
(2011) 08 PAT CK 0045

In the Patna High Court

Case No : Criminal Appeal (DB) No. 104 of 1989

Anant Lal Yadav and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Citation : (2011) 08 PAT CK 0045

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J.—The Appellants have filed the present appeal against the judgment and order dated 15.2.1989 passed by the learned 2nd Additional Sessions Judge, Saharsa in Sessions Trial No. 22 of 1978 whereby he has convicted the Appellant No. 6 (Bajinath Yadav), under Sections 302, 323, 448 and 148 of the Indian Penal Code and has sentenced him to under R.I. for life, six months each and one year respectively. The Appellant No. 1, Anant Lal Yadav, Appellant No. 2, Janki Yadav, Appellant No. 3, Chhedi Yadav, Appellant No. 4, Ram Bharosh Yadav, Appellant No. 5, Bindeshwari Yadav, Appellant No. 7, Narain Yadav and Appellant No. 8, Fuleshwar Yadav have been convicted under Sections 302/149, 323 and 448 of the Indian Penal Code and have been sentenced to undergo R.I. for life and six months each respectively. The Appellant No. 3 (Chhedi Yadav) has further been convicted and sentenced to undergo R.I. for one year for the offence u/s 148 of the Indian Penal Code. The Appellant No. 1, 2, 4, 5, 7 & 8 have also been convicted and sentenced to undergo R.I. for one year for the offence u/s 147 of the Indian Penal Code. The trial court has ordered that all sentences would run concurrently.

2. The prosecution case in brief according to Chhutahru Yadav (P.W.-9) whose oral statement was recorded on 15.1.1977 at 7:00 a.m. and is the basis for instituting F.I.R. is that the Appellants, Bindeshwari Yadav and Bajinath Yadav were irrigating their wheat crops and in that process "GOITHA" of informant's brother, Dhuthar Yadav got wet, as a result of which, an altercation took place between them. However, they went to their respective houses. Sometimes,

thereafter, all these Appellants together with 8-10 unknown persons variously armed with Pharsa, Bhala, Teer (Arrow) and Lathi came to the door of the informant and the Appellant Baijnath Yadav gave a Farsa blow on the forehead of deceased, Panchu Yadav who was milking buffalo as a result of which, he fell down. Thereafter, the Appellant, Anant Lal Yadav, Narain Yadav and Bindeshwari Yadav assaulted him by lathi. When the informant and Dhuthar Yadav came in rescue of Panchu Yadav then, Appellant, Janki Yadav, Chhedi Yadav, Ram Bharosh Yadav, Fuleshwar Yadav and others are alleged to have assaulted them indiscriminately by lathi. They made hue and cry and ran towards their house. The Appellants chased them. They entered inside the house and removed one Lota, one Thali and some clothes from his house. Thereafter, Panchu Yadav was carried to hospital in an unconscious stage.

3. On the basis of aforesaid allegations, initially, case was registered under Sections 148, 149, 326, 324, 307 & 380 of the Indian Penal Code. In course of treatment, Panchu Yadav died in hospital on 17.1.1977 and thus, on completion of investigation charge sheet was submitted on 21.6.1977 against the Appellants under Sections 147, 148, 149, 302, 323 and 448 of the Indian Penal Code. The learned S.D.J.M., Supaul took cognizance of the offence and committed the case to the court of sessions.

4. Since the Appellants did not plead guilty charges were framed against them and they were put on trial. Appellant No. 6, Baijnath Yadav was charged u/s 302 IPC for committing murder. All other Appellants were charged u/s 302 read with Section 149 of the Indian Penal Code for being members of an unlawful assembly in prosecution of common object for causing death of Panchu Yadav. The Appellant Baijnath Yadav and Chhedi Yadav were further charged u/s 148 IPC for being members of unlawful assembly having been in possession of deadly weapons / tools, such as, Farsa and Kudal respectively. The Appellants, Anant Lal Yadav, Bindeshwari Yadav, Narain Yadav, Janki Yadav , Ram Bharosh Yadav and Fuleshwar Yadav were also charged for the offence u/s 147 of the IPC for being members of unlawful assembly armed with lathi. All the Appellants were further charged for the offence under Sections 323, 448 and 380 IPC for causing hurt to Chhutahru Yadav and Dhuthar Yadav after trespassing into the house and committed theft of utensils, clothes, etc belonging to Chhutahru Yadav and Panchu Yadav.

5. In order to prove the charges the prosecution has examined 13 witnesses in support of its case. Out of 13 witnesses so examined, P.W.-1, Sudharshan Rai, P.W.-11, Jai Ram Singh and P.W.-13, Sudhir Kumar Verma are formal witnesses whereas P.W.-2, Tetar Yadav, P.W.-4, Raghunandan Yadav, P.W.-5, Satya Narayan Yadav and P.W.-8, Tuhiya Devi claims themselves to be witnesses to the occurrence, P.W.-3 Chhotan Yadav has been tendered. P.W.-7, Dhuthar Yadav and P.W.-9, Chhutahru Yadav are injured witnesses to the occurrence. P.W.-3, Chhotan Yadav and P.W.-6, Upendra Yadav have been tendered by the prosecution. P.W.-10 Dr. J. Lal had examined all the injured on the date of

occurrence itself whereas P.W.-12, Dr. H.M. Santhalia had conducted post-mortem on the dead body of Panchu Yadav.

6. The prosecution has also proved certain documents in course of trial, which were marked as exhibits. The oral statement of the informant was marked as exhibit-1. The signature of witnesses to the seizure list, namely Raghunandan Yadav and Chandeshwar Choudhary were marked as Exhibits-2 & 2/1. The injury report of Chhutahru Yadav, Panchu Yadav and Dhuthar Yadav were marked as Exhibits-3, 3/1 & 3/2 respectively. The formal F.I.R. was marked as Exhibit-4, post mortem report was marked as Exhibit-5 and out-door slip was marked as exhibit-6. Similarly, requisition sent by the Medical Officer to the Officer-in-Charge informing him regarding death of Panchu Yadav was marked as annexure-7. The inquest report was marked as annexure-8 and seizure list prepared on 16.1.1977 at the place of occurrence was marked as annexure-9, in course of the trial.

7. First of all, I would like to deal with the deposition of eye-witnesses to the occurrence. P.W.-2, Tetar Yadav has stated nothing with regard to the altercation which had taken place between Dhuthar Yadav on one side and Bindeshwari Yadav and Baijnath Yadav on the other side in field when allegedly "Goitha" of Dhuthar Yadav had got wet in the field. He has stated that he saw Baijnath Yadav armed with Farsa, Bindeshwari Yadav armed with Bhala, Chhedi Yadav armed with Kudal, Narain Yadav armed with Lathi and arrow and others armed with Lathi came at the door of Panchu Yadav, where he was milking his buffalo by sitting beneath. He has alleged that Baijnath Yadav assaulted Panchu by back portion of Farsa while, he was milking, as a result of which, Panchu Yadav fell down and thereafter, other accused persons assaulted him by Lathi. He has also alleged that after assaulting Panchu Yadav, they assaulted Chhutahru Yadav and Dhuthar Yadav in their courtyard. They also looted articles from their house. In cross-examination, his attention has been drawn as to whether he had told police that assault was made by back portion of Farsa. To this, he answers in affirmative. He also stated that Dhuthar Yadav and Chhutahru Yadav were also assaulted by "Kudal".

8. P.W.-4, Raghunandan Yadav, in his deposition in examination-in chief, has stated that Baijnath Yadav assaulted Panchu Yadav with Farsa on his head while he was milking buffalo and when he fell down others assaulted him by Lathi. He further stated that Dhuthar Yadav and Chhutahru Yadav came there running to rescue Panchu Yadav but they were also assaulted. They in order to save themselves ran towards their courtyard. The accused persons chased them up to the courtyard and Chhedi Yadav assaulted Chhutahru Yadav by pasa of Kudal on his head. He further alleged that other accused persons assaulted him by Lathi. According to him, Dhuthar Yadav was also assaulted by Lathi by accused persons. He says that the I.O. seized blood-stained lathi, Goitha, Mat and blood stained soil at the place of occurrence. He proved his own signature as also signature of Bindeshwari Yadav on seizure list, which were marked as exhibits- 2

& 2/1 respectively. In cross-examination, P.W.-4, Raghunandan Yadav has stated that blood-stained lathi was seized from the house of Baidya Nath Yadav. He has also stated that he told the Investigating Officer that Chhedi had assaulted on head of Chhutahru by pasa of Kudal.

9. P.W.-5, Satya Narain Yadav stated that he was going to call Rameshwar Mistri when he heard hulla from the Darwaja of Panchu Yadav. He went there and saw that Bindeshwari, Baijnath, Narain, Anant Lal, Janki, Chhedi, Fuleshwar and Ram Bharosh Yadav. He clearly deposed that Baijnath Yadav was holding Farsa, Bindeshwari Yadav was having Bhala, Narain Yadav was possessing arrow and lathi and Chhedi Yadav was holding Kudal and the rest of the accused persons were possessing lathi in their hands. Baijnath Yadav assaulted Panchu Yadav with Pharsa and other accused persons assaulted him with lathi when Panchu Yadav was milking his buffalo. Dhuthar and Chhutahru were also assaulted by the accused persons in the "angan". According to him, accused Chhedi assaulted Chhutahru with the Pasa of Kudal whereas other accused persons assaulted him with lathi. He also identified the accused persons in the dock. He stated in para 3 that there was some altercation with the accused persons and Dhuthar in respect of causing damage to "Goitha" and the occurrence took place due to the said altercation. He stated in his cross-examination that Panchu was assaulted in his presence. He also stated that Dhuthar and Chhutahru were assaulted in the "angan" in his presence. According to him, he remained in the "angan" for 10 minutes when the accused persons assaulted Dhuthar and Chhutahru. He further stated that witnesses Parmeshwari, Chhotan, Surya Narain, Tetar and Raghunath were also present at the time of the occurrence.

10. P.W.-8, Tuhiya Devi is none else but wife of deceased, Panchu Yadav. She claims herself to be an eye-witness and she has stated that it was Baijnath Yadav, who assaulted Panchu Yadav by Fasath of Farsa, as a result of which, he fell down. She did not say anything about assault by other accused persons on Panchu. She has also not stated anything about assault upon Chutaharu Yadav and Dhuthar Yadav. She has also not supported the allegation of removal of any house-hold article by the accused persons. When her attention was drawn regarding her statement to police with respect to assault by Fasath (Back) of Farsa made by Appellant Baijnath Yadav on deceased Panchu Yadav, she has stated that she had told the Police that Baijnath Yadav had caused injury by Fasath of Farsa.

11. Now, I would take up the deposition of injured eye-witnesses, who are Dhuthar Yadav (PW.-7) and Chhutahru Yadav (PW-9).

12. P.W.-7, Dhuthar Yadav, has stated that he was at his Darwaja when Baijnath Yadav, Bindeshwari yadav, Narain Yadav, Chhedi Yadav, Anantlal Yadav and Ram Bharosh Yadav came here. Appellant Baijnath Yadav was armed with Farsa, Appellant, Bindeshwari Yadav was having Bhala and Narain Yadav was possessing Arrow and Lathi whereas Chhedi Yadav was holding Kudal in their hands and other Appellants and unknown accused persons were holding Lathi. Panchu was

milking his buffalo when Appellant Baijnath Yadav gave Farsa blow on his head as a result of which he fell down. He has also alleged that other accused persons assaulted him with Lathi. Thereafter, they chased him who had come in rescue of Panchu Yadav. He ran towards his courtyard. The accused persons entered into the courtyard and assaulted him as well as his brother, Chhutharu (P.W.-9). He has also stated that Panchu Yadav was taken to Supaul Hospital at 8 O'clock on the date of occurrence itself.

13. P.W.-9, Chhutharu Yadav is the informant of the case. The deceased, Panchu Yadav and injured Dhuthar Yadav were his brother. According to him, at about 7.00 a.m. on the date of occurrence, Appellant Baijnath Yadav, Bindeshwari Yadav, Narain Yadav, Anantlal Yadav, Janki Yadav, Chhedi Yadav, Ram Bharos Yadav and Fuleshwar Yadav came at his door. The Appellant, Baijnath Yadav was armed with Farsa whereas Narain Yadav was having Arrow, Appellant Bindeshwari Yadav was possessing Bhala and Chhedi Yadav was holding Kudal. According to him, other Appellants and accused persons were armed with Lathi. His brother Panchu Yadav was milking buffalo at his Darwaja. He alleged that Baijnath Yadav gave a Farsa blow on the head of Panchu. He was hit by the back portion of the Farsa, as a result of which, Panchu fell down and other accused persons assaulted him with Lathi. He went there to save him but he was also chased up to his courtyard and Appellant Chhedi Yadav assaulted him with Kudal on his head whereas other Appellants, namely, Ram Bharosh Yadav, Janki Yadav and Fuleshwar Yadav assaulted him with Lathi. He has stated that he fell down. Thereafter Appellant Ram Bharosh, Fuleshwar and Janki assaulted his brother Dhuthar by Lathi. He has stated that he went to hospital at Supaul where he has treated. He gave his statement before the Police, on this basis of which F.I.R. was registered. He further stated that Panchu died in the hospital. In cross-examination, his attention was drawn towards his statement before the police but he replied that in his statement recorded u/s 161 Code of Criminal Procedure he had sated before Police that Baijnath Yadav assaulted Panchu with back portion of Farsa.

14. P.W.-10 is Dr. J. Lal, who examined Chhutharu Yadav, Panchu Yadav and Dhuthar Yadav on 15.1.1977 and found the following injuries on their person:

Injury on the person of Chhutharu Yadav

- (a) Head- Lacerated wound 2 1/2" x 1/2" on the frontal region.
- (b) Abrasion 1/2" x 1/4" on the index finger of the right hand.
- (c) Bruise 1" x 1" on the right fore-arm.
- (d) Abrasion 1/2" x 1/4" on the right wrist.
- (e) Abrasion 1/2"x 1/4" on the right elbow.

Injury on the person of Panchu Yadav

Lacerated wound 3" x 3" with fracture of frontal bone of the head. Brain tissues

were extruding from the wound.

Injury on the person of Dhuthar Yadav

(a) Bruise 3" x 2" on the right hand.

(b) Abrasion 1/2" x 1/2" on the right index finger.

15. The doctor found all the injuries caused by hard and blunt substance. According to him, injuries sustained by P.W.-9, Chhutamru Yadav and P.W.-7, Dhuthar Yadav were simple in nature but the injury on the person of Panchu was grievous. The doctor, in his cross-examination, has stated that the injury on the person of Panchu Yadav is possible if a man falls head long from a tree. But it must be found reasonable height.

16. P.W.-11 is a formal witness. P.W.-12, Dr. H.M. Santhalia held the post-mortem examination on 18.1.1977 on the dead body of Panchu Yadav. He found following injuries:

1. Lacerated wound 3" x 3" x bone deep on the forehead. On removing the scalp, frontal bone was found broken in pieces with accumulation of blood and blood clots. Meninges on that zone were also torn and brain matter protruded out with laceration on surface. The injuries according to him was ante-mortem and fatal caused by hard and blunt substance such as back part of Pharsa.

17. According to P.W.-12, the death was caused due to shock and haemorrhage caused by injuries on vital organ. He proved the post-mortem report, which was marked as exhibit-5. He has also proved O.D. Slip and requisition, which were marked as exhibit-6 & 7 respectively.

18. P.W.-13 is also a formal witness. He has proved inquest report which was marked as exhibit-8 and seizure list which was marked as exhibit-9.

19. It is worthy to mention here that Investigating Officer of the case has not been examined in this case and there is no explanation as to why he has not been examined in course of trial.

20. Learned Counsel appearing on behalf of the Appellants highlighted the following points to discredit the prosecution case:

(i) That the judgment and order passed by the trial court is against the evidence on record and the judgment of conviction and order of sentence has been passed on surmises and conjectures.

(ii) That on post-mortem examination of the deceased only one lacerated wound was found on his forehead, which according to the doctor (PW-12) was caused by hard and blunt substance. Therefore, the prosecution changed its earlier version as narrated in the F.I.R. that Baijnath Yadav assaulted on head of Panchu Yadav by Farsa to back portion of Farsa.

(iii) That the prosecution changed its earlier version and developed a new story

that the Appellant, Baijnath Yadav assaulted the deceased with back portion of the Farsa i.e. blunt side of Farsa. The prosecution story further stands falsified because no other injury except one on the head was found on the body of the deceased whereas the consistent case of the prosecution is that apart from Baijnath Yadav, Appellant, Anantlal Yadav, Narain Yadav, Bindeshwari Yadav and others assaulted him indiscriminately by means of Lathi. Since, the doctor did not find any other injury on the person of the deceased, the deposition of the eye-witnesses becomes tainted. Thus the prosecution has failed to establish the manner of occurrence.

(iv) That if a person is assaulted on head while milking buffalo the assault would be from back on the head and not on forehead as found. According to him, the prosecution has suppressed the truth and has changed its case from one stage to another.

(v) That non-examination of the Investigating Officer in course of trial has seriously prejudiced the case of the defence as the defence could not take contradiction with respect to statement of some of the witnesses, whose attention were drawn, in course of cross-examination, regarding their statement recorded by Police u/s 161 Cr. P.C. with respect to assault by back portion of Farsa on the head of the deceased.

(vi) That the story of theft of utensils and clothes, etc from the house of the informant and deceased has been disbelieved by the trial court and as there was no material on record to support charge u/s 380 of the IPC. Hence, the trial court ought to have acquitted the Appellants, as the prosecution was guilty of suppressing the truth and bringing false charges against the Appellants.

(vii) That though the prosecution witnesses have alleged that injured Chhutahru Yadav (P.W.-9) and Dhuthar Yadav (P.W.-7) were brutally assaulted by the accused persons but the injuries sustained by them were found to be simple and were superficial in nature. Thus in case of these two injured witnesses also, the medical evidence is inconsistent with the oral testimony of witnesses.

(viii) That exhibit-9, which is seizure list, would show that seizure of blood-stained soil, two blood-stained lathis, blood-stained clothes and blood-stained Mat were prepared at 3.00 p.m. on 16.1.1977 at the door of Panchu Yadav. The allegation of giving fatal blow on head of the deceased, Panchu Yadav, is against Baijnath Yadav, as a result of which Panchu Yadav fell down and blood started oozing out from his head. The weapon which had been attributed in the hand of the Baijnath is alleged to be Farsa. Then, the question arises as to how blood-stained Lathis were found and seized from the place of occurrence after 17 hours of the occurrence.

(ix) That P.W.-4, Raghunandan Yadav is a witness to the said seizure list. Though, in his examination-in-chief he states that seizure of blood-stained Lathis with other articles were made at the place of occurrence but, in cross-examination, he has stated that blood-stained Lathis was seized from the house of Appellant,

Baijnath Yadav.

(x) That no Farsa was ever seized in this case and all those blood-stained seized articles were never sent to Forensic Science Laboratory for examination and report nor were they produced in court.

(xi) That Appellant No. 3, namely, Chhedi Yadav, Appellant No. 6, Baijnath Yadav, Appellant No. 7, Narain Yadav and Appellant No. 8, Fuleshwar Yadav were juvenile on the alleged date of occurrence and their trial stood vitiated for non-compliance of the provisions of Juvenile Justice Act, which had come into force in the year 1986.

21. Learned Counsel for the State relying upon the prosecution witnesses submits that the prosecution has proved its case beyond all reasonable doubts. There is no material contradiction in statement of witnesses. The medical report corroborates the oral testimony of the witnesses and there are overwhelming evidence on record to justify the judgment of conviction and order of sentence.

22. Having heard the parties, I find that the Appellants except Appellant No. 6, Baijnath Yadav have been convicted u/s 302 of the Indian Penal Code with aid of Section 149 of the Indian Penal Code. Section 149 reads as follows:

Every member of unlawful assembly guilty of offence committed in prosecution of common object: If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

23. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed could not be sufficient to prove common object. Section 149 IPC creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with aid of Section 149 IPC, a clear finding regarding the common object of the assembly must be given and the evidence adduced must show not only the nature of common object but also that the object was unlawful. Before recording a conviction u/s 149 IPC essential ingredients of Section 141 IPC must be established. The above principles have been reiterated in Bhudeo Mandal and Others Vs. State of Bihar,

24. From the discussion of evidence, it is apparent that the deceased had suffered only one injury on his head, as a result of which, he died. In my view, the prosecution has tried to establish that the fatal blow on head of the deceased was inflicted by Appellant No. 6, Baijnath Yadav. Had the other accused persons intended or shared the common object to kill Panchu Yadav, they must have used the weapons allegedly carried by them to facilitate the alleged common object of

committing murder. As per prosecution case, Baijnath Yadav was armed with Farsa, Chhedi Yadav was possessing Kudal in his hand, Bindeshwari Yadav was armed with Bhala, Narain Yadav was armed with Arrow and Lathi and others were all armed with Lathi. Surprisingly, no injury either by Bhala, Arrow, Kudal or Lathi apart from one on head was found on the person of the deceased. Had the accused persons intended to kill Panchu Yadav, they must have used weapons in their hands. Hence, in the light of principles enunciated u/s 149 IPC and with the available material on the side of the prosecution, I hold that it is not safe to convict the accused persons under Sections 302 IPC with aid of Section 149 of the Indian Penal Code.

25. Now, I would like to take up the issue as to whether conviction of Baijnath Yadav u/s 302 IPC was justified in the background of materials available on record. As discussed above eye-witnesses being P.W.-2, P.W.4, P.W.7, P.W.-8 & P.W.-9 have made specific allegation that the deceased was assaulted by all the accused persons named in the F.I.R.

26. As per F.I.R., which is initial version of prosecution, Baijnath Yadav assaulted the deceased by means of Farsa on his head while he was milking his buffalo, as a result of which, he fell down and thereafter, Anantlal Yadav, Narain Yadav and Bindeshwari Yadav indiscriminately assaulted him by means of Lathi. The informant, who is P.W.-9, in course of trial, deposed that the deceased was assaulted by Baijnath Yadav by back of Farsa. It is to be noted here that in the F.I.R., he had not stated that Baijnath Yadav had caused injury by back portion of Farsa. This is an improvement on the part of prosecution in course of trial, in order to corroborate the medical evidence. P.W.-9, however, has deposed sweepingly that after the deceased fell down, others assaulted him by Lathi. As discussed above, no Lathi injury has been found on the person of the deceased and this fact discredits the oral testimony of the informant of this case.

27. Similarly, P.W.-4, Raghunandan Yadav has alleged that Baijnath Yadav assaulted the deceased with Farsa on his head and when he fell down, others assaulted him with Lathi. It is to be noted here that P.W.-4, Raghunandan Yadav and P.W.-7, Dhuthar Yadav have not stated that Baijnath Yadav was inflicted injury by blunt portion of Farsa. To the contrary, P.W.-2, Tetar Yadav and P.W.-8, Tuhiya Devi, have alleged that Baijnath Yadav caused injury by blunt portion of Farsa and when the deceased fell down, others assaulted him by Lathi. P.W.-8, Tuhiya Devi, is wife of deceased. Thus, it is apparent from deposition of prosecution witnesses that some of them have simply alleged assault caused upon head of the deceased by blunt portion of Farsa by accused, Baijnath Yadav whereas other set of witnesses who are also in the category of eye-witnesses have alleged that injury was caused by Farsa. However, one thing is consistent in deposition of eye-witnesses that after the injury inflicted by Farsa when the deceased fell down all others assaulted him by Lathi. For the reasons assigned above, the witnesses become unreliable as the injury found on the person of the deceased is not corroborated by medical evidence as the injury is by hard blunt

substance and not sharp hard substance.

28. It is well-established that when medical evidence totally improbabilizes the ocular testimony that becomes a relevant factor in the evaluation of evidence. In the instant case, the medical evidence totally improbabilized the version regarding the manner of assault as alleged. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution and will have priority over the ocular version and can be used to repel the testimony of the eye-witnesses. The court would draw an adverse inference that the prosecution version is not trustworthy.

29. Apart from the material contradiction in deposition of witnesses regarding manner of assault, it is to be noted that attention was drawn of P.W.-2, P.W.-4 and P.W.-8 regarding their statement before the Investigating Officer u/s 161 Cr. P.C. and it was suggested to them that they have not stated before the Police that the assault was caused by blunt portion of Farsa to which they denied. In my view, the defence could have put this question to the Investigating Officer in order to elicit contradiction. The Investigating Officer has not been examined on behalf of the prosecution and there is no explanation given for his non-examination in course of trial. It amounts to with-holdment of material witness deliberately which in the facts of the present case has caused serious prejudice to the defence and thus, the court could draw adverse inference in terms of Section 114(g) of the Evidence Act for non-examination of the I.O.

30. It is further seen from exhibit-9 (seizure list) that on 16.1.1977 the police seized blood-stained soil, blood-stained two small Lathis, blood-stained clothe and blood-stained Mat from the place of occurrence, which is door of the house of Panchu Yadav. P.W.-4, Raghunandan Yadav is an eye-witness to the said seizure list and has identified his signature on it, which is marked as exhibit-2. In cross-examination, P.W.-4 has stated that the Investigating Officer seized blood-stained Lathis from the house of Baijnath Yadav. Thus, two question arises: (i) when the only fatal blow on the head of the deceased which caused bleeding injury was inflicted by Farsa, then as to how, blood-stains were found on Lathis and (ii) when the seizure list discloses place of seizure of two small Lathis at the door of Panchu then, how the Lathi so seized, could have been seized from the house of Baijnath Yadav. These contradictions, embellishments and improvements make the entire prosecution case doubtful.

31. Thus, I hold that prosecution has not been able to establish the charge u/s 302 of the Indian Penal Code against the Appellant, Baijnath Yadav beyond reasonable doubt and on this ground also the conviction and sentence of other accused persons u/s 302 IPC with aid of Section 149 IPC fails.

32. The prosecution case so far as it relates to the injuries caused upon informant and P.W.-7, Dhuthar Yadav is concerned, it can safely be said that witnesses are not coming with true story. In this regard, I would like to mention that as per F.I.R., accused Janki Yadav, Chhedi Yadav, Ram Bharos Yadav,

Fuleshwar Yadav and others assaulted them indiscriminately at the door of the house whereas P.W.-2, Tetar Yadav, P.W.-4, Raghunandan Yadav and P.W.-7, Dhuthar Yadav in their cross-examination states that assault was made upon Chhutiharu Yadav and Dhuthar Yadav in the court-yard by the accused persons. P.W.-9, Chhutiharu Yadav, in his deposition has not stated that he was assaulted inside the courtyard of the house. P.W.-8, Tuhiya Devi, wife of the deceased though claiming to be an eye-witness of the occurrence, has not even supported the allegation of factum of assault caused upon P.W.-9, Chhutiharu Yadav and P.W.-7, Dhuthar Yadav. She has not even stated a word regarding entry of any of the accused person inside the house in courtyard and/or removing any articles from the house. Thus, it appears that witnesses have subsequently, tried to shift the place of occurrence to the courtyard of the house in order to bring the case also u/s 448 of the Indian Penal Code. There is another aspect of the matter too. In the F.I.R., assault upon Chhutiharu Yadav and Dhuthar Yadav is alleged to have caused only by means of Lathi but, in course of trial, P.W.-4, Raghunandan Yadav has stated that accused, Chhedi Yadav assaulted P.W.-9, Chhutiharu Yadav by Pasa of Kudal on head. Similarly, P.W.-5, Satya Narain Yadav and P.W.-9, Chhutiharu Yadav himself have also stated that Chhedi Yadav assaulted him by Kudal on head and others assaulted him and Dhuthar Yadav by Lathi. Thus, it is apparent that the informant, P.W.-9 has improved the allegation of assault upon himself to the extent that Chhedi Yadav is alleged to have injured him by Kudal on head. This improvement is also by some other witnesses as discussed above. It appears that the prosecution has tried to corroborate the medical evidence by ocular evidence but, in the process, it has created bundle of doubts. The injuries found on the person of P.W.-9, Chhutiharu Yadav are all bruise and abrasion except one lacerated wound on the frontal region of head.

33. Similarly, the two injuries found on the person of P.W.-7, Dhuthar Yadav are also bruise and abrasion. The doctor has opined that the injuries caused and found on the person of P.W.-7 and P.W.-9 are simple in nature. Had there been an indiscriminate assault by means of Lathi and Kudal, the injuries could have been much more serious.

34. I find from the F.I.R. and deposition of witnesses that the motive behind the occurrence as alleged is that there had been an altercation between accused Bindeshwari Yadav and Baijnath Yadav on one side and P.W.-7, Dhuthar Yadav on the other side on 15.1.1977 at 7.00 A.M. Immediately, thereafter, when the accused persons came at the door of the deceased, Dhuthar Yadav claims himself to be present there. The prosecution witnesses have not stated anything that any of the accused had any dispute with Panchu Yadav (the deceased). It is true that Panchu Yadav is brother of P.W.-7, Dhuthar Yadav and P.W.-9, Chhutiharu Yadav (informant) but, when Dhuthar Yadav was already present at the place of occurrence, it appears to be unreasonable if not improbable that the accused persons would have targeted Panchu Yadav to be assaulted instead of Dhuthar Yadav. However, this issue would not be much importance in view of the other facts which I have already discussed earlier.

35. In the background of the discussions made hereinabove, I further hold that the charges under Sections 323 and 448 of the Indian Penal Code as also u/s 148 of the IPC could not be established by the prosecution against any of the accused persons.

36. Before concluding, I would like to add that the blood-stained articles so seized by the police were never sent to the Forensic Science Laboratory for its chemical examination and the prosecution has not brought any evidence in this regard.

37. In the light of discussion made hereinabove, it is apparent that the prosecution has not come with clean hands. The genesis of incident is doubtful. There is material contradiction in the deposition of eye-witnesses as well as injured witnesses. The medical evidence is not in conformity with ocular testimony. The I.O. has deliberately been withheld which has caused serious prejudice to the defence. Hence, in my view the prosecution has failed to bring home the charges levelled against the Appellants.

38. I thus set aside the judgment and order dated 15.2.1981 by which the Appellants have been convicted and sentenced to undergo imprisonment. The Appellants, who are already on bail, are discharged from their liabilities of bail bonds.

39. The appeal stands allowed.

40. I appreciate the sincere effort of Mr. Amish Kumar, learned Counsel for the Appellants who has argued the case as Amicus Curiae. The Legal Aid Authority of Patna High Court should make payment of admissible fee of the learned Counsel for the Appellants for three days arguments.