

**Ashish Paswan and anr., Etc. Etc. Vs. State of Bihar**

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**Court :** Patna

**Decided On :** Apr-12-1999

**Judge :** N.N. Singh and D.P.S. Choudhary, JJ.

**Appeal No. :** Criminal Appeal Nos. 67, 69 and 71 of 1986

**Appellant :** Ashish Paswan and anr., Etc. Etc.

**Respondent :** State of Bihar

**Disposition :** Appeal Dismissed

**Prior history :** D.P.S. Choudhary, J. 1. These three criminal appeals have been heard together and this judgment shall dispose of all the appeals. The appellants have preferred these appeals against the judgment of conviction and order of sentence dated 24.1.1986 passed by the 3rd Additional District and Sessions Judge, Munger in Sessions Trial No. 635 of 1983. Appellant, Ashish Paswan has been sentence to undergo life imprisonment for the offence under Section 302 of the Indian Penal code. Accused, Sahdeo Pas

**Judgement :**

**D.P.S. Choudhary, J.**

1. These three criminal appeals have been heard together and this judgment shall dispose of all the appeals. The appellants have preferred these appeals against

the judgment of conviction and order of sentence dated 24.1.1986 passed by the 3rd Additional District and Sessions Judge, Munger in Sessions Trial No. 635 of 1983. Appellant, Ashish Paswan has been sentence to undergo life imprisonment for the offence under Section 302 of the Indian Penal code. Accused, Sahdeo Paswan alias Kokia has been sentenced to undergo life imprisonment for the offence under Section 302 of the Indian Penal Code read with Section 109 of the Indian Penal Code. Accused, Ashok Mandal and Mahendra alias Bhutka have been sentence to undergo life imprisonment for the offence under Section 302/34 of the Indian Penal Code.

2. The prosecution case in brief is that oh 14.7.1983 at about 12 p.m. all the abovenamed four accused persons went to Ram Singh who was residing as a tenant in the house of the informant, Kamaljit Singh. They demanded money from Ram Singh for the purpose of taking wine which he refused. Thereupon, they all started assaulting him. The informant, Kamaljit Singh and his friend Dilip Singh and the servant of Ram Singh, namely, Mathura Yadav intervened and asked the accused not to assault Ram Singh. Thereupon, accused, Ashok Mandal and Sahdeo Paswan abused them and assaulted them with fists and slaps. They raised alarm.

Thereupon, the grand-father of the informant, Sardar Gopal Singh, aged about 70 years, arrived there and objected to the high-handedness of the accused persons. Further case of the prosecution is that thereafter, accused, Sahdeo Yadav ordered to kill Gopal Singh. Thereupon, accused, Ashish Paswan, who had a brick in his hand assaulted Sardar Gopal Singh on his head, who fell down with a bleeding injury. Accused, Ashok Mandal got on the chest of Sardar Gopal Singh with a bottle. On alarm, the local people arrived, including Kishore Kumar, Sarbjit Singh and Birendra Singh (P.W. 1). The accused persons left the place. The informant took his grandfather to Railway Hospital where he was declared dead, who had actually died on way to the hospital. It was alleged that accused persons are veteran criminals and they had been in jail several times. The informant gave his statement before the police which has been marked Ext. 3. The formal F.I.R. was drawn up which is marked Ext. 4. The informant signature on his statement is marked Ext. 1.

3. From the trend of the cross-examination the defence case emerges as that Mathura Yadav was the servant of Ram Singh whose salary was due. On demand of salary there was a quarrel between Mathura Yadav and Ram Singh, upon which deceased Gopal Singh tried to intervene and he was pushed by Mathura Yadav, who fell on the brick-floor, causing injury on his head. It is further case of the defence that accused persons used to protest against the black-marketing done by the informant, who is a fair price shop owner, and as such was falsely implicated.

4. The prosecution has examined in all five witnesses out of which P.W. 1 (Birendra Singh), brother of the informant, and P.W. 2 (Kamaljit Singh) the informant, are the eye-witnesses. P.W. 3 is Doctor Anirudh Prasad who held the post-mortem examination on the deceased and the post-mortem report is Ext.2. P.W. 4 is Mukutdhari Mahto, the Investigating Officer who has proved the F.I.R. (Ext. 3), the formal F.I.R. (Ext. 4) and the Inquest Report (Ext. 5). P.W. 5 (Ramashish Paswan) who is a formal witness who proved the seizure list (Ext. 6). Two defence witnesses have been examined, namely, Ganesh Rout (D.W. 1) and Vijay Kumar (D.W. 2).

5. P.W. 3 who held the post-mortem on the dead body of Sardar Gopal Singh on 15.7.1983 found the following injury:

(1) Lacerated wound 1-3/4' 1/2' fracture of bone on right temporo perital region of scalp. On dissection fracture of right temporal and perital bone was found. On removing the bone chips the membrane substance was found lacerated, bloods and blood clots were present in brain substance, bleeding from right ear.

In the opinion of the Doctor, the time elapsed since death was within 24 hours. The injuries were ante-mortem caused by hard and blunt substance. In the opinion of the Doctor, death was caused due to haemorrhage and shock caused by above injury which might have been caused by giving stone blow.

6. The Investigating Officer (P.W. 4) visited the place of occurrence on 14.7.1983 at 18.30 hours. The place of occurrence is situated in Mohanpur mohalla near the house of the son of deceased-Sardar Gopal Singh. It is the tenancy of Ram Singh and used as Gohal. He found at the place of occurrence blood-stains on the brick-

floor but it was not possible to collect it. The Investigating Officer has not prepared the inquest report not send the dead body for post-mortem examination. The report was prepared earlier by A.S.I., R.S. Mishra.

7. P.W. 1 (Birendra Singh) stated that on hulla which was coming from Gohal, in the occupation of Ram Singh, he rushed there along with Kamaljit Singh, Dilip Singh and grand-father Sardar Gopal Singh. He found scuffle between the accused and his younger brother, his grand-father tried to pacify them. Thereupon, accused, Sahdeo ordered to kill him. Accused Ashish gave a stone blow on his head who fell down with bleeding injury. He further stated that accuse, Ashok got on the chest of Sardar Gopal Singh and accused, Bhutka alias Mahendra assaulted him with bottle on his chest. One the way to hospital his grand-father died. In cross-examination he stated that the stone which was used by accused Ashish was lying near the Nad. It was a brick stone. He further stated that at the time of occurrence one Mathura Yadav was servant of his grand-father but after his death, he fled away. According to this witness, at the time of occurrence due to sock, he became unconscious and when he regained consciousness, he found his mother and other witnesses present there. He further stated that after the stone-blow his grand father fell on the brick-floor which caused injury near nose. The blood had fallen down on the clothes of the deceased and also on the ground.

8. P.W. 2, the informant stated that in his presence the accused persons come inside his Gohal and demanded money from Ram Singh, his tenant for taking wine. On his refusal, a scuffle took place. He tried to intervene, thereupon, he was assaulted by fists and slaps by the accused ' persons. When his grand-father, Sardar Gopal Singh came to pacify them, accused, Sahdeo ordered to kill, thereupon accused, Ashish gave stone blow on his head. His grand-father fell down and subsequently died. He further stated that accused Ashok got on the chest of his grand-father and pressed it and accused Bhutka assaulted him on his chest be means of bottle. In cross-examination, he stated that he has a fair price shop. He further stated that the accused persons assaulted him on his face and cheeks. According to him, when his grand-father fell down on the brick-floor blood fell down but it was not collected by the Investigating Officer. According to him, blood also fell on his Pagrhi and clothes. He admitted that on the date of

occurrence one Mathura Yadav was a servant working with his grand-father but, thereafter, he fled away. Subsequently he found him working in the house of one Kaisar Singh. He has denied the defence suggestion that there was a quarrel between Sardar Ram Singh and his servant, Mathura Yadav for salary and when Sardar Gopal Singh tried to pacify, he was pushed by Mathura Yadav and he fell down on the ground causing head injury.

9. On behalf of the defence, D.W. 1 (Ganesh Rout) has been examined who stated that on the date of occurrence at about 12.00 p.m. while he was purchasing coal from the depot of Nandu Mandal he heard hulla from the nearby shop from the house of Sardar Gopal Singh. He went there and saw Mathura Yadav and Gopal Singh scuffling each other. Mathura Yadav was the servant of Sardar Gopal Singh and Sardar Ram Singh. He was demanding his salary and on refusal, he pushed Sardar Gopal Singh, who fell-down on the ground. He was removed to the hospital. In cross-examination he stated that Sardar Gopal Singh fell flat on the ground after he was pushed by Mathura Yadav. He denied the prosecution suggestions that he is friend of the accused and hence falsely deposing in the case.

10. D.W. 2 (Vijay Kumar) stated that at the time of occurrence, he was sitting on his Verandah. He heard hulla from the Gohal of Sardar Gopal Singh. He went there and Saw Mathura Yadav demanding salary from Sardar Gopal Singh. On the refusal to pay his salary, there was scuffling between them, and Mathura Yadav pushed him who fell on the ground and became unconscious and was removed to the hospital. In cross-examination, he admitted that he was not examined by the police. He has no concern either with Mathura Yadav or Sardar Gopal Singh. He denied the suggestion of prosecution that he is friend of the accused persons and deposing falsely.

11. The learned appellants' lawyer submitted that in the fardbeyan (Ext.3) the informant has named Dilip Singh, Ram Singh and Mathura Yadav who were present at the place and time of occurrence but none of them have been examined. It was also contended that they were independent witnesses and there is no satisfactory explanation for their non-examination and P.W. 1 and P.W. 2 are

brothers and hence interested witnesses. It was further submitted that in the fardbeyan, it is mentioned that on hulla one Kishore Kumar and Sarbjit Singh, who were neighbours, arrived at the place of occurrence but they have not been examined and therefore, the prosecution has suppressed to examine the material and independent witnesses without any satisfactory explanation, hence an adverse inference may be drawn from their non-examination. It was also contended that the Doctor has opined that injury found on the deceased was possible due to fall on the ground and it has come in the evidences of P.Ws. 1 and 2 (Birendra Singh and Kamaljit Singh) and the Investigating Officer (P.W. 4) that the floor was of bricks. D.Ws. 1 and 2 have stated that the servant, Mathura Yadav pushed Sardar Gopal Singh who fell down on the floor and became unconscious and was removed to the hospital. Therefore, there was possibility of such injury caused to the deceased by fall but because of enmity the appellants have been implicated.

12. The learned lawyer for the appellants further submitted that in the fardbeyan and in the evidence of P.Ws. 1 and 2 (Birendra Singh and Kamaljit Singh), it is stated that when Sardar Gopal Singh fell on the ground accused, Ashok Mandal got on his chest and pressed him and accused Bhutka Mandal assaulted him on his chest with bottle. The doctor (P.W. 3) has not found any such injury on the chest of the deceased. In the post-mortem report and in the evidence of Doctor there is mention of only one lacerated wound wintry fracture on right temporal and partial bone. This suggests that prosecution has tried to implicate all the accused persons by attributing some Act of assault against them. Therefore, the prosecution has not come with clean hand. There is also contradiction in the evidences of P.Ws. and in the fardbeyan whether Mathura Yadav was servant of Sardar Gopal Singh or of Ram Singh. The learned appellants' lawyer further submitted that it is the case of the prosecution that accused persons had assaulted the informant and his brother, Kamaljit Singh and Birendra Singh when they tried to pacify them. But, there is no injury report to support this contention of the prosecution. The further falsify the prosecution case.

13. The learned appellants' lawyer further submitted that the prosecution case was that accused persons came to the Gohal of the informant unarmed and they

demanded money from Ram Singh for wine and on refusal to pay the money, they abused Ram Singh and others when Sardar Gopal Singh went there to pacify them, under the order of accused, Sahdeo Paswan, accused, Ashish Paswan picked upon the brick lying there and threw causing injury on the head of the deceased. It is, thus, apparent that the motive of the accused was to demand money from Ram Singh for wine and the subsequent act of accused Ashish Paswan was spontaneous and not with an intention to kill. Therefore, this case comes under the preview of Section 304 Part (ii) of the Indian Penal Code. At best the Act of the accused was done with the knowledge that his throwing of the stone is likely to cause death but without any intention to cause death or the cause such bodily injury as is likely to cause death. The ingredient of intention to cause death is wanting from the facts, circumstances and evidence of the case. Learned Lawyer for the appellants further submitted that the appellants who have been convicted with the aid of Section 34 of the Indian Penal Code had no intention to dwell with the knowledge that the Act of Ashish Paswan was likely to cause death. Therefore, Section 34 of the Indian Penal Code is not attracted to in these appellants.

14. It was further submitted on behalf of the appellants that accused. Ashish Paswan had given only one stone blow on the head of the deceased-Sardar Gopal Singh. This blow was not repeated, even after he fell down on the ground. There was no intervening circumstance to prevent in giving repeated blow. This suggests that he had no intention to kill but only to cause bodily injury that also without being knowledge that it is likely to cause death. Hence, Section 302 of the Indian Penal Code shall not be applicable against accused Ashish Paswan nor Section 302 read with Section 34, I.P.C. against other appellants. The Doctor in his evidence has not mentioned that the injury found on the deceased was sufficient to cause death in ordinary course of nature. In support of the above contention the learned Lawyer relied on the case law reported in : 1993 CriLJ1053 .

15. Learned A.P.P. submitted that he concedes to this submission of the appellant that they assembled inside the house of Ram Singh with an intention to demand money and at that time they had no intention to kill. They were not armed with any weapon but when Sardar Gopal Singh came there and tried to pacify accused,

Sahdeo Paswan ordered to kill Sardar Gopal Singh, thereupon, accused, Ashish Paswan threw a brick stone causing head injury to deceased Gopal Singh, When Gopal Singh fell down other two accused assaulted him on his chest one by pressing his chest and another with bottle. Therefore, subsequently all the accused had intention to kill Gopal Singh. The injury report shows that deceased has lacerated wound with fracture of bone on right temporal perital region of scalp. In cross-examination, the Doctor categorically stated that he did not find any injury on the back side of head. Therefore, the injury on the head of the deceased was not due to fall on the brick floor as suggested on behalf of the defence but due to assault at the hand of accused Ashish Paswan.

16. We have carefully examined the evidence on record and considered the submissions made on behalf of both the parties and come to the conclusion that this case comes under the purview of Section 304, Part (ii) and not under Sections 302 and 302/34 of the Indian Penal Code. The accused persons entered inside the house of Ram Singh unarmed and demanded the money for wine. On refusal and on protest made by him and the informant they assaulted him with fists and slaps. When Sardar Gopal Singh intervened, accused Ashok Mandal ordered to kill, thereupon Ashish Paswan gave a brick stone blow causing head injury to him and subsequently he died. This blow was not repeated by the accused. Therefore, the evidences show that the Act of this accused was done with knowledge that it, is likely to cause death but without any intention to cause death or such bodily injury that is likely to cause death. Accused Ashish Paswan assaulted the deceased on the order of accused, Ashok Mandal. (Therefore, this accused has rightly been convicted under Section 109 of the Indian Penal Code).

17. In the result, the conviction of appellant, Ashish Paswan under Section 302 of the Indian Penal Code is altered to Section 304 Part (ii) of the Indian Penal Code and the conviction of accused, Ashok Mandal and Bhutka Mandal under Section 302/34 of the Indian Penal Code is altered to under Section 304 Part (ii) read with Section 34 of the Indian Penal Code. The conviction of accused Sahdeo Paswan under Section 109 read with Section 302 of the Indian Penal Code is altered to Section 304(ii) read with Section 109 of the Indian Penal Code. It was submitted that the appellants were in custody for about two and half years. No useful

purpose would be served in sending these appellants to jail after 16 years of occurrence, during which period the sword of punishment remained hanging over their heads. In my opinion, the ends of justice would be satisfied if the sentence of the appellants under Sections 304, Part (ii), 304, Part-(ii) with Sections 34 and 304(ii) read with Section 109 of the Indian Penal Code is modified to the period of imprisonment already undergone by the appellants and a fine of Rs. 2000/- each and in default to undergo rigorous imprisonment for two years each. The amount of fine must be deposited within two months, failing which the appellants would be sent to jail to undergo region imprisonment in default of payment of fine.

18. In the result, with the above alteration and modification in the conviction and sentence of the appellants, these appeal are dismissed.

**N.N. Singh, J.**

19. I agree.

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