

families of the informant and the appellants. Paragraph 9 contains a line in which P.W. 1 stated that the appellants had never assaulted any of his

family members before the occurrence. Paragraph 10 also contains a single line indicating that the members of the two families used to meet each

other prior to the occurrence. A few lines of paragraph 13 of P.W. 1 indicates that before the occurrence the two families were dining at each

other's invitations, but the accused persons were not invited to dine on the occasion of the Shradh ceremony of the deceased. P.W. 2 Lakshman

Singh in para 13 of his evidence has stated that the relationship between the informant and the appellants was good. Similarly P.W. 4 who happens

to be one of the family members of the informant has stated in paragraph 8 that there was no animosity between the prosecution party and the

appellants on the date of occurrence or prior thereto. P.W. 4 further states that there was no reason to the appellants for assaulting and killing the

deceased Shiv Narayan Singh. However P.W. 4 Lakshmi Devi one of the three daughters of P.W. 8 examined so far during the trial stated that

some quarrel used to take place between the sides when the appellants used to flow water into the fields of the informant. P.W. 8 Suryadeo Pd.

injured witness and who is also the youngest brother of P.W. 1, has given altogether a different motive and cause for the occurrence. He had

stated in paragraph 12 of his evidence that appellant Asharfi Singh was the full brother of one Baliram Singh who died leaving behind his widow.

Baliram Singh was the elder brother of appellant Asharfi Singh and the lady did not remarry. This evidence of P.W. 12 does not lead us to

anywhere. However when one considers the evidence of P.W. 8 in paragraph 26 in cross-examination, one could find that the widow of Baliram

Singh the elder brother of appellant Asharfi Singh was maintaining an illicit relationship with the deceased Shiv Narayan Singh and on that account

the deceased used to have quarrel with the appellants.

21. The first information report indicates that the appellants alongwith other co-villagers were witnessing the TV. show going on the darwaja of the

informant while sitting in the sahan. This indicates that there might not be bad relationship between the two parties on or before the day of

occurrence which fact has been supported by one of the family members like P.W. 4. Sanjeev Kumar and other prosecution witnesses like P.W.

2. P.W. 1 as noted above does not say anything in examination-in-chief. The land dispute had ended long back during the consolidation

proceedings. The families were on visiting terms with each other. The relationship was cordial in-as-much as they were dining at each others house.

There was nothing on the day of occurrence for which the murder would have been committed except the new story as told by P.W. 8 Suryadeo

Pd. Singh in paras 12 and 26 of his evidence that Devanti Devi wife of the elder brother of appellant Asharfi Singh was keeping an illicit

relationship with the deceased. Was the deceased indeed such a person as a lady could be attracted to him for satisfying her sexual desires? This

was a question which would not have raised itself in my mind had I not considered deeply the post mortem examination report and the findings

recorded by P.W. 9. This is a document tendered in evidence by the prosecution and relied upon by it as regards the state of the dead body. It is a

document which could not be read only for finding out as to what were the injuries as recorded in their nature and effect but it could also be

considered to find out as to how the deceased was organically, after going through the post mortem report which has been marked exhibit by

virtue of the evidence of P.W. 9 and wrongly numbered as Ext. 2 as appears from paragraph 5 of P.W. 9, the document appears in six parts. The

top part describes the external appearance of the dead body and contains many columns in respect of many informations. Column No. 1 is in

respect of the name, caste and residence of the deceased and accordingly it describes the dead body to be the dead body of the deceased Shiv

Narayan Singh. Column No. 2 is in respect of the sex and age of the deceased. It describes the deceased as an impotent person of 48 years and a

Hindu. It could very well be marked that the deceased has neither been described as a male nor as a female organically. On further deeper probe

into other details and findings, one could find that there are six parts in the post mortem report--part No. 1 is headed ""external appearance"" and its

first column is titled ""condition of subject--stout, imatiated, decomposed etc."" This column describes the dead body as of a Hindu impotent of

average built. Again the deceased was not described either as a male or as a female. Part 4 contains the heading ""Abdomen"". Column No. 11 of

part 4 is headed ""organs of generation--external and internal"". The descriptions noted down by P.W. 9 in it are ""impotent. Redumentary penis and

scrutum"". Thus, what appears from the above descriptions is that the deceased was neither a man nor a woman. He did not have the

characteristics of the two genders. This was the reason that he was not married as was stated by P.W. 1 in paragraph 15 of his evidence. He was

living as a man but he was completely impotent. Gender attraction besides being influenced by the beauty of the physique is definitely a matter of

getting satisfaction of sex through the acts of cohabitation. There could be various reasons for a man and a woman being attracted to each other,

like, a man could be attracted to the beauty of a woman as could a woman be also attracted to a man. The other features which could attract

persons of two sexes to each other could be their status in society, their personal achievements in their respective fields of activities. The financial

status of any of them and many matters like that may also be the reason for gender attraction. But when there is a definite allegation that the

deceased was attracted to the lady or the lady was attracted to him and that they were maintaining an illicit relationship, one has always to look to

the physical capabilities of the two in that regard. One could accept the story of an initial attraction of the lady to the deceased, but could not

believe it, for, the deceased would not have been entertained by the lady in the light of the incapability he was suffering from. The confrontation of

the lady with the deceased would simply have generated dissatisfaction frustration and ultimate rejection of the deceased by the lady. In that view

the story does not appear acceptable.

22. The learned Additional Sessions Judge in paragraph 22 of his judgment has dealt with the motive part of the prosecution story and has held

that the appellant had the requisite motive for committing the offence utilising Ext. E which is the certified copy of deposition of a witness examined

in sessions trial No. 135 of 1996 which probably was the counter version of the same incident. The learned Judge has recorded in his discussion

that it occurred to him on perusal of Ext. E that the parties were on inimical terms for the last five years and because of enmity cuts both ways the

appellants had the motive for committing the offence. I am constrained to record my disapproval of utilizing the evidence of the witness examined in

another case for recording a finding in the present case. The deposition of Makhan Ram P.W. 1 examined in session trial No. 135 of 1996 might

be admissible by virtue of being the copy of a public document, or record either u/s 72 or 35 of the Evidence Act. There could be thousand of

records which might be generated by a public servant in discharge of his public functions as per the provision of Section 35 or 72 of the Evidence

Act. It might be admissible on account of its very nature but on that account a Judge could not receive the document as evidence in a particular

case. A document or any other evidence could be admitted only when it is relevant to the facts in issue. Relevancy of evidence either oral or

documentary could be judged on various parameters specially the one that either the evidence probabilises or improbabilises the existence or non-

existence of fact in issue. If it did not probabilise or improbabilise the very fact in issue then in that case the evidence could never be said to be

relevant and could not be admitted or accepted by court. Deposition of a witness recorded by a Judge and a copy thereof which has legally been

issued is definitely an admissible document, but it can be used only for the purpose of finding out as to who the witness was and in which case he

deposed to. The facts stated by a witness before a court of law in his deposition do not have the evidentiary value because those facts were not

recorded in the presence of the accused persons in the case in which they were being tried for a particular charge. The Judge who tried the present

case did not administer oath to the witness in the same proceedings/These are some of the reasons on account of which the evidence of Makhan

Ram a witness in Sessions Trial No. 135 of 1996 could not have been utilised by the learned Judge for recording a finding on a particular fact.

23. As regards the other parts of the prosecution story, the evidence of its witnesses also does not appear inspiring confidence and it appears to

me after going through the evidence that the case suffers from some material defects. One such defect which afflicts the prosecution case, in my

considered view, is the very place of occurrence where Shiv Narayan Singh was allegedly shot and killed by the accused persons. One could

simply recapitulate that the occurrence took place on the verandah of the house of the informant which faces north. The deceased was as per

prosecution story sitting on a cot. He was shot and injured in that condition. Some witness say that he fell down on the ground while some says that

he fell on the same cot when the sword was pierced into his back and a Chhura blow was given in the back of his ear. It does not require to be

said that piercing of sword and the injury which has been described by the doctor must have caused profused bleeding to the deceased. It would

have not only been copious but it would have flooded the verandah and specially the part of it where the deceased was sitting on the cot. Place of

occurrence has been described by P.W. 10 S.I. Nageshwar Sharma in paragraph 6 of his evidence and on a perusal of the same he does not

appear speaking that he found any blood on the verandah where the dead body was lying on a cot. In paragraph 8 he has stated that he had seized

the blood stained earth from near the same cot. But, when he was cross examined in para 16 he resiled from his earlier evidence by telling that his

statement made earlier in paragraph 8 was an erroneous statement and the fact was that he had not seized anything from the place of occurrence.

This appears in paragraph 16 of the evidence of P.W. 10 in which he further stated that in fact whatever was seized by Police Inspector Neelam

Singh (D.W.1) and from the place of occurrence and was handed over to him. P.W. 10 further stated that the seized articles were a white towel,

two cotton towels one of which was found with a coin of one rupee and five paise tucked into one of its ends, one lungi of light blue checks which

was stained at various places with blood, a piece of baniyan, five pairs of wooden foot wears (kharpa), three hawai slippers, one broken plastic

slipper one sandal of black colour, one knife of about 6" fitted with a white handle, one empty of a cartridge. The consideration of the evidence of

P.W. 10 in paragraph 6 would indicate that the above articles were seized from a place where some earth and sand had been amassed by the side

of the road which passed from in front of the house of the prosecution party and went ahead across the village and the place was at a distance of

about 200 yards off west of the house of P.W. 1 which was in front of the house of one Mishri Singh. D.W. 1 Neelam Kumar Singh the Inspector

of Police in Hajipur was not examined by the prosecution. He was examined by the defence as a witness and he has deposed to having seized the

above articles from the place in front of the house of Mishri Singh which was at a distance of 200 yards towards west from the house of P.W. 1

Shiva Shankar Singh, No brickbats, no articles of violence or any evidence of violence having occurred at the house of the informant was found

either by P.W. 10 or D.W. 1. Thus it makes it very difficult to accept that indeed there was an occurrence at the house of P.W. 1.

24. However, P.W. 11 S.I. Bachhan Mishra who was the officer incharge on the relevant day of Industrial Area P.S. Hajipur says that he seized

the blood stained earth after having taken over the charge of the investigation from P.W. 10. This evidence appears in paragraph 3 in which he

stated that after taking charge of the investigation on 27.4.1989 he seized the blood stained earth and sent the same to the Forensic Science

Laboratory for its chemical examination on 25.5.1989. One has grave doubt in accepting the evidence of P.W. 11, firstly, for the reason that the

occurrence had taken place at 8.30 P.M. on 23.4.1989 and blood could not have remained in such a state as to be seized from the place of

occurrence on 27.4.1989 after four days under summer conditions. Secondly, P.W. 11 does not say as to whence did he seize the blood. The

place of occurrence, that is. the verandah of P.W 1 was a pucca construction appears from P.W 10 para 15. There is no dispute in it. The blood

had remained on the verandah or had been allowed to remain there, considering the social taboos appears simply impossible. Moreover after

having seized the blood on 27.4.1989 the witness sent it for chemical examination on 25.5.1989 and it casts a serious doubt on the veracity of the

claim of P.W. 11 that he indeed seized blood. In addition to the above there was no report of the serologist to show that indeed it was human

blood which tallied with the blood group of the deceased so as to connecting it with the deceased. In the light of the above discussion of the

evidence of the witnesses it is clearly indicated that the prosecution claim that occurrence took place at the darwaja of P.W.1 does not appear

reasonably an acceptable story.

25. The other reason which appears from the circumstances of the case has also convinced me that indeed there could not have been any

occurrence at the place as claimed by the witnesses. It may be recalled that the villagers have assembled at the darwaja of the informant for

witnessing the television show. The family members of the P.W. 1, as appears from the fardbeyan and the evidence of different witnesses, were

sitting in verandah while the villagers and the nine accused persons were sitting in the sahan, i.e., the open land which was below and in front of the

verandah. What weapons the accused were having in their hands are told by different witnesses. Only three accused persons namely Sidhi Singh,

Daroga Singh and Mithilesh Singh, as per P.W. 1, were respectively armed with firearm, sword and Chhura. Other witnesses like P.W. 2

Lakshman Singh, P.W. 3 Veena Devi, P.W. 4 Sanjeev Kumar, P.W. 5 Lakshmi Devi and others assigned sickle and iron rods to other accused

persons like Asharfi Singh, Salik Singh, Kusheshwar Singh, Awadhesh Singh and Rampukar Singh. A sword or an iron rod are articles which

could not be concealed by the accused persons. Even a sickle or a firearm could not have been concealed by the accused persons considering that

it was the month of April and it would have been quite hot in and around Hajipur so as not to permit any person to put on additional cloth over his

body. All the accused persons and the villagers came peacefully and sat together and were never seen with them before they wielded their

respective weapons in the melee which occurred after the light had gone out. There was no bad blood between the parties so that the accused

persons could prepare themselves so stealthily. There did not happen anything at the darwaja of the informant so as to flare up the commission of

the occurrence. These circumstances taken together create a doubt that indeed anything had occurred at the place as claimed by the prosecution.

26. What I have discussed above, in light thereof it may not be imperative for the court to consider whether there was any means of identification

or the source of any light at the place of occurrence. If there is reasonable doubt in the prosecution claim about the occurrence taking place at the

darwaja of P.W. 1, then it becomes immaterial whether there was any light or not. There could be a source of light even in the rural area which had

been electrified because one does not know when the electric line would go-off. Under this apprehension every one even in the township of Bihar

has an additional electric source of light put on as soon as it is dusk. There is some belief in the rural area also that it was not good that one should

keep his house dark. Under this belief as well every house in the rural Bihar has a lamp at its darwaja or inside. In that view the decision cited

during the course of argument by both the sides do not appear of much relevance. The appellant cited AIR 1975 SC 300 and 1977 BBCJ 400.

As against that the learned counsel appearing for the informant has placed before us 1997 (2) PLJR 1 (SC), Sahid Ekbal Khan and Another Vs.

State of Bihar, to counter the argument of the appellant and to submit that it was not always necessary that source of identification be established

by the prosecution.

27. It is not essential to express any view on the point of availability of light at the place where the occurrence could have taken place in-as-much

as there could be two possibilities that either the occurrence had taken place at the darwaja, which I have grave doubt to believe or, at other place

which has appeared in the evidence of P.W. 10 the I.O. S.I. Nageshwar Sharma. I have already noted in the earlier part of the judgment that

D.W. 1 Neelam Kumar Singh had seized many articles from a place 200 yards west off the darwaja of the informant and that was in front of the

house of one Mishri Singh. The defence version is that a Panchayati had been convened at the darwaja of Mishri Singh for settling the dispute

between the two sides on account of illegal drawal of electric power by the informant side and during that course some incidence took place. If at

all a Panchayati was convened there there might have been sufficient lighting because no Panchayati could be held in darkness. In that view also

source of light would have been sufficient so that people assembled and sitting there could see each other and discuss the dispute and decide the

same. This is another angle of considering the argument of the two learned counsel.

28. The most important aspect of the matter of the entire case is that there is a counter version according to which the occurrence took place in

some other manner and as per fardbeyan of the counter case i.e. Ext. C. While the Panchayati was going on at the darwaja of Mishri Lal Singh

there was some altercation between the parties with some exchange of abuses and it was alleged that the informant and others assaulted two

appellants Asharfi Singh and Salik @ Saligram Singh with sword, dagger, bhala, lathi etc. and in that melee Ram Narayan Patel (he has been

named by the prosecution as Ram Narayan Singh and cited in the F.I.R., as witness) fired shot which hit the deceased Shiv Narayan Singh and in

order to creating a defence a false case was lodged. It might be a repetition but I want to note again that D.W. 1 seized some articles from a place

situated in front of the darwaja of Mishri Singh. It may also appear from the reading of the evidence of P.W. 1 Shiv Shankar that there was some

injuries on the person of the accused and the informant P.W. 1 in order to explaining the same made a statement in the fardbeyan Ext. 3 that while

the accused persons were retreating they were confronted by the villagers and some brickbat and stones were pelted on them and as a result of

which two persons Salik @ Saligram Singh and Asharfi Singh were injured. Witnesses have been cross-examined on the above point. Specific

questions were put to each and every witness as to who had pelted stones/ brickbats on accused persons as may appear from P.W. 1 paragraph

19 P.W. 2 paragraph 13, P.W. 3 paragraphs 10 and 11, P.W. 5 in paragraphs 7 and 13, P.W. 6 in paragraphs 9 and 14 and P.W. 8 in

paragraph 8. This is admitted by P.W. 1 in paragraph 23 that there was a counter case in which besides the informant, Suraj Singh (P.W. 8)

Radheshayam Patel, Shiyaram Singh, Sanjeev Kumar (P.W. 4) Munna Singh, Mahendra Singh, Shivanand Singh, Ram Narayan Singh, i.e. Ram,

Narayan Patel, Golan Singh were accused persons and that case was pending in the same court. P.W. 1 stated in paragraph 19 that persons who

pelted stones/brickbats were Laxman (P.W. 2), Sanjeev (P.W. 4) Suraj (P.W. 8) and others. P.W. 2 Laxman Singh does not say that he had

pelted any stones nor does P.W. 4 Sanjeev Kumar says that he had pelted stones on the appellant. P.W. 3 Meena Devi in para 11, P.W. 5 Laxmi

Devi in paragraph 7, P.W. 6 Shakuntla Devi in paragraph 14 have stated that the accused persons, i.e., the appellants had not been assaulted on

that day and specially not by their family members, that is, the informant and others. The accused persons were injured in the same transaction is

admitted in the fardbeyan itself. Besides the above, P.W. 10 the I.O. in paragraph 20 of his evidence has stated that he had found the two

appellants Salik Singh @ Saligram Singh and Asharfi Singh in the hospital and none of the witnesses say as indicated above that the two appellants

Asharfi Singh and Saligram Singh had been assaulted by any of them or anyone from their side.

29. Two documents brought on record by the defence have to be considered in the light of above evidence as also in the light of the evidence of

D.W. 2 Dr. Krishnandan Prasad Singh which indicates that the two appellants Asharfi Singh and Saligram Singh were injured on account of which

they were hospitalised and there were injuries on their person. D.W. 2 was the Deputy Superintendent of Sadar Hospital, Hajipur on 23.4.1989

and he examined the two injured appellants. Asharfi Singh had four injuries all incised wounds on his body caused by sword or dagger and one of

the wounds, i.e., injury No. 1 was on chest measuring 4" x 2" x bone deep. As regards the injuries on appellant Salik @ Saligram Singh there were

three incised wounds on his person as well -the two on back and one on middle of left forearm. On consideration of the above injuries one could

find that though the doctor had not found the same to be grievous but they were not less serious as one of the injuries had cut both layers of his

skin. P.W. 10 as noted above had found the two injured hospitalised in the hospital. The witnesses do not say, as does the basic prosecution

document like the fardbayan, that the two appellants were injured in the same transaction. The witnesses, as pointed out a bit earlier, do not say

that they had caused the injuries. What they say is that some brickbats or stones were pelted by the villagers. The evidence of D.W. 2 regarding

the nature of the injuries found on the two appellants indicates that those injuries could never have been caused by pelting brickbats or stones. No

person has come forward to say that indeed he had caused the injuries. The explanation given by the prosecution regarding the cause of injuries on

the two appellants simply does not appear acceptable as the injuries do not conform to the explanation.

30. In the above background the principle set down by the Supreme Court in Lakshmi Singh and Others Vs. State of Bihar, appears applicable. In

that case also the injuries sustained by the accused persons had not been explained by the prosecution witnesses. It was laid down that the court in

absence of any explanation coming from the witnesses regarding the presence of the injuries on the person of the accused could draw the following

inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore

their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on

the prosecution case.

31. In addition to the drawing of above inferences, in my considered view, if the injuries sustained by the accused persons are not explained by the

prosecution satisfactorily, then, the fourth inference which the court may draw could be that the accused persons might have acted in exercise of

their right of private defence either of person or property as the case may be. The last inference which I have indicated just now could be drawn

specially when the evidence comes from the inimical or interested witnesses which appears to be a case in hand because all the witnesses are

family members of P.W. 1 except P.W. 2. But. P.W. 2 also appears interested with the informant side.

32. It is not necessary in a case where the court comes to the conclusion that the accused persons might have acted in exercise of right of private

defence that such plea be specifically set up. This inference may be drawn by considering the evidence even if such plea has not been taken by the

accused. It is not at all necessary that the plea of right of private defence must be taken by the accused; the courts have to consider the evidence

and if an inference appears coming out of the evidence to the above effect, the court has to extend the benefit thereof to the accused persons.

Drawing of the inference definitely depends on the facts and circumstances of the case. The law regarding raising of an inference of exercise of right

of private defence by the accused persons has very deeply been analysed in yet another decision of the Supreme Court reported in Vijayee Singh

and others Vs. State of U.P., of the judgment contains the summary of the principle and I am tempted to extract the same:--

The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the case covered by S.

105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same

specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or

rely on the prosecution case itself or, as stated above, he can indirectly introduce such circumstances by way of cross-examination and also rely on

the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in

favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The

accused can also discharge the burden under Sec. 105 by preponderance of probabilities in favour of his plea. In case of general exceptions,

special exceptions, provisos contained in the Penal Code or in any law defining the offence, the Court, after due consideration of the evidence in

the " light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he

would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly.

The point of law involved in the present case appears to me those which were laid down by the Apex Court in the Lakshmi Singh's case. As

regards the status of the witness one could simply refer the evidence of P.W. 1 in paragraphs 15 and 16 in which he has stated that he had five

other brothers namely Ramsevak, Rup Chandra, Rambriksh, Shiv Narayan Singh (deceased) and Surajdeo, P.W. 8. Ramsevak had two sons Siya

Ram and Radheshyam @ Kapal (P.W. named in the F.I.R. and not examined) Ram Chandra had two sons Shivanand Singh and Mahendra Singh

both accused in the counter case. Rambriksh had one son Ramnath Singh @ Patel (cited in the F.I.R. as P.W. but not examined) whose son

Sanjeev Kumar is P.W. 4, P.W. 8 Surajdeo had two sons and one of them Munna is accused in the counter case. P.W. Lakshman Singh who is

not the family member of the informant or the deceased, appears interested with the informant as he was an accused in criminal case with F.I.R.

named P.W. Devilal Singh as may appear from paragraph 5 of his evidence. Moreover he has admitted that he had gone with Ram Narayan Singh

the full brother of the informant to inform the police about the incidence. It may not appear of much importance at the first blush, but when one

considers this statement of P.W. 2 in the context that only very close and confident person could be entrusted to report the matter to the police, the

above statement of P.W. 2 appears of significance and raises inference that he was highly interested with the informant, In the above background

there is a suppression as to how the injuries were caused to the two appellants. The explanation which had been given does not appear plausible

and acceptable. This simply indicates that the genesis of the occurrence was not the fact which has been projected rather it was something

different. This probability gets heightened when one considers that all the accused persons came, sat together to view the TV. show, erupted in

violence, and suddenly they ran berserk. What could be the reason for the accused persons for acting in the above manner? I could not get any

reasonable explanation or answer, to the above question which occupies my mind deeply. The informant appears not telling the truth rather the

P.Ws. appear to me suppressing the genesis of the occurrence, the manner of the same as also the place where the occurrence had occurred, I do

not find any basis and reasons for upholding the conviction of the appellants. In the result I allow the appeals, set aside the conviction and sentence

recorded and passed against each of the eight appellants of the three appeals. I hereby acquit all the appellants. Since all the appellants are on bail

they stand absolved from the liabilities of their respective bail bonds.

Shiva Kirti Singh, J. - I agree.