

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Appeal (DB) No.176 of 1995**

1. Ram Prasad Rai, son of Matar Rai,  
2. Surjee Devi, wife of Matar Rai, Both resident of village – Ukhra, P.S.  
Bishanpur, District-Darbhanga.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with  
**Criminal Appeal (DB) No. 816 of 2010**

Rama Roy, son of Matar Roy, Resident of village – Ukhara, P.S. Bishanpur,  
District – Darbhanga.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

**Appearance :**

(In Criminal Appeal (DB) No. 176 of 1995)

For the Appellants : Mr. Jagannath Singh, Advocate,  
Mr. Pushkar Kumar Ray, Advocate,

For the State : Mr. Dilip Kumar Sinha, APP

(In Criminal Appeal (DB) No. 816 of 2010)

For the Appellant : Mr. Pratik Mishra, Advocate,

For the State : Mr. Shivesh Chandra Mishra, APP

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR  
SRIVASTAVA**

and

**HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA**  
**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR  
SRIVASTAVA)**

**Date : 06-09-2018**

One Dinker Rai gave his fardbeyan to S.I. Surendra Prasad Singh of Bishanpur Police Station on 04.07.1992 at 7:45P.M. and on the basis of fardbeyan of aforesaid Dinker Rai, Bishanpur P.S. Case No. 59 of 1992 for the offence punishable under Section 302 and other minor Sections of the Indian Penal Code was registered on the same day and, thereafter, formal F.I.R. was drawn up against the appellants and others. The



Officer-in-charge of the Bishunpur Police Station, namely, Surendra Prasad Singh took the charge of investigation and subsequently, he handed over the charge of investigation to another police officials, namely, Md. Anwar Sulaiman, who submitted charge-sheet against the appellants in Criminal Appeal No. 176 of 1995 as well as in Criminal Appeal No. 816 of 2010 and at the time of submission of charge-sheet, the appellant no.2 in Criminal Appeal No. 176 of 1995 was in custody, whereas remaining two appellants were absconding and, therefore, they were shown absconder in the charge-sheet.

However, the investigation against the remaining F.I.R. named accused was kept pending. Subsequently, after cognizance, the case was committed to the court of Session and the case of appellant in Criminal Appeal No. 816 of 2010 was separated from the case of appellants in Criminal Appeal No. 176 of 1995.

2. The appellants in Criminal Appeal No. 176 of 1995 stood charged for the offences punishable under Section 302 read with Section 149 of the Indian Penal Code and appellant no. 1 in Criminal Appeal No. 176 of 1995 was separately charged for the offence punishable under Section 307 of the Indian Penal Code. The above stated appellants denied the charges and, accordingly, the prosecution examined, altogether,



nine witnesses and also got exhibited certain documents and one Dhurmus, two lathies as material exhibits. The statement of appellants in Criminal Appeal No. 176 of 1995 was recorded under Section 313 of the Code of Criminal Procedure, in which, they, again, denied the prosecution story and claimed their false implication. The appellants in Criminal Appeal No. 176 of 1995 got examined two defence witnesses in support of their defence. The learned trial court, after scrutinizing the evidences available on the record, convicted the appellants in Criminal Appeal No. 176 of 1995 for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life for the above stated offence and furthermore, the appellant no. 1 in Criminal Appeal No. 176 of 1995 was separately convicted for the offence punishable under Section 307 of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for five years for the offence punishable under Section 307 of the Indian Penal Code passing the impugned Judgment of conviction and sentence order dated 30.06.1995 passed in Sessions Trial No. 163 of 1993 / 55 of 1993.

3. Appellant in Criminal Appeal No. 816 of 2010 was arrested and brought before the court below on 05.07.2006 and,



accordingly, his trial bearing Sessions Trial No. 163A of 1993 (G.R. No.249 of 1992) commenced. The appellant in Criminal Appeal No. 816 of 2010 stood charged for the offence punishable under Sections 302 and 307 of the Indian Penal Code, to which he denied and claimed to be tried.

4. In course of aforesaid trial, the prosecution examined three witnesses and apart from this, also brought the depositions and documents from the original record i.e. from Sessions Trial No. 163 of 1993 and got exhibited, the aforesaid documents and depositions of witnesses recorded in Session Trial No. 163 of 1993 in the trial of appellant in Criminal Appeal No. 816 of 2010. The statement of appellant in Criminal Appeal No. 816 of 2010 was recorded under Section 313 of the Code of Criminal Procedure, in which, he claimed his false implication and denied the prosecution story, but he did not adduce any evidence in support of his defence. The learned trial court, after considering the evidences available on the record, convicted the aforesaid appellant in Criminal Appeal No. 816 of 2010 for the offence punishable under Section 302 of the Indian Penal Code, whereas, acquitted him from the offence punishable under Section 307 of the Indian Penal Code and, accordingly, sentenced him to undergo life imprisonment for the offence



punishable under Section 302 of the Indian Penal Code passing the impugned Judgment and sentence Order dated 15.06.2010 and 18.06.2010, respectively.

5. The appellants in Criminal Appeal No. 176 of 1995 preferred the appeal against the impugned Judgment and sentence order dated 30.06.1995, whereas, appellant in Criminal Appeal No. 816 of 2010 preferred separate appeal against the impugned Judgment and sentence Order dated 15.06.2010 and 18.06.2010, respectively. Since Sessions Trial No. 163 of 1993 / 55 of 1993 and Sessions Trial No. 163A of 1993 / GR No.249 of 1992 arose from Bishunpur P.S. Case no. 59 of 1992, both the aforesaid Criminal Appeals were heard together and a common Judgment is being passed in both the above stated Criminal Appeals.

6. As we have already stated the Bishunpur P.S. Case No. 59 of 1993 was registered on the basis of Fardbeyan of informant Dinkar Rai, who was examined in Sessions Trial No. 163 of 1993, as P.W.5, whereas, in Sessions Trial No. 163A of 1993 as P.W.2. The aforesaid informant Dinkar Rai claimed in his Fardbeyan that on 04.07.1992 at about 5:45P.M., he returned from Jatmalpur and came at his door, where he saw the appellants and other persons, total 11 persons in number,



standing in front of hut of appellant Rama Rai. The aforesaid persons including appellants were armed with deadly weapons. The informant Dinkar Rai, specifically, claimed that appellant no.1 in Criminal Appeal No. 176 of 1995 was armed with Farsa, appellant no.2 in Criminal Appeal No. 176 of 1995 was armed with Garasa, whereas, appellant in Criminal Appeal No. 816 of 2010 was armed with Pistol. The informant Dinkar Rai, further, claimed that having seen the aforesaid persons, he entered into the hut. In the mean time, all the F.I.R. named accused came near the hut and appellant Rama Rai asked him to come out from the hut. The informant Dinkar Rai, further, claimed that the appellant Rama Rai used to threaten him as he suspected that his family members got apprehended by the Police. However, informant did not dare to come out of the hut and in the mean time his brother Ram Pukar Rai (deceased) came there. The above stated F.I.R. named accused went towards Ram Pukar Rai and seeing this the informant came out of the hut and saw that the appellant Ram Rai brought a Dhurmus from the Dalan of the informant and hurled the aforesaid Dhurmus upon Ram Pukar Rai, as a result whereof, Ram Pukar Rai sustained injury on his head and having sustained the aforesaid injury, the injured Ram Pukar Rai became restless. However, in the mean



time F.I.R. named accused Matar Rai with lathi, appellant no. 1 in Criminal Appeal No. 176 of 1995 with back portion of Farsa, F.I.R. named accused Shankar Rai with lathi, F.I.R. named accused Rajo Rai with lathi, F.I.R. named accused Upender Rai with lathi, F.I.R. named accused Bajju Rai with lathi, F.I.R. named accused Ranchander Rai with Mussar and F.I.R. named accused Shiv Shankar Rai with lathi started assaulting his brother Ram Pukar Rai, as a result whereof, his brother became unconscious and seeing this, informant raised alarm but he was, too, assaulted by appellant no. 1 in Criminal Appeal No. 176 of 1995 by means of Farsa which caused injury on his head and, again, appellant no.1 in Criminal Appeal No. 176 of 1995 hurled Farsa blow which was warded off by the informant, but he sustained injury near his left thumb. Informant further claimed that the wife of appellant no. 1 in Criminal Appeal No. 176 of 1995 was providing lathi to the aforesaid F.I.R. named accused, including the appellants. The informant claimed that the aforesaid occurrence was witnessed by female members of his family as well as his brother Feku Rai, and co-villagers Juggu Rai, Tejan Rai and others.

7. Surendra Prasad Singh, the then S.I. of Bishunpur Police Station, who had recorded the Fardbeyan of informant



Dinkar Rai, was examined in Sessions Trial No. 163 of 1993 as P.W.8 and Md. Anwar Sulaiman, who had, subsequently, taken the charge of investigation of Bishunpur P.S. Case No. 59 of 1993 was examined in Sessions Trial No. 163 of 1993 as P.W.6.

8. Dr. Vijay Pratap Singh was examined in Sessions Trial No. 163 of 1993 as P.W.7. The aforesaid P.W.7 had conducted postmortem on the dead body of deceased Ram Pukar Rai. This witness stated before the Court in Sessions Trial No. 163 of 1993 that he found following antemortem injuries on the person of the deceased:-

*I. One lacerated wound 1½" x ¼"x 1/6" present on right parietal region.*

*II. Swelling on the right side of the neck.*

This witness further stated that on removal of the scalp underlying tissues were found bruised and infiltrated with blood and blood clots in both the temporal and parietal region. He further stated that he found fracture of both the temporal bones and saggital sutural fracture. He also found 7, 8 and 9 ribs fracture. This witness admitted, in his deposition, that the swelling on right side on neck was not independent injury rather it was the effect of other injuries and, further, he admitted that on the external part of the body, he found only one sign of



lacerated injury. He further admitted that the second blow on the same place is expected to create impact of bone, but no such impact was found on the bone of the deceased.

9. Anil Kumar Srivastava is another Doctor, was examined as P.W.9 in Sessions Trial No. 163 of 1993. This witness claimed that he examined Dinkar Rai (informant) on 05.07.1992 and found the following injuries on his person:-

1. *lacerated injury on finger wed between left thumb and left index of finger 1"x 1" x skin deep*
2. *lacerated injury over scalp 1"x1/4"x scalp deep*
3. *Profound swelling over right devoid region and according to opinion of this witness the aforesaid injuries were caused by hard and blunt substance.*

However, the injury found on left index finger of the informant Dinkar Rai was grievous in nature.

10. Feku Rai, brother of the informant, was examined as P.W.1 in Sessions Trial No. 163 of 1993 and, similarly, he was examined as P.W.1 in Sessions Trial No. 163A of 1993. Palani Rai another witness was examined as P.W.2 in Sessions Trial No. 163 of 1993, but this witness was not examined in Session Trial No. 163A of 1993. Similarly, Meena Devi was examined as P.W.3 in Session Trial No. 163 of 1993 as well as



in Sessions Trial No. 163A of 1993, witness Raj Kumar Jha was examined as P.W. 4 in Sessions Trial No. 163 of 1993, but he was not examined in Sessions Trial No. 163A of 1993. Moreover, P.W.4 Raj Kumar Jha examined in Sessions Trial No. 163 of 1993 is only a formal witness, who has proved formal F.I.R. as exhibit-1 in the aforesaid Sessions Trial No. 163 of 1993.

**11.** It is pertinent to note here that the Postmortem report of deceased Ram Pukar Rai, which has been exhibited in Sessions Trial No. 163 of 1993, was brought in Sessions Trial No. 163A of 1993 and got exhibited as Ext.-3. Similarly, injury report of informant was got exhibited as Ext.-4, the deposition of witness Meena Devi got exhibited as Ext-5, the deposition of informant got exhibited as Ext.6, the deposition of Md. Anwar Sulaiman was exhibited as Ext.7, the deposition of Dr. Vijay Pratap Singh got exhibited as Ext.8, the deposition of Surendra Pratap Singh got exhibited as Ext.9 and deposition of Anil Kumar Srivastava got exhibited as Ext.10 in Sessions Trial No. 163A of 1993.

**12.** P.W.1 Feku Rai, in Session Trial No. 163 of 1993 as well as in Session Trial No. 163A of 1993 claimed himself to be eye witness of the alleged occurrence and stated that on the



alleged date of occurrence, a quarrel had taken place between the daughter of the deceased Ram Pukar Rai and Bhagini of appellant in Criminal Appeal No. 176 of 1995 and the appellants and other F.I.R. named accused committed the alleged occurrence due to the aforesaid childish quarrel. P.W.1 has supported the prosecution case, but one thing is clear from the evidence of this witness that appellants are neighbours of the deceased and the hut of appellant's was situated in front of hut of the deceased. Furthermore, it is also clear from the evidence of P.W.1 as well as other witnesses, who claimed themselves to be eye witness in both the above stated Sessions trial that prior to alleged occurrence, there was a childish quarrel between the daughter of deceased and Bhagini of appellant no. 1 in Criminal Appeal No. 176 of 1995 and the aforesaid childish quarrel developed into the quarrel of elders, and in that quarrel, the deceased sustained one injury on his head. The injury, which became fatal to the deceased, is said to be given by appellant in Criminal Appeal No. 816 of 2010. It is also obvious from the evidence available on the record that the informant Dinkar Rai sustained grievous injury said to be caused by hard and blunt substance, but claim of the so called eye witnesses is that the appellant no. 1 in Criminal Appeal No. 176 of 1995 had given



Farsa blow to the informant, but the aforesaid claim is not corroborated by the injury report of informant Dinkar Rai, as no sharp cut injury was found on the person of injured informant Dinkar Rai and, therefore, in our view, the learned trial court committed error in convicting the appellant no.1 in Criminal Appeal No. 176 of 1995 for the offence punishable under Sections 307 of the Indian Penal Code, because the prosecution failed to prove the aforesaid charge beyond all shadow of reasonable doubts.

**13.** The appellants in Criminal Appeal No. 176 of 1995 have been convicted for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code on the ground that they had also participated in the alleged crime, but not a single prosecution witnesses claimed that the appellants in Criminal Appeal No. 176 of 1995 had assaulted the deceased. Although, prosecution witnesses claimed that the appellant No. 1 in Criminal Appeal No. 176 of 1995 was armed with Farsa, whereas appellant no.2 in the aforesaid criminal appeal was providing lathies to other accused, but, admittedly, no Farsa injury was found on the person of the deceased and except one injury, there was no any other injury on the person of the deceased as the doctor had admitted that the swelling on the



neck of the deceased was result of injury found on his head. Therefore, non finding of Farsa injury or sharp cut injury on the person of the deceased creates doubt about the participation of appellant no. 1 in Criminal Appeal No. 176 of 1995 in the occurrence. Furthermore, the appellants in Criminal Appeal No. 176 of 1995 are next door neighbours of the deceased and prior to alleged occurrence, a childish quarrel had taken place and, therefore, it is quite natural that having heard the noise of aforesaid childish quarrel, the appellants came out of their houses and assembled near the place of occurrence and, therefore, mere presence of the appellants in Criminal Appeal No. 176 of 1995 is not sufficient to show that the aforesaid appellants had shared common object with the person, who had assaulted the deceased and, therefore, in our view, the learned trial court committed error in convicting the appellants in Criminal appeal No. 176 of 1995 for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code.

**14.** It is admitted position that in Sessions Trial No. 163A of 1993, only three prosecution witness were examined and out of aforesaid three prosecution witnesses, informant of the present case was examined as P.W.2, whereas, wife of the



deceased was examined as P.W.3. The brother of informant, namely, Feku Rai was examined as P.W.1.

**15.** P.W.1 Feku Rai claimed that when deceased came at his door, appellant no. 1 in Criminal Appeal No. 176 of 1995 gave Farsa blow on the back of deceased Ram Pukar Rai, whereas, appellant in Criminal Appeal No. 816 of 2010 went to his house and brought a Dhurmus and gave Dhurmus blow on the Kanpatti of deceased Ram Pukar Rai and when informant Dinkar Rai came to save him, appellant No.1 in Criminal Appeal No. 176 of 1995, namely, Parsadi gave Farsa blow, as a result of which he sustained injury on his finger. This witness has, nowhere, stated about the appellant no.2 of Criminal Appeal No. 176 of 1995. Moreover, he has changed the manner of occurrence, because informant has, nowhere, claimed that when deceased Ram Pukar Rai came, appellant no. 1 in Criminal Appeal No. 176 of 1995 gave Farsa blow on his back. Moreover, the doctor also did not find any injury on the back of the deceased.

**16.** P.W.2, Dinkar Rai, the informant of this case, stated in Sessions Trial No. 163A of 1993 that it was F.I.R. named accused Matar Rai, who gave Dhurmus blow to deceased. This witness further stated that someone assaulted him from his back



causing injury on his head, but he could not see the aforesaid person. On being cross examined by the defence, this witness stated that he had only identified F.I.R. named accused Matar Rai and had not seen the other F.I.R. named accused on the place of occurrence. This witness has not been declared hostile and, therefore, the prosecution cannot deny to place reliance upon the evidence of P.W.2.

**17.** P.W.3 Meena Devi, is the wife of the deceased Ram Pukar Rai. She has stated in Sessions Trial No. 163A of 1993 that the appellant in Criminal appeal No. 816 of 2010 and others had killed her husband, but she had not seen the occurrence. This witness has been declared hostile and there is nothing important in the evidence of this witness.

**18.** Admittedly, the depositions of some of the witnesses recorded in Sessions Trial No. 163 of 1993 as well as some documents exhibited in Sessions Trial No. 163 of 1993 were brought on the record of Sessions Trial No. 163A of 1993 and got exhibited by the prosecution. The learned trial court passed the Judgment of conviction and sentence Order in Sessions Trial No. 163A of 1993 on the basis of above stated documents. The learned counsel appearing in Criminal Appeal No. 816 of 2010 has argued that the aforesaid documents had



not been brought in evidence in accordance with law as the ingredients of Section 33 of the Evidence Act was not fulfilled.

**19.** Section 33 of the Evidence Act permits to bring the evidence of a witness given in a previous judicial proceeding or in subsequent judicial proceeding or in a later stage of the some judicial proceeding, but the aforesaid permission has been granted with certain riders and limitations. Second proviso of Section 33 of the Evidence Act puts a rider that both the proceeding should be between the same parties or their representatives in interest.

**20.** In the present case, admittedly, the appellant in Criminal Appeal No. 816 of 2010 was not party to Sessions Trial No. 163 of 1993. Furthermore, it is an admitted position that the appellant in Criminal Appeal No. 816 of 2010 did not get an opportunity to cross examine the witnesses, who were examined in Sessions Trial No. 163 of 1993 and therefore, in our view, learned counsel of appellant in Criminal Appeal No. 816 of 2010 rightly submitted that the depositions of witnesses recorded in Sessions Trial No. 163 of 1993 have not been brought in evidence in Sessions Trial No. 163A of 1993 in accordance with law and, as a matter of fact, the learned trial court committed error while basing his findings on those



documents. In our view, there was nothing before the trial court in Sessions Trial No. 163A of 1993 to convict the appellant of Criminal Appeal No. 816 of 2010 and, therefore, the conviction of appellant in Criminal Appeal No. 816 of 2010 cannot sustain in the eye of law.

**21.** On the basis of aforesaid discussions, both the aforesaid appeals are allowed and the impugned Judgments and sentence order passed in Sessions Trial No. 163 of 1993 as well as impugned Judgment and sentence Order passed in Sessions Trial No. 163A of 1993 are, hereby, set aside. All the appellants are acquitted of the charges, the appellants are on bail. They are discharged from the liabilities of their respective bail bonds.

**22.** In the aforesaid manner both the above stated Criminal Appeals stands disposed of.

**(Hemant Kumar Srivastava, J)**

**( Rajendra Kumar Mishra, J)**

Manish/Rahul

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