

Ld. AG
25-7-14

(Petitioner in Jail)

IN THE HIGH COURT OF JUDICATURE AT PATNA
(CRIMINAL WRIT JURISDICTION)

Cr. W.J.C. No. of 2014

Lutan Sharma.

...Petitioner.

Versus

The State of Bihar & ors.

...Respondents.

Sub: - Habeas corpus.

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SYNOPSIS

The petitioner prays for direction to his pre-matured release from custody on the ground of his age 88 years in S.C No.28/1983 arising out of Kumarkhand P.S. Case No.28/1983 dated 03.07.1983 under section 302/34 I.P.C in which the petitioner & others were held guilty under section 302/34 I.P.C. and awarded imprisonment of life by the learned Trial Court on 21.12.1987. On appeal the other convicts have been acquitted except the petitioner vide Cr. Appeal No.87/1988 by a Division Bench of this Hon'ble Court on 28.08.2007.

RELEVANT DATES AND ANNEXURES:-

21.12.1987:- Judgment & order dated 21.12.1987 in S.C. Annexure-1 No.28/1983.

28.08.2007:- Judgment & order dated 28.08.2007 passed in Cr. Annexure-2 Appeal No.87/1988.

Hence this writ application.

(Petitioner in Jail)

IN THE HIGH COURT OF JUDICATURE AT PATNA
(CRIMINAL WRIT JURISDICTION)

Cr. W.J.C. No. _____ of 2014

In the matter of
an application Under Articles 226 &
227 of the Constitution of India;

AND

In the matter of:-

Lutan Sharma, Son of Late Sundar Sharma, Resident of Village:-
Sarhadgati, P.S.: -Kumarkhand, District:-Madhepura.

.....Petitioner.

Versus

1. The State of Bihar through the Principal Secretary, Department of Home, Govt. of Bihar, Patna.
2. The Inspector General of Police (Prison), Bihar, Patna.
3. The District Magistrate, Madhepura.
4. The Superintendent of Police, Madhepura.
5. The Superintendent of Jail, Bhagalpur.

...Respondents.

Filed Through
Anubindo Panigrahy
Adv. 04946

To,

The Hon'ble Ms. Justice Rekha M. Doshit, the Chief Justice of the High Court of Judicature at Patna and Her companion Justices of the said Hon'ble Court.

The humble petition on behalf of the above named petitioner.

Most Respectfully Sheweth:-

1. That by this criminal writ petition, the petitioner prays for direction to his pre-matured release from custody on the ground of his age 88 years in S.C No.28/1983 arising out of Kumarkhand P.S. Case No.28/1983 dated 03.07.1983 under section 302/34 I.P.C in which the petitioner & others were held guilty under section 302/34 I.P.C. and awarded imprisonment for life by the learned Trial Court on 21.12.1987. On appeal the other convicts have been acquitted except the petitioner vide Cr. Appeal No.87/1988 by a Division Bench of this Hon'ble Court on 28.08.2007.
2. That the petitioner is a citizen of India and having jurisdiction of this Hon'ble Court.

3. That the petitioner and others made an accused in ~~Muraliganj~~ ²⁸ ~~(Kumarkhand)~~ P.S. Case No. ~~179~~/1983 for offence under sections 302/34 I.P.C. and short story of prosecution is that on the day of occurrence at about 09:00 A.M. the informant Sukhdeo Choudhary (P.W.7) was returning from West Bahiyar after inspecting the field. His cousin Kamlu Choudhary (deceased) was in front of his at about 20 yards and he was also returning after seeing the field. When the deceased Kamlu Choudhary reached the house of Lutan Sharma, then 8/9 persons variously armed came out from between the house of Lutan Sharma and Saryug Sharma. They caught Kamlu Choudhary on the road and dragged towards the house of Saryug Sharma. On seeing informant ran and saw these seven accused and two others namely Mahendra Sharma & Bindeshwari Sharma (absconder). They had thrown Kamlu Choudhary on the Parti land and near the house of Gujai Sharma, Lutan Sharma assaulted on the neck with dabiya to the deceased. He tried to save him but threatening was made by daughter of Saryug Sharma and Gujai Sharma they were

armed with spade. Gujai Sharma also assaulted with Farsa to the deceased. On his hulla witnesses Rajendra Choudhary P.W.3 Sant Kumar Yadav P.W.2 Sk. Sakur P.W.4 Md. Ibrahim P.W.5 and Gajendra P.W.6 came there. On seeing the witnesses, accused persons dragged deceased to Angan.

4. That after completing investigation, charge-sheet was submitted against the accused persons. Cognizance for offence was taken and all the seven accused persons were committed to the Court of Sessions. They were pleaded not guilty of the charges framed against them.
5. That the prosecution proved ^{to} its case ~~and~~ examined altogether 11 witnesses. P.W.1 Abhinandan Yadav (Formal Witness), P.W.2 Sant Kumar Yadav, P.W.3 Rajendra Choudhary, P.W.4 Sk. Sakur, P.W.5 Md. Ibrahim, P.W.6 Gajendra Choudhary are witnesses in the F.I.R., P.W.7 Sukhdeo Choudhary (Informant) P.W.8 Madan Ram, P.W.9 Dr. J.B. Singh who conducted the Autopsy of the dead body. P.W. 10 Baleshwar Choudhary (formal witness) and P.W.11 Shiv Nath Yadav (I.O.).

6. That the petitioner and others were put on trial and finally held guilty under sections 302/34 I.P.C and sentence of imprisonment for life was awarded by the learned Additional Sessions Judge, Madhepura on 21.12.1987 in S.C. No.28/1983.

A photo copy of the judgment & order dated 21.12.1987 passed in S.C. No.28/1983 is annexed herewith and marked as Annexure-1 to this writ application.

7. That being aggrieved by the sentence awarded by the learned Trial Court, the petitioner & others preferred two different appeals vide Cr. Appeal No.87/1988 and Cri. Appeal No.121/1988 and both were heard together by a Division Bench of this Hon'ble Court and finally Appeal of the petitioner Lutan Sharma and Gujai Sharma in Cr. Appeal No.121/1988 is dismissed and their sentence awarded by the learned Trial

Court is confirmed and in the Appeal of remaining convicts are acquitted on 28.08.2007.

A photo copy of the judgment & order dated 28.08.2007 is annexed herewith and marked as Annexure-2 to this writ application.

8. That it is relevant to state here that before Trial the petitioner was taken into custody on 05.07.1983 and his bail was granted by this Hon'ble Court on 12.04.1989 but he was released from the jail on 04.05.1989.
9. That the petitioner during Trial remained in jail custody since 05.07.1983 to 04.05.1989, total period 5 years 9 months 29 days. Thereafter the petitioner was held guilty and awarded sentence of imprisonment for life, the petitioner filed an Appeal before this Hon'ble Court and the appeal was dismissed on 28.08.2007. Thereafter he was taken into custody on 13.08.2008 and since then he is in jail custody.

10. That from perusal of the Trial Court's judgment & order dated 21.12.1987 the age of the petitioner was assessed by the learned Trial Court as 61 years. Thereafter 27 years is going to be passed so at present age of the petitioner is 88 years.
11. That the petitioner is not in position to move and do his natural work without help of the others.
12. That it is stated and submitted that the Government has passed a resolution dated 15.03.2010 Category (D) (C) premature release to life convict and the petitioner comes under this purview.
13. That the petitioner has no other alternative and efficacious speedy remedy than to move before this Hon'ble Court in its Criminal Writ Jurisdiction.
14. That the petitioner has not moved earlier before this Hon'ble Court in this subject matter.

It is, therefore, humbly prayed that your Lordships may graciously be pleased to admit this writ application, issue notice to

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the respondents and after hearing the
parties be further pleased to allow the
prayer made in paragraph no.1 of this writ
application.

AND/OR

Pass such other order or orders as your
Lordships may deem fit and proper.

And for this, the petitioner shall ever pray.

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ofc
H.A. 2/2/83-1
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District:- Madhipura.

In the Court of 1st Additional Sessions Judge,
Madhipura.

Present:- Sri Aditya Sharan,
Addl. Sess. Judge,
Madhipura.

The 21 st day of December 1987

Sessions Case no. 28/83

(Against the commitment order dated 14/8/83 passed by learned
Chief Judicial Magistrate, Madhipura in G.R. 733/83)

State

Versus.

- | | | |
|-----------------------|----------------------------|----|
| 1. Lutan Sherma | aged about 61 years. + 3): | 88 |
| 2. Gujai, Sherma | " " 42 " | |
| 3. Sarjug Sherma | " " 45 " | |
| 4. Deo Narayan Sherma | " " 60 " | |
| 5. Butan Sherma | " " 45 " | 6 |
| 6. Bouku Sherma | " " 40 " | |
| 7. Bachan Sherma | " " 30 " Accused persons. | |

Lawyer for the accused persons:- Sri Chandra Deo Singh, Adv.
Sri Shashidhar Pd. Singh, State Def.

Lawyer for the Prosecution:- Sri A.N. Jha, P.P. Madhipura

Charge U/S 302/34 of the Indian Penal Code.

Judgement

The above named accused persons have been
charged u/s 302/34 I.P.C. for committing murder of ^{Kamly} ~~Indian~~ Chao
udharyin furtherence of common intention of 3/7/83 at village-
Sarhad within P.S. Kumar Khand, District Madhipura.

2. In short the case of the prosecution is that

on the alleged date at about 9 in the morning when Kamly Chaudh. was returning to his home from his field all these accused persons along with other accused persons variously armed with deadly weapons caught hold of Kamly Choudhary near parti field/ of the house of Gujai and felled him on the ground. It is said that Lutar Sharma assaulted Kamly Choudhary by Dabiya on the neck. Gujai Sharma assaulted the said Kamly Choudhary by means of Farsa. The other accused persons had caught hold of Kamly Choudhary and facilitated the other accused persons to commit crime. The two daughters of/ namely Rubiya Devi and Shyam Pyari Devi, who were armed with Kudal were also chasing the persons and were preventing the witnesses to come near the place of occurrence. As a result of the assault Kamly Choudhary died at the spot.

3. After the death of Kamly Choudhary the accused persons dragged the dead body to the courtyard of Gujai through street. No body was permitted to go to the courtyard. Gujai sharma set a small Phooash house on fire where Lutan, Sarjug, Shyam Pyari and Rubia were present there. Lutan with bhala and both women were preventing the witnesses from entering into the courtyard. The occurrence from the beginning was seen by the informant and who coming from the field at the relevant period of time. He raised hulla while Kamly Choudhary was being dragged and assaulted. On hulla the witnesses came and saw the occurrence. The dead body was recovered by the police later on. The informant gave a statement before the police on the basis of which this case was started. Thereafter the case was registered U/S 302/34 I.P.C. and after investigation charge sheet was submitted u/s 302/34 I.P.C. against the 11 accused persons including two girls accused who were released by the police on P.R. Bond. The learned G.J.M. Madhipura took cognizance of the offence and committed the case to the court of Sessions. The case was pending at Saharsa. Later on it was transferred to Madhipura when the new Judgeship was opened. Ultimately this case was transferred to this court for disposal.

4. Accused Lutan Sharma, Gujai sharma Sarjug

are in Jail. The Four accused persons namely Mahendra Sharma, Bin-
deshwari sharma and two daughters of Gujai namely Shyam Pyari and
Rubiya Devi were absconding. Therefore their trial has been
separated by this court/dated 19/5/87. The trial is proceeding
against the seven(7) accused persons only.

5. The charge u/s 302/34 I.P.C. were framed against
all the seven accused persons to which they pleaded not guilty
and claimed to be tried. Their further case is that they have been
falsely implicated at the instance of the informant who was sworn
an enemy to the deceased. The motive assigned for the murder can
not be believed and therefore the whole case is to be thrown
out. One written statement has been filed on behalf of Gujai
Lutan and Sarjug which has become the part of the record. One
written statement has been filed on behalf of the four accused
persons who are on bail. These W.S. have also been considered at
the time writing out this judgment. No D.Ws. have been
examined on behalf of the accused persons.

6. The only question which arises for consideration
is whether the prosecution has been able to bring home the charge
against the accused persons beyond shadow of all reasonable doubt

7. In support of the prosecution case all together
11 witnesses have been examined P.W. 7 is the informant of the
case P.W.1 Abhinandan Yadav is a formal witness P.W. 2 Sant
Kumar Yadav, P.W. 3 Rajendra Choudhary, P.W. 4 Sk. Shookur, P.W.
5 Sk. Ibrahim, P.W. 6 Gajendra Choudhary are alleged to have seen
the occurrence. P.W. 8 Madan Ram is the here say witness.
P.W. 9 Dr. J.B. Singh has held post Mortem examination on the dead
body of deceased P.W. 10 Baleshwar Singh is a formal witness
who has proved the protest petition(ext.4). P.W.11 Shiv Nath Yadav
is the I.P. of the case. The prosecution has also relied
on Formal F.I.R. (Ext.1) Signature of Sukhdeo Choudhary on the
Fardbeyan (Ext.2) signature of Baleshwar Yadav (Ext.2/1) signature
of Motilal Choudhary (Ext.2/2) Signature of Sukhdeo Choudhary on

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inquest Report(Ext.2/3) signature of Chandra Shekhar jha on the inquest report(Ext.2/4) and the post Mortem report(Ext.3) Farbeyan(ext.5) inquest report (Ext.6) Sketch Map (Ext.7) certified copy of complaint petition and statement on S.A. of 380/80 (Ext.8) and certified copy of the order sheet of complaint case no. 380/80(ext.9).

8. In this case the prosecution has tried to bring the photographs of the deceased which were taken after his death but the negatives and the photograph here were not produced. Hence it could not be exhibited but remained marked (ex -X to X/5) for identification).

9. P.W.9 is the doctor who had held post mortem examination on the dead body of Kamly choudhary and found as far as 14 antimortem injuries which are as follows:-

1. Incised wound 12" x 4" x into cutting all structures of the neck started from hyoid bone posteriorly up to skin of the back of the neck cutting both sides of the mid line.
2. Cervicle ventilery were cut at second and fifth level posteriorly showing two bones on the same scare.
3. In cised wound 6" x 2" x into muscle deep on right side neck started from middle line at the second ring of the trachen directing posteriorly.
4. In cised wound 8" x 1" into muscle deep at the root of right side of neck at clavicle.
5. In cised wound 3" x 1" x into muscle deep on right upper chest below clavicle.
6. In cised wound 5"x2" x into cutting the teeth of the lower jaw extending lateral side, cutting both thickness of the right cheek.
7. In cised wond 3" x 1" x into muscle deep on the right side of ~~right~~ mandible.
8. In cised wound 2" x 1" x into skin deep into chin.
9. In cised wound 12" x into upper half superficial lower half

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1/2" into skin deep.

10. In cised wound 3" x 3" into skin deep semi lunar in shape in right fore arm.

11. In cised wound 5" x 1" x into muscle deep into the left shoulder.

12. Penetrating wound 2" x 1" x into bone deep into left arm.

13. In cised wound 2"x3" x into skin deep into left arm.

14 In cised wound 3" x 1" x into skin deep on the back of chest on right acapular region.

10. According to the doctor the death was caused by shock and hamorrhage on account of above injuries. The doctor has further opined that injury no. 1 was sufficient to cause death in ordinary course of nature and he has proved the post-mortem report ext-3. In cross examination a suggestion was given to the doctor whether the injury no. 1 can be caused by curve weapon he doctor answered that it is not always necessary that it can be caused konly by curve weapon. The doctor has further said in para 4 of his evidence that the injury no. 1 has been caused by single blow. The doctor has further opined that injury no. 12 can not be caused only by pointed weapon. The doctor has further explained that it can be caused by sharp cutting weapon like Dabiya and it can be also caused by pointed weapon. In the chief the doctor has opined that injury found in the dead body may be cause by Dabiya Farsa and Garasa. The case of the prosecution is that those injuries were caused on assault and weapon like Dabiya and Farsa were used. So the doctors evidence is that death was caused by means of assault and injuries which were caused by Dabiya and Farsa which fits in with the prosecution case. It does not held the defence in any/ way ^{to prove} that the injuries were caused by other weapons.

11. P.W. 2 Sant Kumar Yadav is one of the eye witnesses of this case. In para-1 he has given the date time and place of occurrence. He reached on hulla. He has said that when he

reached to the place of occurrence, he saw that 7 to 8 persons had felled down Kamly choudhary on the ground, Lutan was assaulting Kamly Choudhary by means of Dabiya and Gujai was using Farsa, others had pressed the Kamly Chaudhary so that he may not escape. The two girls, the daughters of Gujai and Sarjug were also armed with Kudal and they were not allowing the other to reach on P.O. and to save Kamly choudhary. This witness has said that Sukhdeo chaudhary was also raising hulla along with Rajendra Choudhary and thereafter the accused persons dragged the dead body of Kamly chaudhary to the Aangan of Sarjug. This witness has said that he went in the village and raised hulla. He has further said that the accused persons also set fire in the Phoosh house which was situated in the Aangan. He has indentified all the accused persons, who are facing trial, in the dock. He claims to have indentified Bouku and others who were present at the P.O. The witness has said that he was going on a house to see his field and when he reached the P.O. on hulla he saw the occurrence. In para 30 he has said that he knew Lutan since last five years. In para 35 of the cross examination he has said that Deo Narayan, Bouku, had caught hold Kamly choudhary. In para 36 he has said that he can not say who had caught which portion of the deceased and what were the dress worn by the accused person? In para 37 he has said that Sukhdeo chaudhary was there.

12. P.W. 7 Sukhdeo Choudhary is the informant of this case. He has also given the same manner of the occurrence which has been narrated by P.W.2. Similarly P.W.2 Rajendra Choudhary has supported P.W. 2 and P.W.7 regarding the manner of occurrence and Place of occurrence. They have been subjected to lengthy cross examination but they have stood the test of cross examination very well and they have not been shaken on the point of assault and the place of occurrence, though some minor cant radictions have been pointed out in their evidence

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but in my humble opinion that is not enough to disbelieve the entire prosecution case, moreover both the witnesses have identified the accused persons in the dock. They have said that they were also present at the time of occurrence.

13. Then their evidence have been supported by P.W.4 and P.W.5 P.W.4 Sk. Shakoor has said that at the relevant period of time he was going to see his doctor via Sarhad village and on hulla of Sukhdeo chaudhary he went to the P.O. and saw the occurrence P.W. 4 has given in detail in para 2 about the manner of occurrence and then he has also said how the dead body was taken to the Aangan and Phoosh house was burnt by the accused persons. P.W. 5 was in his Patua field and was plucking grass from the patua field. He heard hulla of Sukhdeo chaudhary and then went to the P.O. In para 3 of his evidence he has said the manner of occurrence. In para 4 he has given the details how the dead body was taken to the P.O. In para 13 of the evidence he has said that he had seen one horse man near the P.O. but he reached there before he reached to the P.O. The presence of P.W.2 Sant kumar Yadav is admitted by this witness. These witness have said consistently about the same version and manner of occurrence as narrated by all the P.Ws. said above P.W.6 Gajendra Choudhary has also said that when he reached on hulla saw the assault on Kamly choudhary. In para 10 he has said that in the place of occurrence he saw Sand Kumar Yadav, Sukhdeo Choudhary, Sk. Shakoor, Sk. Ibrahim at the P.O. In para-3 he has given the place of occurrence where Kamly chaudhary was way laid by the accused persons. In para 4 he has given the manner of occurrence. He has said that Sarjug had also assaulted by means of Lathi. The accused Butan some times used to come on the chest of Kamly chaudhary and some time used to got down. He has said that Deo Nafayan Sharma had caught the hand of Kamly choudhary. This statement has not been narrated but the other P.s namely the assault by Sarjug and Butan going over chest of Kamly

(H)

Chaudhary. It appears that he has become excited to support the prosecution case by giving exaggerated versions. In other words he wants to say that two persons were actually assaulting the deceased and the others were facilitating the assault. The evidence given by the witnesses regarding the infliction of the injuries by the accused persons are consistent and find support from the medical evidence.

14. P.W. 8 Madan Ram is another witness who has said that on the night of Sant Kumar Yadav he reached P.O. and learnt the story of assault from P.W.2. In para 3 he has said that he tried to enter the Aangan of Sarjug where the dead body was kept but was prevented by the two girls namely Shyam Pyari Devi and Rubia Devi who were armed with Kudal. Inter on the police recovered the dead body. The evidence of this witness supports some part of the occurrence.

15. It has been urged on behalf of the defence that not none of the P.Ws. have given the details of the blows and part played by all the accused persons. In other words the defence wants to say that the sequence of assault has not been given by the P.Ws. in details. In an attack where 7 to 8 persons are participating to expect a witness to give a sequence of blows by each accused and the part of the body where the blows landed is not possible but I find that P.W.2 Sant Kumar Yadav, P.W.6 Rajendra Choudhary, P.W.4 Sk. Shakoor, P.W.5 Sk. Ibrahim, P.W.6 Gajendra Choudhary and P.W.7 Sukhdeo Chaudhary have given a fair account of the occurrence and I find no reason to disbelieve their testimony. The deceased was assaulted in front of the house of the accused persons. The spot of the crime shows that while Kamly Choudhary was returning from his way to his house, he was suddenly attacked by the accused persons. It is not disputed at the trial that the deceased had died homicidal death. The death of Kamly Choudhary was homicidal and not a nature as has been supported by P.W.9 the doctor. Minor omissions to specifically mention some of the facts in the First Information report

(18)

is not a circumstance to view the prosecution case with suspicion.

16. Evidence of P.Ws. are assailed by the accused persons on the ground that they had given inconsistent version Chief and cross examination which discredits the entire testimony of P.Ws. On going through the entire testimony it is difficult to hold that it suffers from any infirmity. On going through the entire evidence of P.Ws. I do not find any justification to hold that they had given perjured version before the court.

17. Then the evidence of P.Ws. find support from the I.O.(P.W.11) Shiv Nath Yadav. In his evidence he has given the description of P.O. He has found blood where Kamlu Chaudhary was assaulted ? He has found the dragging sign through the street. The dead body was taken from the P.O. to the Angan. Then he recovered the dead body from Angan of the accused persons and he also saw a phoosh house was also burnt which was located in the Angan of Gujai and Sarjug. All these versions lend support to the prosecution case and the P.Ws. The I.O. has taken pains to prepare the Inquest report(ext-6) Sketch map(Ext.7) He deserves commendation as he has tried to investigate the case fairly and promptly.

18. Then the accused persons have themselves filed a criminal case regarding their version of their occurrence. The case no is 380 C/83. They have filed a case against Sukhdeo Chaudhary, Umesh Choudhary, Gajendra Choudhary, Ranendra Chaudhary Sk. Shakoor, Sk. Ibrahim who are the witnesses of this case and they have produced the order sheet of that case which has been marked as Ext.9. If the two exhibits are considered then they admit that some occurrence had taken place at the relevant period of time. They have not produced any evidence on the record to prove their version. On the other hand, the prosecution has adduced evidences in support of their version and that has to be accepted in absence of any other evidences.

19. No I take up the motive which has been assigned on behalf of the prosecution and which has been disputed by the defence P.W.6 has said in para 9 that Kamly Chaudhary had dug his earth and planted Sisam trees etc. in front of the house of Gajai. This plantation of trees was resisted by the accused persons. This is the motive which has been given in the Fard-beyan also. According to the defence this can not be the motive for such a heinous crime but they have not given any other motive in their defence. They have set up fluctating and shifting defence. It is said that Kamlu chaudhary was man of bad character. It is also said that he was a money lender and he had given loan to some of the accused persons. He was demanding return of his money which was being resisted by the accused persons. All these circumstances taken together would show that the accused persons were not pulling well with Kamlu chaudhary since before the occurrence. So if they have been agitated by the said Kamlu Chaudhary over digging over the earth in front of their house, it is not wonder that, that might have prompted them to do away with the life of said Kamlu chaudhary. It is not necessary to prove the motive but where motive has been assigned in the fard beyan it is the duty of the prosecution to prove it what ever may be the defence. If findin the evidence of the I.O. who has found digging of the earth near the house of the accused that would show that the prosecution has fairly discharged the onus of proving the motive.

20.. Now I take up the charge formed in this case. The charge has been framed u/s 302/34 I.P.C. It is said that the murder was committed in furtherence of the common intention. The

following facts will prove the common intention;-

- (i) All the accused persons were seen at a scene of occurrence with unlawful purpose in mind. They had congregated at the P.O. with an unlawful object.
- (ii) Out of them two persons actually used wepon in the crime and the others had caught hold the deceased

and were facilitating the crime. They were not allowing others to come to the P.O:

- (iii) They had taken the dead body to the Aangan after the death of Kamlu chaudhary. All the accused persons went together to the house of the accused Gujai. They left together ~~xxxxxxxx~~ from the place of occurrence.
- (iv) There was strain relation between the accused persons and Kamlu Chaudhary from before the occurrence.
- (v) Kamlu chaudhary was way laid at the P.O. by all the accused persons. The common intention was to kill the deceased.

In my humble opinion the above circumstances and evidence on the record are sufficient to prove that all the accused persons had common intention to kill Kamlu chandhary.

21. Now it has been urged on behalf of the defence that no witnesses from the locality is coming in support of the prosecution case, even the son and wife of the deceased are not coming only the chance witnesses have been cited that shows that there is some suspicion in the prosecution case. No body will come in a case like this voluntarily. It is quite possible that some of the witnesses who have seen the occurrence have not supported the case out of fear, because the accused persons would not spare them. If the son and wife would come to depose, then it would have been said on behalf of them that the relations are only supporting the case. Then it is not necessary to examine all the P.Ws. It is enough that quality of evidence is produced. In this case I find that the prosecution has tried to bring independent witnesses in support of the prosecution case and they have given a fair account of the occurrence.

22. Thus considering the above evidence I find that the entire evidence is of convincing nature and appears probable, natural and cogent. I accept the evidence, and hold that the deceased Kamlu chaudhary was killed by all the accused persons in furtherance of their common intention and in the manner

Agarwal 2

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CRIMINAL APPEAL (DB) NO. 87 of 1988
With
CRIMINAL APPEAL (DB) NO.121 OF 1988

Against the judgment and order dated 21st December, 1987
passed by Sri Aditya Sharan, Additional Sessions Judge,
Madhepura in Sessions Case No.28/83.

In Cr. Appeal No.87/1988

1. Deo Narayan Sharma
2. Butan Sharma
3. Bouku Sharma &
4. Bechan Sharma Appellants
Versus
The State of Bihar Respondents

In Cr. Appeal No.121/1988

1. Sarjug Sharma
2. Lutan Sharma &
3. Gujai Sharma Appellants
Versus
The State of Bihar Respondents

For the Appellants :- Mr. Narayan Singh, Sr. Advocate with
Mr. Birendra Kr. Singh, Advocate

For the Respondents :- Mr. Ashwini Kr. Sinha, Addl. P.P.
(In both these appeals)

P R E S E N T

THE HON'BLE MR. JUSTICE SHIVA KIRTI SINGH
THE HON'BLE MR. JUSTICE SYED MD. MAHFOOZ ALAM

Shiva Kirti Singh &

S.M.M. Alam, JJ. Both the appeals have been heard together as they arise out of the same judgment dated 21st December 1987 passed by the learned Additional Sessions Judge, Madhepura in Sessions Case No. 28/83 whereby all the four appellants of Criminal Appeal No.87/1988 and the three appellants of other appeal have been convicted under Section 302 read with Section 34 of the Indian Penal Code. By an order of the same date, they have been awarded imprisonment for life for the said offence. This judgment shall govern both the appeals.

2. The prosecution case, as disclosed in the fardbeyan of the informant Sukhdeo Chaudhary (P.W.7), in brief, is that on 3.7.1983 at about 9.00 A.M. the informant was returning from Paschim Bahiyar after inspecting his fields. His cousin brother Kamlu Choudhary (deceased) was in front of him at a distance of 200 yards. He was also returning after seeing his fields. When Kamlu Choudhary reached near the house of accused Lutan Sharma and was on the road situated towards north then 8-9 persons variously armed came out from between the houses of Lutan Sharma and Sarjug Sharma. They caught Kamlu Choudhary on the road and pulled him towards south behind the house of Sarjug Sharma. The informant ran and saw these seven appellants and two others, namely, Mahendra Sharma and Bindeshwari Sharma (both are absconding). They had thrown Kamlu Choudhary down on the Parti land adjacent to the west of house of Gujai Sharma. Lutan Sharma assaulted Kamlu Choudhary on the neck with Dabia. The informant wanted to prevent them by going closer but he was threatened by the daughter of Sarjug Sharma and daughter of Gujai Sharma, who were having spades in their hands, therefore, the informant stepped back and saw Gujai Sharma assaulting Kamlu Chaudhary with farsa. Kamlu Chaudhary started throwing his hands and legs and writhing in pain. The informant raised hulla upon which Rajendra Chaudhary (P.W.3), Sant Kumar Yadav (P.W.2), Sk. Shakur (P.W.4), Md.Ibrahim (P.W.5), and Gajendra Choudhary (P.W.6) arrived. On seeing the witnesses, the accused persons dragged Kamlu Choudhary from the place of assault to the Angan (courtyard) of Gujai Sharma through a passage between the houses of Musai Sharma and Gujai Sharma. According to the

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in the manner spoken by the witnesses. I therefore find and hold each of them guilty of the charge U/S 302 I.P.C. read with section 34 of the I.P.C. The manner of assault and the nature of injuries inflicted and the manner in which the plan was executed leaves no doubt that all the accused persons had the common intention and they knew it fully that they are going to kill the deceased. I therefore having found them guilty convict them for the offence U/S 302 I.P.C. read with section 34 of the I.P.C. The four accused persons namely Deo Narayan Sharma, Butan Sharma, Bauku Sharma and Bechan Sharma are on bail Their bail bonds are cancelled and they are taken in custody. The other three accused persons are in jail custody from before.

Dictated and corrected by me,

Sd/- Aditya Sharan
21/12/87
Additional Sessions Judge

Sd/- Aditya Sharan
21/12/87
Additional Sessions Judge.

Later on:- Heard the learned Advocate on behalf of the accused persons and the learned P.P. on the point of sentence. It has been urged on behalf of the defence that some of the accused persons are old and some of them are in jail since very long time. Therefore a lenient view of the matter may be taken. It is true that the three accused persons are in Jail since very beginning and some are on bail having crossed the age of 40 years. But, since an innocent life has been taken away by them, they do not deserve any sympathy. I therefore convict and sentence each of the accused persons to undergo imprisonment for life, which will meet the end of justice. They are sent to prison to serve out the sentence so awarded.

Dictated and corrected by me.

Sd/- Aditya Sharan
21/12/87
Additional Sessions Judge.
Madhipura

Sd/- Aditya Sharan
21/12/87
Additional Sessions Judge
Madhipura.

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informant, the deceased was lying in the same courtyard and Gujai Sharma started a fire in the northern portion of his house and fled away with two co-accused, who were his Samadhis towards west north. Other accused also escaped in different directions and they could not be caught because they were having weapons in their hands.

According to the informant, the reason for the occurrence was that deceased Kamlu Chaudhary had given money on loan to accused Sarjug Sharma, Gujai Sharma, Deo Narain Sharma and Lutan Sharma. He used to demand that money from the accused persons and recently towards adjacent east to the houses of Gujai Sharma and Sarjug Sharma, the deceased had planted Sheesam tree on the western ridge of his land and that had annoyed the accused persons.

3. The fardbeyan of the informant was recorded by the police near the place of occurrence on the same date at 10.30 A.M. The Investigating Officer, Shiv Nath Yadav (P.W.11) inspected the place of occurrence. took charge of the dead body from Angan of the concerned accused persons, prepared the inquest report and sent the dead body for post mortem examination. He prepared a sketch map of the place of occurrence which has also been exhibited as Exhibit 7. After recording the statements of the witnesses and completing investigation he submitted chargesheet against the accused persons. Cognizance was taken of the offence and all the seven accused-appellants were committed to the Court of Session. They pleaded not guilty of the

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charges framed against them and after trial they have been convicted and sentenced by the judgment and order under appeal, noticed earlier.

4. The prosecution in order to prove its case has examined altogether 11 witnesses. P.W.1 Abhinandan Yadav is a formal witness, who has proved the formal F.I.R. as Exhibit 1. P.W.2 Sant Kumar Yadav, P.W.3 Rajendra Choudhary, P.W.4 Sk. Shakur, P.W.5 Md. Ibrahim and P.W.6 Gajendra Choudhary are named witnesses in the first information report. They have claimed to be eye-witnesses of the relevant part of the occurrence and have supported the prosecution case with respect to time, place and manner of the occurrence. P.W.7 Sukhdeo Choudhary is the informant who has supported the prosecution case, as alleged by him in the fardbeyan. The noticeable improvement made by the informant in respect of the manner is in paragraph 2 of his deposition where he has added that at the time of assault by Lutan Sharma with Dabia and by Gujai Sharma with farsa, the other accused persons had engaged themselves in holding either the hand or leg etc. of Kamlu Chaudhary.

5. P.W.8 Madan Ram has claimed to be a hear-say witness. He deposed that he heard regarding killing of Kamlu Choudhary by accused persons from Sant Kumar Yadav (P.W.2) and then he went to the place of occurrence and wanted to go in the Angan but he was not allowed to do so. He has further deposed that the dead body could be recovered only when the police arrived. P.W.9 Dr.J.B.Singh held autopsy on the dead body of the deceased Kamlu Choudhary. He has proved the Post

Mortem Report as Exhibit 3. According to the said report, the deceased has sustained as many as 14 injuries on his person. Almost all injuries were of sharp cutting weapon except injury no.12 which was an injury on left arm, of the dimension 2" x 1" x bone deep which appeared to be by a penetrating weapon as per opinion of the doctor. The injuries in the ordinary course of nature were sufficient to cause death and time elapsed since death till holding of the post mortem examination on 4.7.1983 at 1.30 P.M. was opined to be within 36 hours. P.W.10 Baleshwar Singh is a formal witness who has proved a protest petition of the informant Sukhdeo Chaudharv as Exhibit 4. P.W.11 Shiv Nath Yadav is the Investigating Officer. Besides proving the fardbeyan as Exhibit 5 he has also proved the inquest report and rough sketch map of the place of occurrence. In his deposition he has described in detail the entire place of occurrence. He found trampling mark as well as blood in sufficient quantity on the Parti land where the deceased was allegedly taken from the road and assaulted. He also found dragging mark in the Gali between two houses leading to the Angan (courtyard) of Gujai Sharma and Sarjug Sharma. He found the dead body kept in the Angan. Towards north of the Angan he found part of the house burnt and only the Tatti on the north was left in half burnt condition. He also found small plants near the place of assault whose upper part had been cut by some sharp weapon. Thus, the objective finding of the Investigating Officer fully supports the place of occurrence, as alleged by the prosecution.

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6. The defence has not examined any witnesses but a certified copy of the ordersheet of a complaint petition bearing No.380(C)/83 has been taken on record as Exhibit-9. This shows that accused Sarjug Sharma filed a complaint in the court of the Chief Judicial Magistrate, Madhepura while he was in jail custody in connection with the present case i.e. Murliganj (Kumarkhand) P.S.Case No. 179/83. On 19.7.1983 that complaint case was placed for enquiry under section 202 of the Code of Criminal Procedure and since on various dates no witness was produced, the complaint case was dismissed on 6.4.1984 under Section 203 of the Cr.P.C. Apparently, Exhibit 9 related to some defence on behalf of the accused persons but they have not led any material in support of any counter case. Exhibit 9 appears to have been placed on record by the prosecution to expose that a defence case had been dismissed due to lack of any evidence produced during the enquiry.

7. From the trend of cross-examination it appears that only defence of the accused persons is of false implication but there is no explanation suggested for presence of the dead body of the deceased in the Angan of some of the accused persons. Even in course of arguments, learned counsel for the appellants has submitted that the entire prosecution case should be disbelieved because it appears absurd that after assaulting the deceased behind their house, the accused persons would carry the dead body in their courtyard (Angan). However, there is no suggestion or arguments which may persuade the Court to doubt time and place of occurrence. The witnesses are consistent regarding

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time of the occurrence as well as the place where the deceased was assaulted. Even the objective findings of the Investigating Officer, as noticed earlier, support the prosecution case in respect of the place of occurrence.

8. The submission that the prosecution case disclosing taking of the dead body in the Angan of the accused persons should be disbelieved on the ground of absurdity does not appear to have any substance. The exact motive of removing the dead body from the actual place of occurrence must be known only to the accused persons and the prosecution cannot find out such motive. However, this fact was disclosed at the earliest opportunity and in the fardbeyan it was indicated that probably the accused persons wanted to destroy the dead body by putting on fire one of their rooms towards north. Whatever be the real motive, attempt by miscreants to destroy the dead body or disturb the evidence at the place of occurrence is not uncommon and there is every likelihood that the dead body might have been carried inside the house to show the deceased as an assailant and unwanted intruder. Be that as it may, on this ground it is not found possible to disbelieve the entire prosecution case.

9. The other submission advanced on behalf of the appellants is that only two of the accused persons, namely, appellants Lutan Sharma and Gujai Sharma have been attributed with specific weapons - dabia and farsa, respectively and only they are attributed with specific assault upon the deceased. It was highlighted that in the hands of other five appellants no weapon

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has been alleged either in the fardbeyan or even during deposition in Court by the material witnesses. On the basis of such facts it has been submitted that manner of occurrence alleged by the prosecution has been exaggerated to implicate other five appellants besides Lutan Sharma and Gujai Sharma because they happened to be closely related. Many of them have common courtyard and they all belong to Sharma Toli.

10. In context of the aforesaid submission we have examined the evidence on record with care and it has been found that the witnesses are consistent regarding the weapon used by appellants Lutan Sharma and Gujai Sharma as well as assault by them upon the deceased. The post mortem report and the medical evidence also support the prosecution case and clearly the deceased has died of injuries inflicted upon him by these two appellants Lutan Sharma and Gujai Sharm at the time and place alleged by the prosecution. Their conviction for the offence under Section 302/34 of the Indian Penal Code is not found to suffer from legal or factual error so as to warrant any interference.

11. In so far as the other five appellants are concerned, on close scrutiny of the evidence of the material witnesses it is found that in the fardbeyan the informant had made an omnibus allegation that all the accused persons dragged Kamlu Choudhary (deceased) from the road towards back of their house and there on the Parti land he was thrown down by all the accused persons. Thereafter in course of assault by Dabia and Farsa by appellants Lutan Sharma and Gujai Sharma no role has been assigned to the remaining five

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appellants. In the earliest version there is no allegation that they helped in the murder by catching hold of the legs and hands of the deceased. It is further found that none of the witnesses claimed to have heard any cry of help from Kamlu Choudhary (deceased) which was natural if he had been dragged from the road to the Parti land on south of the road and behind the house of the accused persons. Hence, there is sufficient reason to doubt the allegation that all the four appellants of Criminal Appeal No.87 of 1988 i.e. Deo Narayan Sharma, Butan Sharma, Bouku Sharma and Bechan Sharma as well as appellant Sarjug Sharma of Criminal Appeal No.121 of 1988 participated in the occurrence and that they shared the common intention of causing death of the deceased. A close perusal of 14 injuries found on the body of the deceased also shows that sharp weapons were freely used on the body of the deceased by both the assailants causing serious cut injuries. In course of such severe assault, it is not possible for the five other persons to be close to the body of the deceased and pin him down without taking serious risk of sustaining injuries by farsa. Even the Investigating Officer in course of inspection of the place of occurrence has found that some small plants were cut from the top near the place of occurrence. This also shows that the weapons like farsa and dabia were used in free manner to assault the deceased and that had resulted in cutting of some of the small plants near the place of occurrence. All these facts create a doubt regarding involvement of the aforesaid five appellants in the assault upon deceased Kamlu Choudhary which caused his death. Hence, we are

inclined to agree with the submission advanced on behalf of the appellants that aforesaid five appellants deserve to be given benefit of doubt.

12. In view of the aforesaid discussions, the appeal of appellants Lutan Sharma and Gujai Sharma (appellant. nos. 2 and 3 in Cr.Appeal No.121/88) is dismissed and their conviction and sentence as awarded by the trial court is confirmed. The appeal of remaining appellant nos. 1 to 4 (Criminal Appeal No.87/1988) and Sarjug Sharma (appellant no.1 of Criminal Appeal No.121/1988) is allowed. They are acquitted of the charge under section 302/34 of the Indian Penal Code on account of benefit of doubt. They shall stand discharged from the liabilities of their bail bonds. The bail bonds of appellants Lutan Sharma and Gujai Sharma shall stand cancelled. They should be taken into custody forthwith to serve out the remaining period of sentence in accordance with law.

sd/- (Shiva Kishor Singh, J.)

sd/- (Syed Md. Mahfooz Alam, J.)

PATNA HIGH COURT, PATNA
The 28th August, 2007.
N.A.F.R. (B.T.)

True copy
Bisuddhananda
Secretary
5-9-07