

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (DB) No.1 of 1994**

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|-----|---------------------------------------------|
| 1.  | Mahendra Mahto s/o Nathuni Mahto            |
| 2.  | Ram Briksha Mahto son of late Asharfi Mahto |
| 3.  | Halkhori Mahto son of late Nanan Mahto      |
| 4.  | Tapeshwar Mahto son of late Kishori Mahto   |
| 5.  | Bhagwat Mahto son of Sri Tapeshwar Mahto    |
| 6.  | Rameshwar Mahto son of late Asharfi Mahto   |
| 7.  | Mahajan Mahto son of Sri Dhanusdhari Mahto  |
| 8.  | Kari Mahto s/o Shri Kripal Mahto            |
| 9.  | Charitar Mahto son of Shri Kripal Mahto     |
| 10. | Luchai Mahto son of late Sundar Mahto       |
| 11. | Bunni Mahto son of late Makhhan Mahto       |
| 12. | Ram Bharosh Mahto son of Bunni Mahto        |
- All resident of village Dekuli Chatti, P.S. Bahadurpur, Dist. Darbhanga

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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**Criminal Appeal (DB) No. 26 of 1994**

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|----|-------------------------------------------------------------------------------------------------------------|
| 1. | Kapileshwar Mahto s/o Moti Mahto                                                                            |
| 2. | Maheshwar Mahto s/o Asharfi Mahto                                                                           |
| 3. | Hiral Lal Mahto s/o Mahendra Mahto                                                                          |
| 4. | Ram Sagar Mahto s/o Bunni Mahto                                                                             |
| 5. | Dhanushdhari Mahto s/o Late Pulkit Mahto                                                                    |
| 6. | Raj Kumar Mahto s/o Bunni Mahto, all resident of village Dekuli Chatti P.S. Bahadurpur, District- Darbhanga |

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Rizwanullah Khan, Advocate

For the State : Mr. Shiwesh Chandra Mishra, 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 Criminal Appeals arise out of the judgment of conviction dated 14<sup>th</sup> December, 1993 and order of sentence dated 16.1.1993 passed by the learned 3<sup>rd</sup> Additional Sessions Judge, Darbhanga in Sessions Trial No. 92 of 199, whereby the learned 3<sup>rd</sup> Additional Sessions Judge has held out that the prosecution has been able to bring home all the charges against accused Kapileshwar Mahto, Maheshwar Mahto, Dhanushadhari Mahto, Ram Sagar Mahto, Raj Kumar Mahto and Hira Lal Mahto under Section 302/34 of the Indian Penal Code. Learned Addl. Sessions Judge convicted Kapileshwar Mahto, Maheshwar Mahto and Hiralal Mahto under Section 302/149, 427 and 448 IPC and accused Ram Sagar Mahto and Raj Kumar Mahto under Sections 302/149, 427, 147 and 448 IPC. The Sessions Court convicted Mahendra Mahto under Section 302/144, 302/149, 427, 448 and 147 IPC and accused Bunni Mahto, Ram Bharosh Mahto, Tapeswar Mahto, Bhagwat Mahto Dhanushdhari Mahto, Mahajan Mahto, Ram Briksh Mahto, Luchai Mahto, Kari Mahto, Chalitar Mahto, Halkhori Mahto and Rameshwar Mahto under Section 302/149, 427, 448 and 147 of the Indian Penal Code. However,



the accused persons have been acquitted of the charge under Section 380 of the Indian Penal Code. The Trial Court sentenced accused Kapileshwar Mahto, Maheshwar Mahto and Hira Lal Mahto to undergo rigorous imprisonment for life under Section 302/34 IPC and one year under Section 427 IPC and six months under Section 448 IPC. Further the accused Dhanushdhari Mahto and Raj Kumar Mahto as well as Ramsagar Mahto were sentenced each under section 302/34 to undergo R.I. for life and one year on each count under Section 427 and 147 IPC and R.I. for six months under Section 448 IPC. No separate sentence was passed under Section 302/149 IPC, accused Mahendra Mahto is sentenced to undergo R.I. for life under Section 302/114, one year under Section 427 and one year under Section 147 IPC and six months under Section 448 IPC, and no separate sentence was awarded under Section 302/149 IPC and accused Bunni Mahto, Rambharosh Mahto, Tapeswar Mahto, Bhagwat Mahto, Mahajan Mahto, Ram Briksh Mahto, Luchai Mahto, Kari Mahto, Chalitar Mahto, Halkhori Mahto and Rameshwar Mahto are sentenced to undergo R.I. for life under Section 302/149 IPC, one year under Section 147, one year under Section 427 and six months under Section 448 IPC, all the sentences were to run concurrently.



2. The prosecution case in short is that the informant Arun Kumar Mahto lodged FIR before the A.S.I Bahadurpur police station on 25.4.1990 in the clinic of Dr. P.P. Gupta. He had alleged that while he was sitting in his Darwaza on the same day at about 11 AM, all of a sudden accused Mahendra Mahto, Hiralal Mahto, Kapileshwar Mahto, Maheshwar Mahto, Ram Briksh Mahto, Rameshwar Mahto, Dhanushdhari Mahto, Mahajan Mahto, Luchai Mahto, Kari Mahto, Chalitar Mahto, Bunni Mahto, Ram Bharosh Mahto, Ram Sagar Mahto, Raj Kumar Mahto, Tapeswar Mahto, Bhagwat Mahto, Malwar Mahto, Halkhori Mahto came with lathi, Bhala etc. Mahendra Mahto issued an order to kill the father of the informant and to loot away the house hold articles of the informant. Thereupon Kapileshwar Mahto assaulted the father of the informant, namely, Siya Dhari Mahto with Bhala who fell down on the ground. Maheshwar Mahto assaulted Siyadhari Mahto with bhala and Hiralal Mahto, Ram Sagar Mahto, Dhanushdhari Mahto, Raj Kumar Mahto started assaulting Siyadhari Mahto with lathies. On hearing alarm Jagdish Mahto, Puri Mahto, Raj Kumar Sah, Jagdish Yadav and others started assembling there and some accused persons then took away two bags of wheat, two lotas, four thalies and one box and fled away. They damaged the tiles of the roof of the informant. The injured



Siyadhari Mahto was taken to the clinic of one Dr. P.P. Gupta as there was strike in the Medical College and Hospital as per the prosecution story. The injured was later removed to the Medical College Hospital where he was succumbed to the injuries and as such Section 302 IPC was added to the FIR.

3. The police after registering the FIR investigated the case and submitted charge sheet against the appellants. Cognizance was taken by the Magistrate concerned and the case was committed to the Court of Sessions for trial.

4. On behalf of the prosecution 9 witnesses have been examined out of which P.Ws. 8 and 9 are the Doctors who attended the injured and conducted post mortem report. P.W. 6 is the informant of the case. PWs. 1,3,4,5 and 6 claimed to be eye witnesses. P.W.7 is the I.O. P.W. 8 is the Doctor who attended the post mortem and injury on the person of the deceased.

5. The Trial Court after scrutiny of the deposition of the witnesses held out that the accused have committed the crime of killing Siadhari Mahto and looted the house as they were not withdrawing the case. From the FIR it appears that the appellants entered into the house of the informant variously armed with weapon and on the order of Mahendra Mahto, Kapileshwar Mahto gave blow on chest but it hit left arm of his father who fell down



and thereafter Maheshwar Mahto gave Bhala blow on his head, Hiralal gave Sahad blow on the left knee joint, Mahendra, Bunni, Dhanushadhari, Mahajan, Ram Sagar and Rajkumar assaulted the deceased with lathi, Bhagwat, Rambriksh took out one bag of wheat, Rameshwar Mahto took away four thalies, Tapeswar Mahto took away two lotas and Mahendra took away a box containing saries, silver ornament and Rs. 230/- cash. It is alleged that the accused persons damaged the tiles of the roof of the informant.

6. In the instant case total 18 persons have been convicted. So far as the allegation of assault is concerned, it is only against Maheshwar Mahto, Hiralal Mahto, Rambriksha Mahto and Kapileshwar Mahto, the allegation of loot against the other appellants has been found not proved as all the accused persons have been acquitted for the offence under Section 380 IPC.

7. Mr. Anil Singh, counsel appearing on behalf of the appellants has submitted that there is no allegation of any kind of overt act against any of the appellant except the appellant, Maheshwar Mahto, Hiralal Mahto, Ram Briksh Mahto, Kapileshwar Mahto. He submitted that the prosecution case that 18 persons who assembled for committing offence variously armed with lethal weapons have assaulted the victim but the medical



report falsifies the allegation of the prosecution party. The lethal weapon is not corroborated with the ante-mortem injury found by the Doctor. The Doctor has found the following injuries.

- (I) one pierced incised wound 1/2" x 1/4" x skin deep on the left side of the forearm.
- (II) one swelling with bruise 4" x 1" on the right shoulder
- (III) one swelling with bruise 3" x 1" on the left arm.
- (IV) one swelling with bruise 3" x 1" on the right thigh
- (V) one swelling with bruise 4" x 1" on the right side of the back.

8. From the opinion of the Doctor except one incised wound skin deep on the left side of the forearm rest injuries were only simple in nature. He submitted that initially the case was registered under Section 307 IPC and Section 302 IPC was subsequently added after the death of the deceased. Taking note of the injuries on the person of the deceased, no case under Section 302 IPC is made out as none of the injuries was sufficient to cause death. All the injuries were simple except injury No. 1 which was grievous but it was in the forearm and not on vital part.

9. Counsel submitted that in the instant case the prosecution has miserably failed to explain the injury sustained by co-accused whereas the defence has explained the injuries on the deceased. He also submitted that the prosecution has examined Kari Mahto who was not named as witness of the occurrence in the FIR but



deliberately withheld Raj Kumar Sao and Jagdish Yadav who have specifically been named as witnesses in the FIR and there is no explanation as to why they have been withheld as such he submitted that withholding the material witnesses, Raj Kumar Sao and Jagdish Yadav has caused prejudice in this case and these two material witnesses could have narrated the true story of the incident. There is no explanation as to why they have not been examined in this case.

10. Counsel for the appellants submitted that the motive of the alleged occurrence is falsified by the defence which shows that all the accused persons were acquitted in the case filed by Mahendra Mahto in 1989, who is appellant in this criminal appeal and as such the very foundation of the appellant entering the house, committing murder of the deceased and committing loot stands falsified. Referring to Ext. F he submitted that accused persons were acquitted in all the cases whereas in the case filed by the accused the informant and others were convicted in 1987 and they were only acquitted on 19.7.1990, i.e. after lodging of the FIR in the instant case. He also submitted that in the FIR no motive was assigned. It was subsequently added to make out a case. Counsel for the appellants has referred to various contradictions in



the prosecution case and also raised a question of false implication referring to delay in lodging the FIR.

11. Referring to the prosecution case, counsel for the appellants submitted that P.Ws. 3 and 6 claimed to be eye witnesses of the entire incident but it is most unnatural that they have not made any statement before the police about the occurrence when the incident took place at 11.00 A.M. and the fardbeyan was recorded in the clinic of Dr. P.P.Gupta at 7.00 P.M.

12. There is no explanation as to why they have not lodged the case unless the fardbeyan was registered at 7.00 P.M. Referring to deposition of P.W. 7 he submits that the person accompanying Sirdhari Mahto did not make any statement at the Police Station. He also disputed the place of occurrence. According to the appellant the place of occurrence is not the Angan of the informant. This was concocted as an afterthought. Counsel for the appellant referred to the deposition of the Doctor and submitted that there is no explanation as to why the deceased was taken to Dr. P.P. Gupta when Dr. Gupta has admitted that he is not specialized doctor for treatment of such type of patient. He submitted that there is no treatment chart nor prescription nor details of the kind of treatment extended to deceased which also falsifies the statement of Dr. P. P. Gupta, P.W.9. Presumably his



story was introduced to explain the delay which is not permissible in this case.

13. Counsel for the appellant submitted that in the instant case the case diary was exhibited. With reference to various paragraphs of the deposition of the I.O., P.W. 7 and in particular paragraphs 13 and 18 he submitted that the entire prosecution case is under serious cloud as the place of occurrence has not been established. Daily reports are not mentioned in the case diary, station diary has not been mentioned in the case diary, no station diary has been exhibited and referring to para-18 the deposition of P.W.7 I.O. he submitted that from the facts and circumstances, it is established that persons accompanied the deceased had no knowledge about the occurrence, otherwise, the I.O. must have written the statement of those witnesses in the case diary and as such the deposition of P.Ws. 3 and 6 who claimed to be eye witnesses cannot be relied upon, their natural conduct would have been that they must have disclosed the name of the persons involved in the crime and the manner of commission of crime before the I.O who must have mentioned the details of assailants in the station diary and the manner of occurrence.

14. He also submitted with reference to P.W. 5 that there is major contradiction in the deposition of the witnesses as to manner



or commission of the crime. He submitted that the conduct of the P.W. 5, the wife of the victim sitting at the Chatai when the crime was committed by the appellants is not natural.

15. Adverting to the injury report he submitted that the medical evidence runs contrary to the account of injury caused by the appellants. There is specific allegation that Maheshwar gave Bhala blow on the head of the deceased and Hiralal gave Sahat blow but no such injury was found. The injury report as discussed above does not stand on the line of the allegation leveled by the prosecution. In the totality of the fact situation he submitted that no one is eye witness to the occurrence. The occurrence has not taken place as suggested by the prosecution. They have been made accused only on account of inimical terms. No independent witness has been examined in this case. The material witnesses have been deliberately withhold. He submitted that non-explanation of the injury of the accused falsifies the claim that occurrence took place as a sequel of refusal of the deceased from withdrawal of the case. He submitted that the defence has examined witnesses to substantiate their case of injury. He has stated that the alleged motive of committing crime as a sequel of refusal to withdraw pending case has been found false and as such the entire prosecution case is bundle of falsehood.



16. Learned Additional Public Prosecutor appearing on behalf of the State submitted that the judgment of the trial court is well considered and he has discussed all the evidence and on consideration of the entire facts and circumstances, rightly convicted the appellants since the trial court was justified in convicting them in view of the fact that there was previous enmity established.

17. We have heard both the appellants and the Additional Public Prosecutor on behalf of the State. We have gone through the entire records of the case. The Trial Court judgment was rendered on 14th December, 1993, 24 years has gone by now. Out of 18 convicts appellant Mahendra Mashto, Halkhori Mahto, Banni Mahto and Luchai Mahto on the date of judgment of the trial court rendered on 14th of December, 1993 were 50 years old, Tapeswar Mahto 61 years old, Dhanusdhari Mahto 65 years old and they must have crossed 75 years and they have now practically invalid and we see that no purpose would be served in upholding the conviction, deciding legality and validity of conviction and sentence of aforesaid persons who were 60 years of age on the date of judgment of the trial court on 14th of December, 1993. In addition thereto there was only allegation of assault by Maheshwar Mahto, Hiralal Mahto, Ram Sagar Mahto, Dhanusdhari Mahto and



Raj Kumar Mahto that they have given blow on the person of the deceased and the rest others were only members of the mob. We also noticed that the trial court has held out that allegation of loot has not been proved in this case and specific allegation of loot leveled against the member of the mob and as such we find that in the totality of the fact situation, when there are major contradiction in the case as highlighted by the appellant, we do not find it appropriate at this stage to uphold the conviction and sentence passed by the trial court.

18. Moreso for the reasons-

(a) There is major contradiction in the deposition of the witnesses

(b) There is delay in lodging of the FIR

(c) non-exhibit of the station diary

(d) unusual conduct of the P.Ws. 1 and 3 claiming to be eye witnesses but not disclosed the name of assailant and manner of commission of crime to the I.O. when so called station diary was entered.

(e) The nature of injury is simple except the injury on the right forearm as discussed in the previous paragraph, -

19. We find substance in the submission of the appellant regarding withholding of the material witnesses who were the



witnesses in the FIR but not examined in this case. We also find substance in the submission of the appellant that non-examination of the injury of the accused by the prosecution also goes against them and creates serious doubt about the manner of commission of crime. We have also noticed the fact that occurrence took place on 25.4.1990 and Maheshwar Yadav was in jail custody when the judgment of the trial court was rendered. He remained in jail for four years and we have also noted the fact that when the appellants have become 75 years and above today and at the evening of their life and as such, sending them to jail at this stage would not serve any penalogical purpose. The purpose of imprison is deterrent, preventive or reformatory and at this age of 75 we do not find that sending them to in jail custody in a case which is not full proof and conviction is based on many doubtful circumstances and none of the injuries was fatal and on vital part of the deceased, as uncalled for.

20. In the totality of the fact situation and on consideration of the materials available on the record and on scrutiny of the deposition of the witnesses, we are of the considered view that the instant case does not fall in the category of Section 302 IPC but at the highest it can be taken as an offence of 304 IPC against the appellants Maheshwar Mahto, Hiralal Mahto, Ram Sagar Mahto,



Dhanusdhari Mahto and Raj Kumar Mahto and rest are the only members of the mob and as such we find that no useful purposes would be served in upholding the conviction and sentences.

21. We accordingly, allow the appeal in part and modify the judgment of conviction and sentence from under Section 302 to Section 304. The appellants' conviction is converted from 302 IPC to 304 IPC and considering the period already undergone, we are of the view that ends of justice would be served in treating the period already undergone as sufficient sentence and modify the sentences to the period already undergone and the period already undergone be treated as sufficient punishment.

22. Accordingly, we direct that the appellants shall be discharged from the liability of the bail bonds.

23. Accordingly, the appeal is allowed in part.

**(Rajendra Menon, CJ)**

**( Anil Kumar Upadhyay, J)**

spandey/-

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