

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.262 of 1989

(Against the judgment of conviction and order of sentence dated
26.05.1989 passed by Shri S. S. Das, learned Sessions Judge, Bhojpur,
Arrah in Sessions Trial No. 128 of 1984, arising out of Sandesh P.S.
Case No. 15 of 1982)

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1. Kedar Chaudhary, son of Bilash Chaudhary,	 Appellant/s
2. Natha Chaudhary @ Rameshwar Chaudhary, son of Somaru Chaudhary	
Versus	
The State of Bihar	 Respondent/s
With	

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Criminal Appeal (DB) No. 319 of 1989

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1. Ramayan Choudhary, son of Sri Bindeshwari Choudhary	
2. Bindeshwari Choudhary, son of Late Someru Choudhary	
Both residents of Village- Balaur, P.S.- Udwananagar, District- Bhojpur	
	 Appellant/s
Versus	
The State of Bihar	 Respondent/s

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Appearance :

(In CR. APP (DB) No.262 of 1989)

For the Appellant/s : Mr. Rabi Bhushan Prasad, Amicus Curiae

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

(In CR. APP (DB) No.319 of 1989)

For the Appellant/s : Mr. Rabi Bhushan Prasad, Amicus Curiae

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 07-10-2017

Both the appeals arises out of common judgment of conviction and order of sentenced dated 26.05.1989 passed by the learned Sessions Judge, Bhojpur, Arra in Sessions Trial No.128 of 1984, arising out of Sandesh P.S. Case No. 15 of 1982, whereby the learned Sessions Judge held out that all the appellants herein are



guilty of offence under Sections 302/34 of the Indian Penal Code. Further the appellants Kedar Chaudhary and Natha Chaudhary (Cr. Appeal (DB) No. 262 of 1989) are held guilty for the offence under Sections 323 of the Indian Penal Code and appellant Bindeshwari Chaudhary was also held guilty for the offence under Section 324 of the Indian Penal Code. All the appellants have been sentenced to undergo R.I. for life for the offence under Sections 302/34 of the Indian Penal Code. The appellants, namely, Kedar Chaudhary and Natha Chaudhary (Cr. Appeal (DB) No. 262 of 1989) have been sentenced to undergo R.I. for four months for the offence under Sections 323 of the Indian Penal Code and appellant Bindeshwari Chaudhary was sentenced to undergo R.I. for six months for the offence under Section 324 of the Indian Penal Code. However, all the sentences were directed to run concurrently.

2. The prosecution case as per written report of Ramadhar Chaudhary is as follows:

The informant in his written report stated that on 09.03.1982 in the morning, he and deceased Hirnyanand Chaudhary alongwith labourers including Khaderan Sah went to their field for harvesting Masuri and Khesari crops. While they were harvesting the crop, at about 9.00A.M., the accused persons arrived there. Accused Kedar Chaudhary aimed his gun and threatened the informant that if



he try to escape he would be shot dead. Accused Natha Chaudhary shouted “Maro Sale Ko” and fired from his pistol. Kedar Chaudhary also fired from his fire arm. The labourers thereafter fled away from the place of occurrence. The informant and his brother were surrounded by accused Bindeshwari Chaudhary and his son (Ramayan Chaudhary) who assaulted the informant and his brother Hirdyanand Chaudhary with their “Kattas”. Hirdyanand Chaudhary was assaulted severely on several parts of his body with Katta due to which he fell down and became unconscious. The accused snatched away the informant’s lathi and Natha Chaudhary assaulted the informant and his brother. The place of occurrence is situated in Jharathi Badhar of village Maniyachh. It is the case of prosecution that on the alarm raised by the informant and his labourers, co-villagers and persons from different Badhars, namely, Tipan Chaudhary, Aditya Chaudhary, Deonath Chaudhary, Ramnath Chaudhary and others arrived there and took the injured to Pawna on cot. It is the prosecution case that these witnesses also witnessed the occurrence. All the assailants belongs to village Belaur P.S. Udawantnagar. The informant’s brother had sustained severe Katta injuries on his neck. He was taken to Sadar Hospital, Arrah, where he died.

3. The police on the basis of the written report, registered a case against the appellants and after investigation charge-



sheet was submitted under Sections 302/307 and 326/34 of the Indian Penal Code, besides Section 27 of the Arms Act. Thereafter the learned Magistrate took cognizance and the case was committed to the Court of Sessions for trial. The appellants pleaded not guilty and as such they were subjected to the Sessions Trial.

4. Mr. Rabi Bhushan Prasad appearing as Amicus Curia submitted that on behalf of the prosecution 8 witnesses were examined. P.W. 1 is Ramadhar Chaudhary, P.W.2 is Topan Chaudhary, P.W. 3 is Khaderan Sah, P.W.4 is Dr. P. B. Ojha, P.W.5 is Dr. Ugra Pratap Narain Singh and P.W.6 is Kailash Prasad. Out of which P.W.1 is the informant, P.W.2 Topan Chaudhary and P.W.3 Khedar Chaudhary are the eye witness of the occurrence. P.W.4 and P.W.5 are the doctors, who conducted post-mortem of the dead body of the deceased and injured person. P.W.6 is the investigating officer of the case.

5. He at the very out set submitted that the occurrence took place on 09.03.1982 and on the date of judgment i.e. on 26.05.1989, the age of appellant Kedar Chaudhary was 65 years, and Natha Chaudhary @ Rameshwar Chaudhary was 65 years and Bindeshwari Chaudhary was 60 years. We are in 2017 and during the intervening period 29 long years have passed and as such the appellants, namely, Kedar Chaudhary and Natha Chaudhary, who



were 65 years on the date of judgment must have completed 94 years. The appellant Bindeshwari Chaudhary, who was 60 years of age, is approximately 89 years of age, today if alive. There is no definite information furnished to the Court whether they are alive or not? He submitted that even assuming that the appellants Kedar Chaudhary and Natha Chaudhary are alive, they must have crossed 94 years of age and Bindeshwari Chaudhary if alive must have reached 89 years and even assuming that they are alive, at the age of 94 years and 89 years entering into nicety of the evidence and material to adjudicate whether the trial court has rightly convicted them and passed the order of sentence would be exercise in futility as sending the old, invalid to serve remaining rigorous imprisonment of life would be uncalled for as experience suggest old people of 90 years cannot live without support and passing order to serve remaining sentence of rigorous imprisonment at the age of 90 would amount of passing order incapable of execution.

6. He also submitted that from the prosecution case, it appears that Natha Chaudhary has shouted “Maro Sale Ko” and fired from his pistol. Kedar Chaudhary is alleged to have fired from his fire-arm. The appellant Bindeshwari Chaudhary and his son Ramayan Chaudhary have allegedly assaulted the informant and his brother with Katta.



7. Counsel for the appellants submitted that in the instant case, the doctor was examined as P.W.4 and during his cross-examination he admitted that no definite opinion can be given about the type of weapon used causing lacerated wound. He also admitted that Katta is a heavy sharp cutting weapon if stuck with vigor of force, it would cause deep wound. He submitted that the witnesses have specifically alleged that Kedar Chaudhary and Natha Chaudhary have used fire arm and the deceased sustained fire-arm injury, whereas the doctor, who conducted post-mortem has admitted that he has not detected any foreign body in the injury said to have been caused by discharge of fire-arm. In view of the statement of the doctor, the allegation of firing by Kedar Chaudhary and Natha Chaudhary stands belies. The nature of injuries on the informant are simple, as per the opinion of the doctor, caused by the hard and blunt substance and one injury of subcutaneous deep on the right chest of the informant cannot be attributed to these appellants, as according to the informant his Lathi was snatched by the accused and he was assaulted by the said lathi and Bindeshwari Chaudhary and Ramayan Chaudhary assaulted with Katta. If the version of the informant is accepted that he was assaulted by Bindeshwari Chaudhary by Katta, then as per the opinion of the doctor that injury would have caused deep wound and not subcutaneous deep injury.



8. He further submitted that the genesis of the incident is enmity due to some dispute of the appellants with brother of informant while carrying business at Punjab, such motive has neither been proved nor can be accepted as ground for commission of such crime. He submitted that in this case *mens rea* is totally lacking for commission of the crime and as such the prosecution has failed to establish the guilt beyond reasonable doubt. Mr. Rabi Bhushan Prasad submitted that from the evidence of prosecution it appears that the informant himself was injured and he became unconscious after receiving injury and once he became unconscious, he could not have seen the occurrence and as such he cannot be relied upon as eye witness of the occurrence and his version of commission of crime is not acceptable. The other witnesses P.W.2 and P.W.3 are the witnesses, who arrived at the place of occurrence only after the occurrence, since they arrived at the place of occurrence after the crime was committed, they cannot be taken as eye witness as to the actual commission of offence of assault, manner of assault and the actual role attributed to the appellants in commission of the crime.

9. Mr. Prasad argued that in the instant case, the investigating officer stated that when he visited the place of occurrence he found marks of blood on the earth and seized the material exhibits, but those articles have not been produced in the



Court during the course of trial. The investigating officer claims to have recorded the statement of eye witnesses, namely, Ramnath Chaudhary, Deonath Chaudhary, Etwaro Devi and Shanti Devi, but they have not been examined, if they were the eye witness of the crime, they were the material witness and non-examination of such eye witness without any plausible reason goes against the prosecution as withholding of material witness, who could have unfolded the true narrative of the incident goes against the prosecution. In the instant case, deliberate withholding of such witnesses without any plausible explanation renders the prosecution case doubtful.

10. Counsel for the appellants further submitted that there are apparent contradictions in the version of P.Ws. in the matter of identification of the culprit, their version that they have seen the occurrence is not trust worthy. They are at variance in the matter of their statements as to manner of occurrence, place and time of occurrence and as such their depositions cannot be relied upon for upholding the conviction.

11. Learned Additional Public Prosecutor appearing on behalf of the State has supported the judgment of the trial court and argued that from the materials available on the record, it is established beyond reasonable doubt that all the accused persons have assaulted in furtherance of common intention and as such the trial court has



committed no illegality in convicting the appellants for the offence under Sections 302/34 of the I.P.C.

12. We have given our anxious consideration to the rival contention of the appellants and the State and after going through the records, we find that the appellant Kedar Chaudhary and Natha Chaudhary, if alive, must have crossed 94 years of age whereas appellant Bindeshwari Chaudhary must have completed 89 years of age, and as such there is some substance in the submission of the counsel for the appellants that deciding the appeal on its own merit at this stage is uncalled for, as no penalogical purpose would be served in passing order directing them to serve remaining Rigorous Imprisonment of sentence to these appellants, who are in the evening of their life and must have become invalid for all practical purposes if at all they are alive. Prima facie, we are in agreement with the counsel for that appellants that directing Rigorous Imprisonment to be served by invalid persons, who are in the year 90's is not supported by any reasoning or theories of punishment. But in sentencing process for offence under Section 302 of the I.P.C., there is no choice making except death sentence or life imprisonment. We cannot exercise any discretion in the matter of quantifying punishment for offence under Section 302 of the I.P.C. in appeal, which remain pending in the High Court for 28 long years. The framers of the Code never visualized the



situation of pendency of trial for seven years and pendency of appeal for 28 years in High Court and in between rendering the accused/appellants' crossing 90 years of age and the effect of dismissal of appeal in directing serving of remaining sentence of rigorous imprisonment for life at the age of 90 years. If the idea of imprison has any penological purpose or rational objective then appellate court must see whether passing order to serve remaining sentence at the age of 90 years would achieve the objective or not, but in the matter of limited choice making the Court is helpless to enter into the jurisprudential issue raised in this case and we leave it open for the jurist, and law makers to ponder over this issue as law has to answer this issue which remain unanswered till date and our limited choice making even as constitutional court does not permit us to authoritative decide this issue. We have yet another reason to leave this issue, as we find that entering into such issue in this case is uncalled for, as the attending facts and circumstances would indicate that the case of firing on the deceased by the appellants Kedar Chaudhary and Natha Chaudhary is not proved by medical evidence/post-mortem report. We also find that the nature of injuries sustained by the informant was simple.

13. On deeper scrutiny of the material in this case, we are constrained to hold that the trial court has not appreciated the



entire evidence with proper perspective, the informant as per his own version became unconscious, as such he could not have seen the actual occurrence, after he became unconscious, other witnesses have arrived the alleged place of occurrence after the alleged occurrence took place and as such they cannot be regarded as eye witness. We also find that prosecution has made a pick and choose of witness and without any cogent reason not examined the eye witnesses, namely Ram Nath Chaudhary, Deonath Chaudhary, Etwari Devi and Shanti Devi. This lapse of the prosecution goes against the prosecution as with holding of the material witness and pick and choose of witness goes against the prosecution.

14. We also find substance in the submission of the appellants that prosecution has failed to establish any motive behind killing the deceased. Analyzing the nature of injury of the deceased and the informant, we find that conviction under Section 302 of the Indian Penal Code is not justified.

15. In the totality of the facts situation, we find that the trial court has committed error in convicting the appellants under Section 302 of the Indian Penal Code, as the trial court proceeded that the appellants have fired, which proved fatal for the deceased. The story of firing in the instant case is not supported by the doctor, as discussed above, and as such we are of the view that the instant case is



not falling under the category of Section 302 of the Indian Penal Code, rather under Section 304/34 of the Indian Penal Code and accordingly, we convert the conviction of the appellants under Section 304 of the Indian Penal Code from one under Section 302/34 of the Indian Penal Code. We also approve the conviction of Bindeshwari Chaudhary under Section 324 of the Indian Penal Code. However in the peculiar facts and circumstances, the sentence of all the appellants are reduced to the period undergone. The appeal is partly allowed to the extent indicated above. The appellants are discharged from the liabilities of their bail bonds.

16. Let a copy of the judgment be handed over to Mr. Rabi Bhushan Prasad, who appears in these appeals, as Amicus Curiae for needful.

17. The Patna High Court Legal Services Authority is directed to pay the fixed remuneration to Mr. Rabi Bhushan Prasad, who appears in these appeals, as Amicus Curiae.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
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