

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.937 of 2018**

Arising Out of PS. Case No.-81 Year-2017 Thana- KASIMBAZAR District- Munger

Sunil Yadav, Son of Lakhandev Yadav, Resident of Village- Navtoliya, Police Station- Kasim Bazar, District- Munger.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Ashutosh Nath, Advocate
	:	Mr. Nishant Kumar Sinha, Advocate
For the Respondent	:	Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 11-02-2025

The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') against the impugned judgment of conviction dated 08.06.2018 and order of sentence dated 13.06.2018, passed by learned Additional District and Sessions Judge-IIInd, Munger, in Sessions Trial No.241 of 2017, arising out of Kasim Bazar P.S. Case No.81 of 2017, whereby the concerned Trial Court has convicted and sentenced the present appellant for the offences punishable under Section 302 of the Indian Penal Code and also



imposed a fine of Rs. 2,000/- and, on failure to deposit the same, the appellant shall serve simple imprisonment for three months. Further, the appellant shall have to undergo three years of rigorous imprisonment and fine of Rs. 2,000/- for the offence punishable under Section 27 of the Arms Act and, in default of payment of fine, he shall have to undergo simple imprisonment for three months.

FACTUAL MATRIX:

2. The prosecution story, in a nutshell, is as under:-

2.1. *Fard-beyan* of Savita Devi, wife of Sushant Kumar @ Fantush Yadav (deceased) came to be recorded on 15.04.2017 at 07:00 A.M. In the said *fard-beyan*, the informant has mainly stated that her husband Fantush Yadav returned to house at around 01:00 A.M. in the night after watching day-night cricket match in the village and called her to open the gate, when she opened the gate, she saw that her elder brother-in-law (*bhaisur*) Sunil (appellant herein) and Khabri were standing there having pistol and cartridge. Sunil and Khabri shot at her husband in her presence. Her husband died there. When she started weeping, Sunil closed her inside the room and threatened her not to make noise else she and her children will be killed. It is further state in the *fard-beyan* that when she came out of the house after the door was opened,



villagers and police were present there. Who opened the door, she does not know. On the basis of the aforesaid *fard-beyan* given by informant (Savita Devi), formal FIR came to be lodged in Kasim Bazar Police Station at 09:30 A.M.

2.2. After registration of the F.I.R., the Investigating Agency carried out the investigation and, during the course of the investigation, the Investigating Officer recorded the statement of the witnesses and collected the necessary evidence. Prior to that inquest report was prepared on the spot and dead body of the deceased was sent for conducting the post mortem. The Investigating Officer arrested the accused/appellant herein and thereafter filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court under Section 209 of the Code, where the same was registered as Sessions Trial No.241 of 2017.

2.3. At the trial, the prosecution examined eight witnesses and also produced documentary evidence. The defence also examined three witnesses. Thereafter, further statement of the accused was recorded under Section 313 of the Code and after completion of the trial, the Trial Court passed the impugned



judgment and order against which the appellant has preferred the present appeal.

3. Heard Mr. Ashutosh Nath assisted by Mr. Nishant Kumar Sinha, learned counsel for the appellant and Mr. Sujit Kumar Singh, learned APP for the Respondent-State.

SUBMISSIONS ON BEHALF OF THE

APPELLANT:-

4. Mr. Ashutosh Nath, learned counsel for the appellant referred the deposition of the prosecution witnesses as well as defence witnesses. Learned counsel would mainly submit that the prosecution has projected the informant (PW-4) as eye-witness. However, in fact, she is not the eye witness to the incident in question. Similarly, it has been contended that PW-3 is also not an eye-witness to the occurrence, despite which the prosecution has projected him as an eye-witness. In support of the said contention, learned counsel referred to the *fard-beyan* and contended that in the *fard-beyan* given by PW-4 (informant), there is no reference of presence of PW-3, who is the brother of the informant. It is further submitted that conduct of the informant, who is the wife of the deceased, was unnatural. Though she was locked inside the house, she did not cry for help and waited till morning, though, as per her case, the incident took place during night hours at 01:00 A.M. It is



further submitted that even conduct of PW-3, who has been projected as an eye-witness, is also unnatural and, as per his deposition, he was sleeping on the roof of the house and he saw the occurrence, despite which he did not intervene nor he had opened the lock of the door. It is also submitted that the present appellant is the elder brother of the deceased and has been falsely implicated by the informant due to land as well as household dispute.

4.1. Learned counsel would further submit that PW-1, who is an independent witness, has specifically stated in para 2 of his deposition that the deceased was having enmity with a number of persons and against him number of cases were registered and, therefore, some other criminal has killed the deceased and thereafter thrown his dead body in the village. It is further submitted that the said witness has also stated that no blood was found at the door of the deceased. It is contended that the said witness has not been declared as hostile witness and no re-examination was done by the prosecution. It is also submitted that PW-2 is not an eye-witness to the incident in question. Similarly, it has been contended that PW-3 was, though projected as eye-witness, from the deposition given by the Investigating Officer (PW-8), it is revealed that while giving the statement under



Section 161 of the Code before the Police, the informant or the said witness has not stated that PW-3 is an eye-witness to the occurrence. It is also submitted that PW-5, who is the mother of the deceased and the present appellant, has not supported the case of the prosecution and she has turned hostile.

4.2. Learned counsel referred the deposition of PW-7 (Dr. Ajay Kumar Singh), who conducted the *post mortem* of the dead body of the deceased. The said witness has specifically narrated about the injury sustained by deceased and observed that there was circular lacerated wound ½”x1/2” above the right eye ball with charring around the wound of entry. Wound of entry had inverted margin deep to cranium. At this stage, learned counsel has referred para 8 of the cross-examination of the said witness and submitted that charring mark will be caused around injury if gunshot injury will be caused from some distance. At this stage, learned counsel referred the deposition given by PW-4 (Sabita Devi)/informant, more particularly para 12 of her cross-examination and submitted that the informant, who is projected as eye-witness, has specifically deposed before the Court that the bullet was fired from point blank range. Learned counsel, therefore, contended that medical evidence does not support the version given by the so-called eye-witness, i.e., the informant.



4.3. Learned counsel further submits that the Investigating Officer (PW-8) has also admitted during cross-examination that he did not find any blood stain/blood at the place of occurrence. It is further submitted that the said witness has also admitted that during the course of the investigation, statement of the neighbours, Karelal Yadav and Devan Yadav were recorded, and both the aforesaid persons have stated before the Investigating Officer that deceased was having criminal antecedents and Sunil Yadav (appellant) has not caused any injury to the said deceased with fire-arm. It is contended that the Devan Yadav was examined as PW-1 before the Court. However, he has specifically deposed before the Court that somebody else has killed the deceased and thrown his dead body in the village. It is further submitted that Karelal Yadav has not been examined by the prosecution and, therefore, the defence has examined him as DW-1. Learned counsel referred to the deposition of DW-1, who has deposed in favour of the present appellant.

4.4. Learned counsel submitted that there are major contradictions, discrepancies and inconsistencies in the deposition of the prosecution witnesses and, in fact, the prosecution has miserably failed to prove the manner of occurrence, place of occurrence and the time of occurrence, despite which the Trial



Court has recorded the order of conviction against the present appellant. It is submitted that the appellant is in custody for more than seven years. Learned counsel, therefore, urged that impugned judgment and order be quashed and set aside and the present appeal be allowed.

SUBMISSIONS ON BEHALF OF THE STATE:-

5. On the other hand, learned APP for the Respondent-State has opposed the request made by learned counsel for the appellant. Learned APP would mainly submit that, in the present case, there are two eye-witnesses to the incident in question and both have supported the case of prosecution. It is submitted that presence of informant (PW-4), who is the wife of the deceased, was natural during night hours at the place of occurrence. She has specifically narrated the manner in which the incident took place. The same has been supported by her brother, i.e., PW-3, who was also present in the house. The said witness has also supported the version given by PW-4. Learned APP thereafter contended that from the medical evidence, i.e., deposition of PW-7 (Doctor), it is revealed that the cause of death is fire-arm injury and the Doctor found two bullet injuries on the dead body of the deceased. Learned APP, therefore, urged that the medical evidence also supports the case of the eye-witness and merely because there



are minor contradictions and minor discrepancies in the deposition of the prosecution witnesses, the entire story put forward by the prosecution may not be discarded. Learned APP submitted that Trial Court has, after considering the entire evidence of the prosecution, rightly passed the impugned judgment of conviction and order of sentence as the prosecution has proved the guilt of the accused beyond reasonable doubt and, therefore, the Trial Court has not committed any error. Hence, this Court may not interfere with the impugned judgment.

**DISCUSSION WITH REGARD TO THE
DEPOSITION OF THE PROSECUTION WITNESSES:-**

6. At this stage, we would appreciate the evidence given by the witnesses. PW 1, who is an independent witness, in his deposition has mainly deposed that many cases were going on against deceased Fantush Yadav and he was on inimical terms with many persons. Criminals have killed the deceased and thrown his dead body in the village. He has, in his cross-examination, deposed that he had not seen blood at the door of the house of the deceased.

7. PW 2, Sachin Kumar, who is full brother of the deceased, is apparently a hearsay witness as he came to know from the wife of deceased that the shot fired by Sunil Yadav hit the head



of the deceased and that fired by Khabri Yadav hit the waist of the deceased. In his cross examination he has deposed that he was not aware about the fact as to at whose house deceased went to watch T.V. and that the deceased was a notorious criminal and cases of murder, loot and rape were going on against him. He saw the dead body of the deceased lying on a *chowki* (wooden cot) in the morning when he came. The police had already arrived when he came there.

8. PW 3, Vikram Kumar, who is the brother of the informant and brother-in-law of the deceased, has deposed in his examination-in-chief that at the time of occurrence he was sleeping on the roof and when deceased came and knocked the door, he awoke and saw that Sunil Yadav (appellant) and Khabri Yadav, both fired at Fantus Yadav and Fantush Yadav fell down and died. He has deposed that he put his signature on the inquest report as a witness. In his cross-examination, he has deposed that he was present at the house of the deceased by chance as he missed his train for Bhagalpur and stayed at the house of the deceased. He has deposed that he had gone with his brother-in-law (the deceased) to watch the match. He has deposed that blood was spread at the place of occurrence and that police had not collected blood from the place of occurrence in his presence. He has further



deposed that he was aware about the cases pending against the deceased, but he does not know how many times he had been to jail and the nature of cases pending against the deceased.

9. PW-4, Savita Devi, who is the wife of the deceased and the informant, has deposed in her examination-in-chief that the incident took place in the night of 14.04.2017. She was sleeping in her house and her husband had gone to watch a cricket match. On his return, her husband called her to open the gate, when she opened the gate, she saw that her elder brother-in-law (*bhaisur*) Sunil (appellant herein) was standing there having pistol and cartridge. Sunil and Khabri shot at her husband in her presence. Her husband died there. When she started weeping, Sunil closed her inside the room and threatened her not to make noise else she and her children will be killed. She has further deposed that when she came out of the house after the door was opened, villagers and police were present there. Who opened the door she could not tell. She has deposed that Sunil killed her husband because of dispute for land and other house-hold issues and to get the house vacated. In reply to the question put forth by the court as to who purchased the house from which they are being ousted, she replied that the land over which the house is constructed was purchased by her father-in-law.



9.1. In her cross-examination, PW-4 has deposed that her husband and her brother-in-law (*devar*) had purchased a Scorpio vehicle and she does not know that a case of selling liquor was lodged against her husband in 2016. She deposed that the shot was fired at the entrance of courtyard and not at the door of the room. She has deposed that her husband was caught hold of and shot from point blank range. Both the accused fired shot in front of her and harsh sound of firing of shot was caused. After being hit by the shot, her husband fell down at the door and died instantaneously. When she started weeping, the accused persons closed her inside the house. Blood oozed out of the wound and spread on the earth upto 2-3 steps. She has deposed that the clothes of the deceased were soaked with blood and a hole was also caused in the clothes because of the bullet. She came out of the room before arrival of her parents. The gate was opened by someone and when she came out, villagers, her father-in-law, mother-in-law and the police had arrived. She has deposed that at the time of occurrence, she and her brother, both went to open the door.

10. PW-5, Parmila Devi, who is the mother of the deceased and the present appellant, has not supported the case of



the prosecution and has been declared hostile at the instance of the prosecution.

11. PW 6, Balkrishan Yadav, was posted as Inspector of Police-cum-S.H.O. He has deposed in his examination-in-chief that on receipt of the information that someone has been killed, he reached at the place of occurrence and recorded the *fard-beyan* of the wife of the deceased and also obtained the signature of the witnesses. He also prepared the inquest of the dead body of the deceased and obtained signatures of the witnesses.

12. PW-7, Dr. Ajay Kumar Singh, the doctor, who has conducted the post-mortem examination of the dead body of the deceased, has found following injuries during post-mortem examination of the dead body of the deceased:-

“(I) Rigor Mortis was present both in upper and lower limbs.

(ii) Deceased having bilateral scrotal-Swelling.

(iii) Circular lacerated wound ½ centimeter x ½ centimeter above the right eyeball with charring around the wound of entry, wound of entry had inverted margin deep to cranium.

On dissection- The cranial cavity was full of blood, brain matter was lacerated



and bullet was recovered from the cranial cavity frontal bone fractured.

(iv) Wound of entry through the right iliac crest, circular lacerated wound ½ centimeter x ½ centimeter over the right iliac crest.”

12.1. PW-7 has deposed in his cross-examination that charring mark will be caused around injury if gunshot injury will be caused from some distance.

13. PW-8, Pankaj Kumar Raut, the Investigating Officer, has deposed in his examination-in-chief that after taking up the charge of investigation, he went to the place of occurrence and recorded the detailed description of the boundaries of the place of occurrence. He recorded the re-statement of the informant and the statement of the witnesses and made raids for apprehending the accused, who were found absconding. He made entries of the criminal antecedents of the deceased in the case-diary.

13.1. In para 4 of his cross-examination, PW-8 has deposed that during the course of investigation, he had recorded the statement of the neighbours and two persons, namely, Karelal Yadav and Devan Yadav. They stated that the deceased was a criminal and Sunil Yadav did not fire bullet in the incident in question. He has further deposed that all together 12 criminal cases with regard to the offence of extortion, murder, dacoity and Arms



Act were pending against the deceased. He has deposed that he did not find any wound on the waist of the deceased. He deposed that witness Vikram Kumar did not tell that the occurrence took place in his presence or that he was present at the place of occurrence when the incident took place. He deposed that he did not make entry in the case diary with regard to presence of blood at the place of occurrence, though subsequently he deposed that blood was spread at the place of occurrence, however, he did not make entry to that effect in the case diary. He has deposed that neither in the FIR nor in her re-statement the informant stated that on the date of incident the brother of informant was there with her in the house. He has further deposed that it did not come to light that any dispute with regard to property was there between both the parties. He denied the suggestion that the investigation is faulty.

14. DW-1, Karelal Yadav, has deposed in his examination-in-chief that the deceased was killed by the side of the railway-track. At around 4 AM, an uproar about killing of the deceased spread in the village and the dead body was brought by the villagers at the door of the house of the deceased. It was being discussed by the villagers that the deceased has been killed by the miscreants and his dead body was dumped by the side of the railway track. He has further deposed that the deceased was a



notorious criminal and had been to jail in connection with several cases. On arrival of the in-laws of the deceased, case was lodged against Sunil (appellant herein).

15. DW-2, Shankar Kumar Yadav, and DW-3, Manoj Kumar, too have deposed that the deceased was a notorious criminal and had been to jail on many occasions and he was killed by unknown criminals.

OBSERVATION AND REASONING:-

16. We have considered the entire evidence led by the prosecution and re-appreciated the same. From the evidence led by the prosecution, it would emerge that, as per the *fard-beyan* given by the informant (PW-4), who is the wife of the deceased, the incident took place at 01:00 A.M., i.e., during night hours when the deceased came to the house after watching the day-night cricket match. When he came near to the house and asked his wife, i.e., the informant, to open the door, at that time, the present appellant along with another accused, namely, Sunny Kumar, who were waiting at the said place, started firing from their country-made pistol and, in the said incident, the deceased sustained two injuries, one near the eye and another on the waist. It is, therefore, revealed that, as per the case of PW-4, the incident took place during night hours at 01:00 A.M. It would further reveal from the



fard-beyan that it was recorded at 07:00 A.M. in the morning. The explanation given by the informant in the *fard-beyan* with regard to delay in lodging the FIR is that threats were administered by the accused and she was locked inside the room and, therefore, she could not inform the Police or neighbours or relatives immediately and somehow she opened the door in the morning and found the villagers and the Police. Thus, from the aforesaid, it transpires that there is a delay of six hours in lodging the FIR, though the informant has projected herself as an eye-witness. At this stage, it is required to be observed that there is no reference of PW-3 Vikram Kumar, who is the brother-in-law of the informant, at the place of occurrence. If the deposition of PW-3 is carefully examined, it is revealed that in Para 1 itself, the said witness deposed that the incident took place at 11:30 P.M. in the night. Thus, there is difference with regard to the time of occurrence in the deposition of so-called two eye-witnesses. It is further revealed from the record that even the conduct of PW-3, who has projected himself as an eye-witness, was not natural. As per his case, he was sleeping on the roof and he has specifically deposed that he had seen that Sunil Yadav (appellant) and another person Khabri Yadav, both started firing and caused fire-arm injury to Fantus Yadav, despite which he did not intervene or try to save his



brother-in-law. Further, as per the case of PW-4 (informant), the accused locked her inside the house. However, if PW-3 was present at the place of occurrence then it appears that he also did not try to help and open the lock of the door. At this stage, we would like to refer the deposition given by PW-8 (Investigating Officer) who has specifically admitted in para 6 of his cross-examination that witness Vikram Kumar did not state that he had seen the incident nor he had disclosed that he was present at the place of occurrence. Thus, from the aforesaid evidence led by the prosecution, it can be said that PW-3 cannot be termed as an eye-witness and, for the first time, he has deposed before the Court that he has seen the incident in question.

16.1. If the deposition given by PW-1 (Devan Yadav), who is an independent witness, is carefully examined, he specifically stated in para 2 of the deposition that a number of cases were lodged against the deceased Fantush Yadav and number of persons were having enmity with him and, therefore, some criminals have killed Fantush Yadav and thereafter thrown the dead body in the village. In para 3 of the said deposition, he has further stated that he had not seen any blood at the door of the deceased. It is relevant to note, at this stage, that the said witness has not been declared hostile and the prosecution did not re-



examine the said witness. It is also relevant to observe that PW-1 is an independent witness.

16.2. At this stage, we would once again like to refer the deposition given by PW-8, Investigating Officer, who has admitted in para 4 of his cross-examination that during the course of investigation, he had recorded the statement of the neighbours and two persons, namely, Karelal Yadav and Devan Yadav. They stated that the deceased was a criminal and Sunil Yadav did not fire bullet in the incident in question. It is pertinent to observe that prosecution did not examine independent witness Karelal Yadav though his statement was recorded by the Police under Section 161 of the Code. Therefore, the defence had examined the said person as DW-1. DW-1 has specifically stated in his examination-in-chief that Fantush Yadav was killed near the railway track and at 04:00 AM in the morning, village people came to know about the same and thereafter his dead body was brought to the *Darwaza* of house of the deceased.

16.3. PW-2 is not an eye-witness to the incident in question and he is a hearsay witness. He came to know about the incident from the informant, who is his Bhabhi.

16.4. PW-3, though has been projected as an eye-witness, he is, in fact, not an eye-witness to the occurrence in



question. The said witness has also admitted in para 14 that a number of cases were registered against his deceased brother-in-law and he remained in jail in some of the cases.

16.5. PW-4 (Savita Devi), the informant, has specifically admitted during the cross-examination that the appellant fired from point blank range. However, at this stage, if deposition given by PW-7, Doctor, who had conducted the post-mortem of the dead body of the deceased, is carefully examined, it is revealed that in paragraph 3 of his deposition, he has deposed that he found circular lacerated wound $\frac{1}{2}$ centimeter x $\frac{1}{2}$ centimeter above the right eyeball with charring around the wound of entry, wound of entry had inverted margin deep to cranium.

16.6. Thus, from the aforesaid finding recorded by the Doctor, it can be said that the doctor found charring around the wound of entry. If paragraph 8 of the cross-examination of PW-7 is carefully seen, it is revealed that the said witness has specifically admitted that if a gunshot injury is caused by touching the skin of the injured/deceased, then it will be burnt and if gunshot injury is caused from some distance, then charring mark will be caused around the injury. In the present case, as observed hereinabove, the Doctor found charring around the wound of entry. That means, the gunshot injury has been caused from some distance. However, as



per the case of the so-called eye-witness (PW 4), the firing was made from point blank range. Thus, we are of the view that the medical evidence does not support the version given by the informant.

16.7. At this stage, it is also relevant to observe that, as per the opinion given by the Doctor, death was caused within 24 hours. From the post-mortem report, it transpires that the doctor received the dead body at 09:30 A.M. and commenced the post-mortem at 10:45 A.M. At this stage, we may recall that, as per the case of the informant, the incident took place during night hours at 01:00 A.M. Thus, on this aspect also, the medical evidence does not corroborate the version given by the so-called eye-witness, PW-4.

16.8. PW-8, the Investigating Officer, has admitted during cross-examination that there is no reference in the case diary with regard to the blood at the place of occurrence. Thus, it transpires that blood was not found at the place of occurrence. Even if blood was present at the place of occurrence, the Investigating Officer did not collect the blood or blood stained soil from the place of occurrence.

16.9. It is relevant to observe, at this stage, that the so-called fire-arm used by the appellant at the time of occurrence has



not been seized by the Investigating Agency. There is no recovery/discovery of the murder weapon in the present case.

16.10. Thus, from the aforesaid evidence led by the prosecution, it can be said that PW-3 and PW-4 are near relatives of the deceased and they have been projected as eye-witnesses. However, from the other evidence led by the prosecution, it can be said that the incident took place at some other place and thereafter the dead body was brought to the door of the deceased. There is a delay of more than six hours in lodging the FIR by the informant, who has projected herself as an eye-witness. PW-3, who is the brother-in-law of the deceased and though he was present at the place of occurrence and sleeping on the roof and seen the occurrence in question, he did not inform anybody during the night hours nor the door of the room, in which the informant was locked by the accused, was opened by him, as per the version given by the informant in the *fard-beyan*. Thus, deposition given by near relative of the deceased, who have projected themselves as eye-witnesses, is not trustworthy and reliable, hence, the same is required to be discarded. Independent witness, PW-1, has specifically stated that the deceased was having criminal antecedents and number of cases have been registered against him, the said aspect has been admitted by PW-3. DW-1, though is a



charge-sheet witness, he has not been examined by the prosecution. Even medical evidence does not support the version given by PW-4.

16.11. Looking to the aforesaid aspects, we are of the view that the prosecution has failed to prove the place of occurrence, the manner of occurrence and the time of occurrence and thereby miserably failed to prove the case against the appellant. Thus, when the prosecution has failed to prove the case against the appellant beyond reasonable doubt, we are of the view that the Trial Court has committed grave error while passing the impugned judgment of conviction and the order of sentence and, therefore, interference is required in the impugned judgment and order passed by the Trial Court.

CONCLUSION:-

17. Accordingly, impugned judgment of conviction dated 08.06.2018 and order of sentence dated 13.06.2018, passed by learned Additional District and Sessions Judge-IIInd, Munger, in Sessions Trial No.241 of 2017, arising out of Kasim Bazar P.S. Case No.81 of 2017, are quashed and set aside.

18. The appellant is acquitted of the charges levelled against him by the learned Trial Court. He is directed to



be released from jail custody forthwith, if his custody is not required in any other case.

19. The present appeal stands allowed.

(Vipul M. Pancholi, J.)

(Alok Kumar Pandey, J.)

Gaurav Kumar-
Pawan/-

AFR/NAFR	NAFR
CAV DATE	N.A.
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