

(2003) 08 PAT CK 0070

In the Patna High Court

Case No : Criminal Appeal No. 540 of 1998 (DB)

Harendra Rai and Bachchu Rai

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 04-08-2003

Acts Referred:

Citation : (2003) 08 PAT CK 0070

Final Decision : Dismissed

Judgement

A.K. Sinha, J.—This appeal has been directed against the judgment and order of conviction and sentence recorded by the Sessions Judge, Samastipur in Sessions Trial No. 21 of 1992, whereby and whereunder he convicted the Appellants u/s 302 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life.

2. The prosecution story, as per the fardbeyan of Ram Kishun Mahto (P.W. 6) recorded by A.S.I. S. Choudhary (P.W. 9) on 9.4.91 at 4.00 p.m. is that on the same day at about 2.00 p.m., the informant who was at his door, saw two youngsters entering into the room in which the deceased was present with a child. The said room was given by the informant to the examinees of village Jadaha, who had come to appear at the matriculation examination. The informant was going to sleep in another room but he heard the groaning sound coming from the room in which the deceased was staying. The informant came out from his room immediately and saw both the youngsters who had entered into the room and one of them was armed with dagger stained with blood and the informant was terrorised that if he raised the alarm he will also be killed with the same dagger and both of them fled away towards the south after crossing the Bandh. The informant chased them and also raised alarm, whereupon, many villagers also chased and the villagers of Tetarpur surrounded the accused, both of them were caught who disclosed their names as Harendra Rai and Bacchu Rai (Appellants). Both the accused confessed their guilt before the villagers. Being enraged the villagers assaulted both the accused as a result thereof they were

injured. In the meantime, the police party arrived there and took charge of both the accused. It has been stated that the accused threw the dagger in course of chase and the handle of dagger was recovered. The informant returned back to his house and saw that Champa Devi was lying dead in the pool of blood and a sharp cut injury caused by dagger was found on her neck. It has been stated that Yogendra Rai had arranged the room for the daughter and daughter-in-law of the deceased who had come to appear at the examination and on the alleged date of occurrence Yogendra Rai was seen in the village. It has been suspected that Yogendra Rai in conspiracy with his son Harendra and relative Bacchu Rai got murdered Champa Devi due to some old grudge against the deceased. The police instituted a case against the Appellants and one Yogendra Rai under Sections 302, 120B/ 34 of the Indian Penal Code and submitted chargesheet against them on the basis of which cognizance was taken and the case was committed to the Court of Sessions. All the three accused faced the trial. Accused Yogendra Rai was however, acquitted of the charges.

3. In order to prove the charges the prosecution examined as many as nine witnesses and the defence also examined three witnesses.

4. D.W. 1 Basudeo Rai has been examined to say that the police had arrested four boys near the school gate including the Appellants. He denied that the Appellants were arrested on chase. D.W. 2 Tribhuwan Prasad was an examinee who has deposed that when he came out of the examination hall, he learnt that these Appellants were arrested from the school gate. He admitted that he had not seen the Appellants when they were arrested. D.W. 3 Shiveshwar Sharma has proved the admit card of D.W. 2 in proof of the fact that he had appeared at the matriculation examination in the year 1991. He has proved the Admit Card of Bimla Kumari (Exhibit-8) and the character certificate (Exhibits-9 and 10).

5. The defence version is that the Appellants are innocent and have been falsely implicated and, as a matter of fact, they were arrested near the school gate but in view of the overwhelming evidence of the prosecution witnesses as also the statement of the I.O., who has deposed that the villagers apprehended the Appellants after hot chase and the Appellants were handed over to the police, who arrived at the scene, there does not appear any force in the defence plea.

6. It is manifest from the F.I.R. that the deceased, namely, Champa Devi had gone to village Kalyanpur and was staying in one of the rooms of the informant's house because her daughter and daughter-in-law had to appear at the matriculation examination and the examination Centre was at Middle School, Madoodabad (Kalyanpur). It is also manifest from the F.I.R. (Exhibit-2) that the father of Appellant Harendra Rai had fixed a room for the stay of the deceased and her children. The said Yogendra Rai was also tried but the trial Court acquitted him finding no positive evidence regarding his conspiracy.

7. P.W. 1 Rameshwar Pd. Sinha is a formal witness who has proved the formal F.I.R. (Ext. 1) and the fardbeyan (Ext. 2) recorded by the I.O.

8. The most important witness in this case is P.W. 6 Ram Kishun Mahto, who is the informant of this case in whose house the deceased had taken shelter. P.W. 6 is most uninterested witness having no grudge or animosity with the Appellants. P.W. 6 has supported the prosecution story as stated in his fardbeyan. He has stated that two young persons entered in the room in which the deceased was staying and all of a sudden he heard the sound of groaning coming from that room, so, he at once came out and saw those young persons and one of them, who was holding dagger with blood stains, threatened him to kill and fled away. He has clearly stated that he saw dagger with blood stains in the hand of Appellant Harendra Rai. He further states that he chased both the culprits and raised alarm, and ultimately, both of them were apprehended on chase and they disclosed their names as Harendra Rai and Bacchu Rai. P.W. 6 has further stated that both arrested accused confessed their guilt in presence of the villagers that they had committed the murder. He also stated that Harendra threw the dagger but the police recovered the butt of dagger. In his cross-examination, PW. 6 has stated that he had given the room to the deceased on rent. He also admitted that after arrest the Appellants were assaulted by the mob who had participated in chase and soon after the arrest of the Appellants the police arrived and took charge of the Appellants. It may be stated here that the alleged occurrence is said to have taken place at 3.00 p.m. and the fardbeyan of the informant was recorded at 4.00 p.m. on the same day. The attention of P.W. 6 was drawn to the statement made by him before the police and he maintained to say that he had seen dagger in the hand of Harendra. But, the defence failed to put any question to the I.O. as to whether P.W. 6 had made such statement before him so that any contradiction could be elicited and, as such, the statement of P.W. 6 that Harendra was holding dagger goes unchallenged. P.W. 6 was cross-examined at length but the defence failed to elicit anything in his evidence which may go to show that his evidence is not worth belief.

9. P.W. 2 Asharfi Mahto is another independent village witness who had participated in chasing the Appellants. He has deposed that he also took part in chasing both the accused alongwith the villagers. He has stated that he saw the dagger in the hands of both the accused and he also noticed blood marks on their clothes and daggers. P.W. 2 has further stated that both the accused threw away the dagger but the handle was recovered. He further stated that both the accused disclosed their names as Harendra Rai and Bacchu Rai and admitted that they were fleeing way after committing murder of Champa Devi. In cross-examination, P.W. 2 categorically stated that he had made statement before the police to the effect that he saw daggers in the hands of both the accused who confessed that they were fleeing after killing Champa Devi. The attention of the I.O. was not drawn regarding the aforesaid statements made by P.W. 2 before the police and, as such, the statement of P.W. 2 that he saw daggers in the hands of both the accused goes unchallenged.

10. P.W. 3 Ramanand Mahto is another independent villager who also participated in chasing the Appellants alongwith other villagers. He has specifically stated that

both the accused were holding one dagger each with blood marks and on chase both of them were apprehended by the villagers and both confessed about the murder of Champa Devi. He has stated that one of the accused threw away the dagger but the other accused was caught with dagger. In cross examination, P.W. 3 has stated that he was not known to the deceased from before and it appears that he was also not known to the Appellants from before. P.W. 3 has stated that he saw the accused throwing dagger from a distance of one lagga (para 20) and hundred of people were chasing both the accused. He has stated before the police that both the accused had confessed that they were fleeing after committing the murder of the deceased and hands of both the accused were smeared with blood. The defence could not contradict his statement by drawing the attention of the I.O. in this regard.

11. P.W. 4 Ram Prakash Mahto is also an independent villager who had participated in chasing the Appellants. He has also deposed that he saw daggers in the hands of both the accused and one of them threw away the dagger, whereas, other accused was holding the dagger. In cross-examination, P.W. 4 claimed to have stated before the I.O. that both the accused were fleeing away after committing the murder of Champa Devi but the attention of the I.O. was not drawn to his statement. This witness further stated that he had caught one of the accused but before their arrest one of the accused had thrown the dagger and one dagger with butt was recovered. It, however, appears from the evidence of the I.O. (P.W. 9) that he had seen the blade portion of dagger measuring 6" without butt banded with brass at three places from the tomato field of Ghuran Mahto which he seized and prepared the seizure-list (Ext. 6). The seizure-list (Ext. 6) goes to show that only the butt portion without blade was seized by him. In other words, the evidence of P.W. 4 that dagger with blade had been recovered has not been supported by the evidence of the I.O. as well as the seizure-list prepared by him. In course of evidence the butt portion of the dagger was produced by the I.O. (P.W. 9) and he admitted that it is the same butt having binding at three places with brass which he had recovered. The butt of the dagger produced by the I.O. was marked as material Ext. I. the I.O. further stated that he had seized the butt portion of dagger from the possession of accused Harendra Rai whom he identified in court. But, it appears that he wrongly identified Bachchu Rai as Harendra Rai. There is variance between the evidence of P.W. 4 and the I.O. (P.W. 9) on the point of seizure as stated above. So far wrong identification of Harendra Rai is concerned, it may be said that the I.O. has no doubt pointed at Bachchu Rai saying that he is Harendra Rai but it appears that he made such statement out of some confusion because he was examined after a lapse of five years of the alleged occurrence and it was not possible for him to correctly identify the accused. Therefore, wrong identification of Harendra made by the I.O., that too, after a lapse of five years, will not mean that he had not made seizure of the butt portion of the dagger and as per his evidence he had recovered that butt portion of dagger from the possession of Harendra Rai of which he was definite. It would further appear that the evidence

of P.W. 4 that blade and butt portion both were recovered is not supported by the I.O. who has deposed that he seized only the butt portion. As such, the evidence of P.W. 4 that the butt had blade portion of dagger was seized is nothing but exaggerated version coming from the mouth of the rustic villager. The fact remains that the evidence of P.W. 4 regarding the recovery and seizure of butt portion of the dagger stands substantiated by the evidence of the I.O. also.

12. P.W. 5 Ram Sumit Kumar is another independent witness who had participated in chasing the Appellants on alarm being raised by P.W. 6. He has also stated that he saw dagger in the hands of both the accused while they were fleeing away and in course of chase one of the accused threw the dagger and another accused was brandishing the dagger. He further stated that both the accused were apprehended who disclosed their names as Harendra Rai and Bachchu Rai. He has not stated about the extra judicial confession made by the accused but has stated that he returned back to the house of Ram Kishun Mahto (P.W. 6) where he saw the deceased Champa Devi with injury of dagger and has stated that these two Appellants had fled away after assaulting her. In his cross-examination P.W. 5 has admitted that the mob had assaulted both the accused. There is nothing in his cross-examination to disbelieve his evidence.

13. P.W. 7 Anil Rai is the son of the deceased who has deposed that the had gone to the Examination Centre where his wife and sisters were appearing at the matriculation examination and there he heard about the alleged occurrence. He also stated that the villagers had caught the Appellants. He further stated that Yogendra Rai is well known to his family and he had taken a loan of Rs. 5,000/- for which his mother was murdered. The prosecution has examined his witness to prove the motive for the alleged occurrence. In cross-examination this witness admitted that there is no independent witness in proof of the fact that his mother had given money to Yogendra Rai nor there is any document to support such lending. I must say that even if the motive as alleged by P.W. 7 has not been proved by the prosecution, the prosecution cannot be rejected on this score alone because it is well settled that motive is not essential to prove an offence. If the offence and charge has been proved by the evidence of trustworthy witnesses, the prosecution cannot be rejected on the ground that the prosecution has failed to prove the alleged motive.

14. P.W. 9 Surendra Choudhary is the I.O. of this case. I have referred about his evidence on the point of seizure of butt portion of the dagger in any foregoing paragraph while discussing the discrepancy occurring between the evidence of P.W. 4 and the I.O. on the point of seizure. So, I need not repeat the same. It appears from the evidence of the I.O. that he was on deputation at the Examination Centre where the Matriculation examination was going on. It further appears that the distance of place of occurrence where the Appellants were apprehended was at a distance of 100 yards from the School where he was present (vide para 15). The I.O. has stated that he heard hulla or "Mar Dia""Mar Dia". So he immediately rushed and it appears from the evidence of P.W. 6 that

the police had arrived at the place as soon as both the accused were apprehended by the mob (vide para 27). The evidence of the I.O. shows that he came at the door of the informant at 4.00 P.M. where he recorded the fardbeyan of the informant on which the informant signed. He has proved the fardbeyan and the signature of the informant thereon (Exts. 2 and 3). He took up the investigation and made endorsement (Ext. 5) on the fardbeyan. He further stated that the villagers produced both the accused before him and the hands of both the accused were smeared with blood and accused Harendra Rai was holding dagger in his hand. Thereafter, he prepared the inquest report of the deceased (Ext. 7) at 4.30 P.M. and inspected the place of occurrence. He has given the detailed description of the place of occurrence and has stated that the field of Ghuran was situated at a distance of one K.M. away from the P.O. and he found the mark of trampling in the tomato field of Ghuran Mahto. He also found fresh blood at the P.O. and noticed that there were cot with bedding and utensils meant for cooking in the room where the dead body of the deceased was found. The I.O. also seized the blood stained earth from the P.O. which he seized and sent the same for examination to the Forensic Science Laboratory. There is no report of the Forensic Science Laboratory but the I.O. has produced the blood stained earth which he seized from the P.O. and the same is marked as material Ext. II. He also seized blood stained cloth of the deceased but did not prepare any seizure-list. He has, however, stated that he mentioned these facts in the case diary. The blood stained cloth of the deceased has not been produced in course of the trial. He also admitted that he had not recorded the statement of the female members of the house of the informant. He had recorded the statement of the neighbours but none of them stated to have seen the accused persons at the time of entering into the house of the informant. It may be pointed out that the alleged occurrence took place at about 3.00 P.M. and the fardbeyan of the informant was recorded by the I.O. at 4.00 P.M. and the I.O. immediately took up the investigation of the case which is manifest from his evidence. There is some variance in the evidence of the I.O. which does not effect the root of the prosecution story so as to disbelieve the same. The I.O. has stated that the statements of the witnesses were also recorded u/s 164 of the Code of Criminal Procedure and it appears that the trial court took into consideration the statements of the witnesses recorded u/s 164 Code of Criminal Procedure (Exts 11 to 11/C) but I must say that the trial court has committed error in considering the alleged statements recorded u/s 164 Code of Criminal Procedure, inasmuch, as the Magistrate who recorded the statements of those witnesses was not examined by the prosecution nor the statements recorded by the Magistrate has been legally proved in course of the trial. The absence of that, the trial court could not have used the alleged statements of witnesses recorded u/s 164 Code of Criminal Procedure for the purpose of corroboration.

15. So far the medical evidence is concerned P.W. 8 Dr. B.B. Jha who conducted the post mortem examination on the dead body of the deceased has stated that he found the following ante mortem injury on the person of the deceased:

Incised wound transversely over neck in front and above the thyroid cartilage 4" x 1/2" x bone deep, on deep dissection of the neck trachea oesofagus, thyroid cartilage, carotid arteries, both left and right were cut. Blood and blood clots were around the wounds. Air bubbles were coming out from the cut part of the trachea.

16. He also deposed that the cause of death was due to shock and haemorrhage on account of the above mentioned injury which was sufficient to cause death in ordinary course of nature and the injury was caused by sharp cutting weapon. P.W. 8 has proved the post mortem report (Ext. 4). Nothing significant could be pointed out by the defence so as to disbelieve the evidence of the doctor whose evidence fully corroborates the prosecution version as regards the alleged occurrence.

17. On behalf of Appellant Bachchu Rai it was contended that in the instant case nobody actually saw the killing. So, the conviction of Bachchu Rai or the other Appellant, namely, Harendra Rai cannot be sustained u/s 302 of the Indian Penal Code without the aid of Section 34 of the I.P.C. It was submitted that P.W. 6 Ram Kishun Mahto who saw the occurrence from the beginning has stated that when he came out from his house on hearing the groaning sound, he saw that both the accused came out and he saw blood stained dagger in the hand of Harendra Rai. He further stated that both the accused confessed their guilt before the villagers that they committed the murder of Champa Devi. It was, therefore, submitted that it was Harendra Rai who might have committed the murder of Champa Devi since P.W. 6 saw blood stained dagger in his hand. As such, the Appellant Bachchu Rai cannot be convicted u/s 302 of the I.P.C. with the aid of Section 34 simply because P.W. 6 saw him coming out with Harendra Rai. It was further submitted that Appellant Bachchu Rai cannot be convicted on the basis of the alleged confessional statement made by him because there is no evidence to show that what were the actual words used by Bachchu Rai while making the alleged confessional statement which is vague in nature.

18. In support of his contention the learned Counsel has relied upon the decision in the case of Mithu Singh Vs. The State of Punjab, wherein it has been held by the apex court that:

To substantiate a charge u/s 302 with the aid of Section 34 it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn, the culpable liability can arise only if such inference can be drawn with a certain degree of assurance. At the worst the accused-Appellant knew that his co-accused was armed with a pistol. The knowledge of previous enmity existing between the co-accused and

the de-ceased can also be attributed to the Appellant. But there is nothing available on record to draw an inference that the co-accused had gone to the house of the deceased with the intention of causing her death and such intention was known to the Appellant, much less shared by him. Simply because the Appellant was himself armed with a pistol would not necessarily lead to an inference that he had also reached the house of the deceased or had accompanied the co-accused with the intention of causing death of the deceased. An inference as to the Appellant having shared with the co-accused a common intention of causing the murder of the deceased cannot be drawn. His conviction u/s 302/34 I.P.C. cannot be sustained and must be set aside.

19. The learned Counsel relied upon another decision in the case of Malkhan Singh and Another Vs. State of U.P., where the apex court held as follows:

The fact that the companion of accused on whose cycle the accused was sitting continued to pedal the cycle after the accused fired pistol and that he too ran away with the accused would not necessarily go to show that the shot had been fired in furtherance of common intention of the two accused. The companion, therefore, could not be held vicariously liable.

20. Both the decisions, as referred to above, is based on the peculiar facts of the respective cases. With great respect to the principle as laid down by the apex court in the aforesaid decisions, I may say that applicability of law has to be examined on the particular facts and circumstances of each case.

21. So far the facts of the instant case is concerned, it would appear from the evidence of P.W. 6 that he saw both the accused entering into the room where the deceased was staying and soon thereafter P.W. 6 heard the groaning sound on which he came and saw both the accused coming out from the room out of whom one was holding dagger with blood stains who threatened the informant to kill him due to which the informant became scared and both the accused fled away. Thereafter, the informant raised alarm which attracted the attention of the villagers who chased both the accused who were ultimately apprehended after chase and from the hand of the Appellant Harendra Rai the butt portion of dagger was recovered and the blade portion of the dagger was thrown away by him in course of chase. It further appears that P. Ws. 2, 3 and 4 have consistently stated that they saw dagger in the hands of both the accused without being unshaken in their cross-examination. So, the fact of seeing the dagger in the hands of both the accused has been supported by P. Ws. 2, 3 and 4. It is true that P.W. 6 has stated that he saw dagger in hand of accused, namely, Harendra Rai. This statement of P.W. 6 does not mean that there was no dagger in the hand of Bachchu Rai and it is possible that he might not have noticed the dagger in the hand of Appellant Bachchu Rai due to nervous state of mind. It is possible that he might have escaped to notice dagger in the hand of Bachchu Rai. But, the other witnesses namely, P. Ws. 2, 3 and 4 have consistently deposed that they saw dagger in the hands of both the accused and there is no reason to disbelieve the testimony of these witnesses. The factum of

seizure is different aspect of matter because the accused had thrown the dagger in course of chase and the evidence of I.O. goes to show that the butt portion of the dagger was recovered from the tomato field of Ghuran Mahto. The I.O. should have made effort to search for the dagger thrown away by the accused persons but it appears that he did not make any effort in that direction and was satisfied with the seizure of the butt portion of one dagger from the field of Ghuran Mahto (vide Ext. 6). Therefore, the ocular version of P. Ws. 2, 3 and 4 to the effect that they had seen dagger in the hands of both the accused cannot be disbelieved on account of the fact that the I.O. failed to search or seize the daggers thrown away by the accused. Once I believe the statements of P. Ws. 2, 3 and 4 who have consistently stated that they had seen dagger in the hands of both the accused, it can be said at once that both the accused had entered into the room where the deceased was staying with the intention to commit her murder which is evident from the circumstances that they entered into the room, cut the neck of the deceased and immediately came out from the room to be noticed by P.W. 6. Therefore, it is clear that both the accused had entered into the room having shared the common intention to commit the murder of the deceased and, that is why, within few minutes they accomplished their object and came out. It would, therefore, appear that the facts of the instant case are quite distinct from the facts of the two cases referred to above and having regard to the peculiar facts and circumstances of the present case, I am of the definite view that both the accused committed the murder of the deceased having shared the common intention, inasmuch, as the essence of sharing common intention is simultaneous consensus of the mind of persons participating in the criminal action to achieve a particular result. Common intention can develop at the spur of the moment also. It is the prior meeting of mind which has to be judged to infer the common intention of an accused. The facts stated above apply go to show that both the accused had gone to the room of the deceased having made preparation being armed with daggers and as soon as they entered into the room they assaulted the deceased and immediately came out and fled away to be caught by villagers on chase soon after the alleged occurrence. As such, the circumstances of the case would go to show that both the accused had shared the common intention to commit the murder of the deceased.

22. Coming to the next question that soon after the apprehension, both the accused confessed their guilt that they had committed the murder of Champa Devi. The learned Counsel appearing for the Appellants contended that the alleged oral extra judicial confession made by the Appellants is too vague, inasmuch, as the actual wordings used by the Appellants while making extra judicial confession has not been stated by the witnesses and there is variance in the statements of the witnesses. As such, it is not safe to base the conviction of the Appellants on extra judicial confession made by them. He has relied upon the decision in the case of Wakil Nayak Vs. State of Bihar, wherein the apex court has held that "Before the court will act on extra judicial confession the circumstances under which the confession is made, the manner in which it is made, the person

to whom it is made will be considered along with two rules of caution. First, whether the evidence of confession is reliable and secondly whether it finds corroboration."

23. The learned Counsel further contended that the Appellants who were caught on chase, were badly assaulted by the mob. P.W. 5 Ram Sumit Kumar has admitted in his cross-examination that people had assaulted both the accused-Appellants. The informant (P.W. 6) also admitted in his cross-examination that mob of 2000 people joined in chasing the Appellants who were assaulted by them with fists and slaps. He also found bleeding injury on the person of both the Appellants. My attention was also drawn towards the ordersheet of the case which shows that the police had sent the F.I.R. along with the injury reports of both the injured (accused) to S.D.J.M. on 11.4.91 and the Appellants were remanded to judicial custody on 17.4.91. The learned Counsel contended that the Appellants were apprehended on 9.4.91 but they were remanded to custody on 17.4.91 because they were receiving treatment of their injuries caused to them by the villagers. As such, the alleged confessional statement made by the Appellants was not voluntary or natural which can be relied upon to form the basis for conviction. In support of his contention the learned Counsel relied upon the decision in the case of Param Hans Yadav and Sadanand Tripathi Vs. State of Bihar and Others, It was a case where the accused was beaten up badly after being apprehended by the mob soon after the bomb blast and several prosecution witnesses stated about the confession of the accused before them. The apex court observed as hereunder:

Even accepting the prosecution story that Yadav made this statement, he appears to have made the statement following assault on him Even if it is accepted that Yadav has made the statements as alleged, can the same be utilised against Sadanand is the next aspect for consideration. Obviously, when Yadav was beaten up, he must have been anxious to ensue that the assault stopped. His plea in such a situation would neither be voluntary nor natural. It would not be proper to rely upon the same for any purpose.

24. Relying upon the aforesaid decision it was strenuously argued that it is also a case of similar nature where the Appellants are said to have made confessional statement before the villagers after being assaulted mercilessly by them, so much so, that the Appellants received treatment for 7 to 8 days and were remanded in the case on 17.4.91 when they were discharged from the hospital. Therefore, the alleged confessional statement made by the Appellants cannot be said to be voluntary or natural and the same deserves to be rejected outright.

25. The learned Counsel pointed out that P.W. 2 has stated that the Appellants stated that they were fleeing away after assaulting Champa Devi. P.W. 3 has stated that the accused admitted about the murder of Champa Devi. P.W., 4 Ram Pragdas Mahto deposed that both the accused were fleeing away after assaulting Champa Devi. P.W. 6 stated that both the accused had confessed their guilt before the villagers. So, in this way the witnesses have given different version as

regards the actual wordings used by the Appellants while making confessional statement which renders the alleged confessional statements unworthy of acceptance.

26. In my view the submission is well founded and I am also of the view that the alleged confessional statement said to have been made by the Appellants does not inspire confidence to believe because the same does not appear to be voluntary and different witnesses have given different account of the actual wordings used by the Appellants while making the confessional statement. As such, it will not be proper or safe to base the conviction relying upon the oral confessional statement said to have been made by the Appellants. Moreover, no question was put to the Appellants while recording their statements u/s 313 of the Code of Criminal Procedure that they had made confessional statements about the killing of Champa Devi before the villagers. So, in this view of the matter also the evidence regarding the alleged oral confessional statement made by the Appellants cannot be used against them.

27. The question, however, remains that apart from the oral confessional statement whether the prosecution has led evidence to prove the charge against the Appellants beyond reasonable doubts. I have discussed above the ocular evidence of the witnesses who are uninterested witnesses having no grudge or animosity with the Appellants, they were not even known to the Appellants and their consistent evidence is that on alarm being raised by P.W. 6 the Appellants were chased while they were fleeing away with dagger in their hands and ultimately they were apprehended by the villagers. It is true that daggers were not recovered from the possession of both the accused for which there is reasonable explanation given by the witnesses that in course of chase the Appellants threw away the daggers but butt portion of the dagger was recovered by the I.O. from the field of Ghuran Mahto which was seized by him. The consistent evidence of the witnesses further goes to show that after apprehending the Appellants, the witnesses came to the house of the informant and they saw that the deceased was lying in pool of blood and was dead. The evidence of the informant would indicate that he had seen both the accused entering into the room and immediately thereafter, the informant heard groaning sound coming from the room of the deceased, so, he came out and saw these Appellants coming out from the room of the deceased with blood stains dagger and their hands were smeared with blood. The informant was also threatened by them and due to fear he kept mum but when the Appellants fled away, the informant raised alarm on which the villagers started chasing these Appellants who were ultimately caught after chase. The evidence further shows that immediately after the arrest of the Appellants the police, who was on duty at the examination centre also rushed to the spot and took charge of the Appellants. The I.O. has stated that the villagers produced the Appellants with the butt portion of the dagger and the hands of both the Appellants were smeared with blood. The I.O. immediately visited the place of occurrence and found the dead body of the deceased with copious blood. So all these circumstances conclusively

prove the fact that both the Appellants had entered into the room of the deceased having shared common intention to commit the murder of Champa Devi and after killing the deceased both of them fled away and were caught by villagers on chase soon after the occurrence. The F.I.R. of this case was lodged after one hour of the occurrence which is very important circumstance to show that the prosecution version is correct and it cannot be doubted from any angle. The evidence led by the prosecution stands substantiated by the medical evidence, inasmuch, as the doctor who conducted autopsy on the dead body of the deceased also found injury which may be possible by dagger.

28. The Appellants have been convicted u/s 302 of the I.P.C. The learned Counsel submits that in view of the facts and circumstances of the case they cannot be convicted u/s 302 I.P.C. without the aid of Section 34 of the I.P.C. The submission carries force in it. In view of the facts and circumstances as discussed above it has been found that both the Appellants had shared the common intention in committing the murder of Champa Devi.

29. After considering all the facts and circumstances of the case, I am of the view that the prosecution has proved the charges under Sections 302/34 of the I.P.C. against the Appellants beyond all reasonable doubts. As such, both the Appellants are held guilty for committing offence u/s 302/ 34 I.P.C. Their conviction u/s 302 I.P.C. is, accordingly, altered to 302/34 I.P.C. With this modification the order of conviction and sentence as recorded by the trial court are upheld.

30. The learned Counsel appearing for Appellants contended that Appellants Harendra Rai was juvenile at the time of alleged occurrence, inasmuch, as he was aged 16 years only. The approximate age of Appellant Harendra Rai as recorded by learned Sessions Judge was about 20 years when his statement u/s 313 of the Code of Criminal Procedure was recorded. It may be stated that during the whole trial the defence did not take any plea that Appellant Harendra Rai was a juvenile nor any enquiry as contemplated under Juvenile Justice Act was done by the court below. It is true that the plea of juvenile can be taken at the appellate stage also and if the appellate court finds that the Appellant was a juvenile on the date of occurrence, it can pass necessary order in accordance with law in terms of the provisions of Juvenile Justice Act. Here in this case apart from the fact that plea of juvenile was not taken at any point of time, it would appear that the age of Appellant Harendra Rai was about 16 years as on the date of occurrence. So. in my view the Appellant Harendra Rai was not juvenile on the date of occurrence and he was definitely 16 years or above, that is why, the defence did not take the plea of juvenile on his behalf. Therefore, the submission of the learned Counsel that Appellant Harendra Rai was juvenile is not acceptable to me.

31. In the result, therefore, I do not find any merit in this appeal which stands dismissed. The Appellants who are in jail will serve out the remaining period of sentence.

B.K. Jha, J.

32. I agree.