

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.478 of 1993

- =====
1. Dhirendra Kumar Yadav Son of Sri Khatam Lal Yadav
 2. Tarachand Yadav son of Late Agam Lal Yadav(**Abated**)
 3. Anand Mohan Yadav son of Late Agam Lal Yadav(**Abated**)
 4. Parmand Yadav Son of late Resham Lal Yadav
 5. Jagdish Yadav Son of late Kishan Lal Yadav
 6. Khatam Lal Yadav son of Ratan Lal Yadav(**Abated**)
 7. Sugan Lal Yadav son of Rit Lal Yadav(**Abated**)
- All residents of Village- Gaiyari, Police Station- Araria District Araria.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

=====

with
Criminal Appeal (DB) No. 542 of 1993

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Birendra Kumar Yadav, son of Sri Khatam Lal Yadav, resident of village-Gaiyari, Police Station-Araria, District-Araria

... .. Appellant

Versus

The State of Bihar

... .. Respondent

=====

Appearance :

(In Criminal Appeal (DB) No. 478 of 1993)

For the Appellant/s : Mr. Pankaj Kumar Sinha, Adv.
Mr. Raunak Kumar Singh “Pankaj”, Adv.
Mr. Kamal Kishore Jha, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

(In Criminal Appeal (DB) No. 542 of 1993)

For the Appellant/s : Mr. Pankaj Kumar Sinha, Adv.
Mr. Raunak Kumar Singh “Pankaj”, Adv.
Mr. Kamal Kishore Jha, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 11-12-2017



Initially, Cr.Appeal(DB) No.478 of 1993 was filed by seven appellants and Cr.Appeal(DB) No.542 of 1993 was preferred by sole appellant Birendra Kumar Yadav against common Judgment of conviction dated 16.10.1993 and sentence dated 18.10.1993 in Sessions Trial No.86 of 1983 and, as such, both appeals were heard together and are being disposed of by this common Judgment.

2. During pendency of the appeal, since appellant no.2(Tarachand Yadav), appellant no.3(Anand Mohan Yadav), appellant no.6(Khatam Lal Yadav) and appellant no.7(Sugam Lal Yadav), all appellants in Cr.Appeal (DB) No.478 of 1993) died, their cases stood abated and now only three appellants survive in Cr.Appeal (DB) No.478 of 1993.

3. Both appeals have been preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against Judgment of conviction and sentence dated 16.10.1993 passed in Sessions Trial No.86of 1983 by learned 5th Addl. Sessions Judge, Purnia arising out of Araria P.S. Case No.166/1982 registered for the offence under Section 147/323/379/341/307 of the Indian Penal Code.

4. Short fact of the case is that on 05.07.1982 at about 12.30 P.M., A.S.I. Rameshwar Prasad Shrivastava (P.W.11) recorded fardbeyan of Ramesh Prasad Yadav (P.W.10) in Sub Divisional



Hospital, Araria. In the fardbeyan, the informant disclosed that on preceding day i.e. 04.07.1982 in the evening at about 4.00 P.M., while Hira Nand Yadav son of his co-villager Manglu Yadav was grazing she-buffalo in the field, he was assaulted by Dhirendra Kumar Yadav (appellant no.1 in Cr.Appeal (DB) No.478 of 1993) by a small bamboo on his head. Thereafter, injury started bleeding. The informant further disclosed that after getting such injury, Hira Nand Yadav returned back to his house and when the informant went to his house at about 8.00 in the night, Manglu Yadav (father of Hira Nand Yadav) came to him and requested for holding Panchayati. Thereafter, the informant asked him to come in the morning on the next date and he will do Panchayati. Thereafter, in the morning on 05.07.1982 at about 7.30 A.M., the informant along with his brother Ram Bilash Yadav (deceased), uncle Puran Yadav(not examined), cousin brother Hari Lal Yadav, Jhari Lal Yadav and Manglu Yadav(P.W.5) went to the house of Khatam Lal Yadav and on his door he found that his two sons, namely, Biren Kumar Yadav@ Birendra Kumar Yadav (sole appellant in Cr.Appeal(DB) No. 542 of 1993) and Dhirendra Kumar Yadav(appellant no.1 in Cr. Appeal(DB) No.478 of 1993) were present. In the meanwhile, villagers Tarachand Yadav, Anand Mohan Yadav, Parmanand Yadav, Jagdish Yadav and Sugan Lal



Yadav@ Sugam Lal Yadav arrived there. Khatam Lal Yadav also arrived there. Thereafter, the informant inquired from Biren Kumar Yadav as to why his brother Dharendra Kumar Yadav had assaulted son of Manglu Yadav. At that very time, son of Manglu Yadav, namely, Hira Nand Yadav was also present there. Biren Kumar Yadav asked the informant as to what was his motive, then he replied that he had come for justice. In the meanwhile, Dharendra Kumar Yadav caught hold of his hair and gave a slap on temporal region and Tarachand Yadav gave blow by his leg on his waist. Parmanand Yadav exhorted other accused persons to kill all persons. Thereafter, Jagdish Yadav caught both hands of his elder brother Ram Bilash Yadav (deceased). In the meanwhile, Biren Kumar Yadav uprooted Khunta(wooden stick) and gave two blow on the head of informant's brother. His brother received injury on his head as well as on temporal region. In the meanwhile, Anand Mohan Yadav uprooted another Khunta(wooden stick) and gave blow on the waist of his brother, whereby his brother was seriously injured and fell down. Dharendra Kumar Yadav (appellant no.1 in Cr.Appeal(DB) No. 478 of 1993 snatched HMT Janta watch from the wrist of his brother, of which he gave number of case scribed on the watch. It was alleged that in the said occurrence, other accused persons were also carrying lathi, Khunta and Phatha.



Khatam Lal Yadav using filthy language said that the informant had come for Panchayati, so that they should be assaulted. In the occurrence, it was alleged that Sugan Lal Yadav was also using filthy language. After alarm being raised, number of villagers arrived such as Bachu Lal Yadav (not examined), Tetar Tatma (P.W.4), Chhatri Tatma (P.W.1), Yogendra Yadav(not examined) and other number of persons, who had seen the occurrence. Due to arrival of said villagers, the life of informant could be saved. Thereafter, the injured was carried to Araria Hospital in unconscious condition.

5. After recording fardbeyan, the police on the same day i.e. 05.07.1982 at 1.30 P.M. drew a formal F.I.R. vide Araria P.S. Case No.166/1982 under Sections 147, 323, 379, 341, 307 of the Indian Penal Code against eight accused persons, namely, (i) Biren Kumar Yadav (appellant in Cr.Appeal (DB) No.542 of 1993)(ii) Dhirendra Kumar Yadav(appellant no.1 in Cr. Appeal (DB)No.478 of 1993)(iii) Tarachand Yadav (iv) Anand Mohan Yadav, (v) Parmanand Yadav (vi) Jagdish Yadav (vii) Sugam Lal Yadav and (viii) Khatam Lal Yadav. The injured, subsequently, while being treated, succumbed to his injury on 18.07.1982 and, thereafter, Section 302 of the Indian Penal Code was added. During investigation, accusation was found true and, thereafter, on



20.10.1982 chargesheet was submitted against all accused persons under Sections 147, 304, 323 and 379 of the Indian Penal Code and learned Magistrate took cognizance on 13.12.1982. Finally, after completion of process under Section 207 of the Code of Criminal Procedure on 15.04.1983 the case was committed to the court of Sessions. On 01.07.1986 against all accused persons, charge under Section 147 of the Indian Penal Code was framed. On the same day i.e. 1st July, 1986 charge under Sections 302 and 149 of the Indian Penal Code was framed against all accused persons, except Birendra Kumar Yadav and separate charge under Section 379 of the Indian Penal Code was framed against Dhirendra Kumar Yadav (appellant no.1 in Cr.Appeal (DB) No.478 of 1993) and separate charge under Section 302 of the Indian Penal Code was framed against Birendra Kumar Yadav (appellant in Cr.Appeal (DB) No. 542 of 1993).

6. Since accused persons denied charges and claimed to face trial, the prosecution to establish its case examined altogether 11 (eleven) witnesses, out of them P.W.1-Chhatri Tatma, P.W.4-Tetar Tatma, P.W.5-Manglu Yadav, P.W.7-Hira Nand Yadav and P.W.10-Ramesh Prasad Yadav (informant) were examined as eye witnesses to the occurrence, whereas P.W.2-Bhuneshwar Prasad Yadav is a witness to the inquest report and has proved inquest



report, which was marked as Ext.1. P.W.3- Lakhan Lal Yadav, who was brother-in-law of the deceased, has proved outdoor ticket in relation to the deceased in the hospital, which was marked as Ext.9 and he himself has proved Post Mortem Examination Report, which was held on the dead body of the deceased Ram Bilash Yadav and it was marked as Ext.10.

7. P.W.6-Dr. Indra Prasad Bhagat had examined injuries on the person of Hira Nand Yadav (P.W.7) and he proved injury report, which was marked as Ext.2. He had examined injury on the person of Hira Nand Yadav on 06.07.1982 and he found the injury simple in nature. P.W.8-Dr. Salauddin Ahmad had examined injuries of the deceased Ram Bilash Yadav. On 05.07.1982 he was posted as Civil Assistant Surgeon in the Sub Divisional Hospital, Araria and on the same day at 9.30 A.M. he had examined injured Ram Bilash Yadav. P.W.9-Ghanshyam Mishra was Officer Incharge of Araria Police Station on the date of occurrence and P.W.11-Rameshwar Prasad Shrivastava was the Investigating Officer.

8. Sri Pankaj Kumar Sinha, learned counsel, who has appeared on behalf of the appellants in both appeals after placing entire evidences i.e. oral and documentary evidence, has argued that it was out and out a case of clean acquittal. So far as



remaining appellants in Cr.Appeal (DB) No.478 of 1993 is concerned, he submits that against all the three appellants, none of the witnesses have asserted that they had participated in the occurrence with common object. He submits that on the basis of evidence on record, there was no question for application of Section 149 of the Indian Penal Code and, as such, their conviction under Section 302/149 of the Indian Penal Code is not sustainable. He has further argued that from the entire prosecution case, it is evident that whatever occurrence had taken, same had taken in spur of moment since during Panchayati some dispute arose and, thereafter, one of the accused i.e. appellant Birendra Kumar Singh uprooted a Khunta (wooden stick) and gave its blow on the head of the deceased without knowing as to whether such injury was enough for causing death of the deceased. It is not a case that again and again assault was given by Birendra Kumar Yadav. So far as other appellants are concerned, there is no allegation against them save and except the fact that they were carrying Lathi, Khunta and Phatha without any specification. Regarding non-application of Section 379 of the Indian Penal Code, it has been argued that the prosecution has miserably failed to establish its case that in the occurrence wrist watch of the deceased was snatched by accused persons. He has argued that it is a peculiar case that in the



fardbeyan, the informant has even disclosed the case number scribed on the wrist watch and the informant had stated the make of the wrist watch as HMT Janta, bearing Case No. 201079. He submits that such assertion in the F.I.R. is glaring example of recording fardbeyan with pre-planned manner and with full discussion to implicate the accused persons.

10. Sri Pankaj Kumar Sinha, learned counsel for the appellants, by way of referring to the evidence of D.W.1 and D.W.2, has argued that on the same date one another occurrence had taken place, for which mother of the appellant had filed a complaint case and copy of the complaint petition was got marked as Ext.A. In sum and substance, it has been argued that there was animosity in between the parties and in trivial issue, colour of a case of murder was given by accused persons, whereas evidence, which has been brought on record, categorically suggests that it was a case of culpable homicide, not amounting to murder. Alternatively, it has been argued that considering the fact that the occurrence had taken place long back in the year 1982 and the appellants have now become very old age, it would be appropriate to reduce the period of sentence for the period already undergone. He submits that during investigation as well as after Judgment of conviction, the appellants remained in custody for considerable



time and, as such, purpose would be served if the sentence is reduced for the period already undergone.

11. Sri Ajay Mishra, learned Addl. Public Prosecutor tried to persuade the Court that there is specific accusation against the appellant Birendra Kumar Yadav for giving blow of Khunta on the head of the deceased. He submits that the allegation of giving blow of Khunta on the head was enough that accused persons were having knowledge that such injury may cause death and, as such, conviction under Section 302 of the Indian Penal Code against appellant Birendra Kumar Yadav is appropriate. So far as application of Section 149 of the Indian Penal Code is concerned, he has argued that once it has been established that all accused persons had participated in the occurrence, the act done by one accused person can be treated as act done by all the accused persons with a common object of all accused persons and, as such, appellants may not be exonerated from the charge under Section 302/149 of the Indian Penal Code.

12. Besides hearing learned counsel for the parties, we have also perused materials available on record. It is true that witnesses who claimed to be eye witness in the occurrence i.e. P.Ws.1,4,5,7 and 10 are consistent on the point that during Panchayati, the informant was assaulted and in the occurrence, brother of the



informant was assaulted, but all witnesses have said that in the occurrence, appellant Birendra Kumar Yadav uprooted Khunta and gave blow, but on the basis of those evidence, it is difficult to perceive that assault was given with knowledge that the injury may cause death. It is difficult to perceive that by giving injury with Khunta, appellant Birendra Kumar Yadav was having any knowledge that it may cause death to the deceased. Had there been any intention to kill the deceased, he would have given again and again blow by Khunta on the person of the deceased, but there is no such allegation and, as such, it appears that the Investigating Officer during investigation had rightly found the case under Section 304 of the Indian Penal Code and chargesheet was submitted in the said Section. Even during trial whatever evidence has been brought on record, those are sufficient only for application of Section 304 of the Indian Penal Code and it is not a case under Section 302 of the Indian Penal Code.

13. P.W.7-Hira Nand Yadav, who was allegedly assaulted by a small bamboo on his head on 04.07.1982, was medically examined by P.W.6-Dr. Indra Prasad Bhagat. Dr. Indra Prasad Bhagat has proved injury of Hira Nand Yadav and same has been marked as **Ext.2**. On going through the evidence of P.W.6 as well



as examining all the injury report, it is evident that the injury was found simple in nature.

14. P.W.8-Dr. Salauddin Ahmad had examined injury on the person of the deceased. He stated that on 05.07.1982 after the injured was brought to the hospital, he gave information to the police, which was in his own writing and signature and proved the same, which was marked as **Ext.3**. Thereafter, he examined the injury on the deceased and found following injuries:

(i) One lacerated wound 2"x ¼" x 1/8" on middle of the head.

(ii) Bruise 1" x ½" on left ear.

(iii) Patient complained of pain back and wrist.

He further stated "Patient was semi conscious and was vomiting. X-ray head was advised. Opinion of injury no. (i) was kept reserved for want of X-ray. Injury nos. (ii) and (iii) were simple in nature caused by hard and blunt substance. Age of injuries were within six hours. Injury no. (i) might have been caused by hard and blunt weapon. All these injuries may have been caused by Khunta of bamboo. Injury no.(i) was at that time not much bleeding. In case of head injury there is vomiting if the injury is serious whether blood is coming out from that injury or not. In case of semi consciousness injured cannot talk properly. Injured was brought in the hospital by his attendant. In case of injury no. (iii) on touch of that part by M.O. patient could have responded pain.



Araria Zero Mile is situated in the south of hospital at a distance of within 1 to 2 Kilometer. Zero Mile is on the pitch road connecting Zero Mile and hospital. In the south of zero Gaiyari village starts.

When the patient came to hospital, I sent an information to the Araria Police.”

He(P.W.8) proved injury report, which was marked as Ext. 2/1. In the case, though the doctor, who had examined the injury, has been examined as P.W.8. The prosecution has not given any explanation regarding non-examination of the doctor, who had conducted the post-mortem on the dead body of the deceased, whereas in a peculiar manner, in this case, post-mortem examination report was got exhibited by P.W.3, who was close relation of the Informant.

15. P.W.9-Ghanshyam Mishra, on 05.07.1982, was posted as Officer Incharge in Araria Police Station and he proved endorsement made on information, which was given to the police by P.W.8-Dr. Salauddin Ahmad, which was marked as **Ext.4**. He also proved fardbeyan, which was marked as **Ext.5** and formal F.I.R. which was marked as **Ext.6**. In paragraph-3 of his evidence, he stated that he got information regarding death of the injured, which had occurred on 18.07.1982 and, thereafter, on 28.07.1982 he sent a letter to the Chief Judicial Magistrate, Araria for adding



Section 302 of the Indian Penal Code. The said endorsement was marked as **Ext.7**.

16. P.W.11-Rameshwar Prasad Shrivastava is the Investigating Officer and in his evidence in paragraph-2 has stated that in the hospital, the injured was unconscious and thereafter he prepared injury requisition in respect of Ram Bilash Yadav and Hira Nand Yadav, which were marked as Ext.8 and Ext.8/1. In paragraph-5 of his evidence, he has explained as to how he inspected the place of occurrence and at the place of occurrence, he had noticed that one Khunta was broken, which was allegedly used in the occurrence. After examining the aforesaid evidences as well as injuries found on the person of the deceased, the Court is of the considered opinion that it was not a case for application of Section 302 of the Indian Penal Code, rather it was a case of Section 304 of the Indian Penal Code. Since Sri Pankaj Kumar Sinha, learned counsel for the appellants alternatively has argued that after converting the conviction for offence under Section 302/149 of the Indian Penal Code to Section 304(II) /149 of the Indian Penal Code the sentence may be reduced to the extent of period already undergone, we are not discussing in detail the application of Section 149 of the Indian Penal Code in respect of



other accused. Fact remains that it is out and out a case of culpable homicide not amounting to murder.

17. Accordingly, the conviction of appellant Birendra Kumar Yadav in Cr.Appeal (DB) No.542 of 1993 is altered from Section 302 of the Indian Penal Code to Section 304 of the Indian Penal Code. Similarly, in respect of conviction of appellants in Cr. Appeal (DB) No.478 of 1993 for offence under Section 302/149 of the Indian Penal Code, it is converted as Section 304/149 of the Indian Penal Code. Now regarding reducing the period of sentence, the Court is in agreement with the submission of learned counsel for the appellants that considering the fact that in the case, occurrence had taken place long back in the year 1982, the sentence of imprisonment can be reduced to the period already undergone. Moreover, it is admitted fact that all appellants are now old aged person and, as such, the purpose would be served if their sentence is directed to be reduced to the period already undergone. Learned counsel for the appellants has argued that appellants remained in custody during investigation as well as after the Judgment of conviction for some period. In view of facts and circumstances, the Judgment of conviction and sentence is modified and conviction of appellants from Section 302/149 of the Indian Penal Code is substituted by conviction under Section



304/149 of the Indian Penal Code. So far as the conviction of appellant Dhirendra Kumar Yadav under Section 147 of the Indian Penal Code is concerned, it requires no interference. The conviction of appellant Birendra Kumar Yadav under Section 302 of the Indian Penal Code is altered /substituted by Section 304 of the Indian Penal Code and there is no reason to interfere with conviction under Section 147 of the Indian Penal Code.

18. Considering the facts and circumstances, alteration of conviction in all fairness, the sentence can be reduced as period already undergone by the appellants.

19. With above observation / modification, appeals stand disposed of.

20. The appellants are directed to be discharged from the liability of their bail bonds.

(Rakesh Kumar, J)

(Mohit Kumar Shah, J)

nawalkrs/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
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