

**Birja Das Vs. State of Bihar**

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**Court :** Patna

**Decided On :** Oct-28-2003

**Judge :** R.N. Prasad and B.K. Jha, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 302

**Appeal No. :** Criminal Appeal No. 122 of 2000

**Appellant :** Birja Das

**Respondent :** State of Bihar

**Advocate for Def. :** Shiva Shankar Prasad Sing, A.P.P.

**Advocate for Pet/Ap. :** Uma Kant Shukla, Rajesh Ranjan 1, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**R.N. Prasad and B.K. Jha, JJ.**

1. The sole appellant has preferred this appeal against the judgment and order dated 29-1-2000 passed by 1st Addl. Sessions Judge, Darbhanga in ST. No. 109/95 whereby the appellant has been convicted for the offence under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs. 500/- to the informant, in default to undergo simple imprisonment for one month.

2. One Jaleshwar Das gave his fardbeyan on 21-2-1995 that 11 a.m. in the field of Jogendra Narain Mallick that on 20-2-1995 at about 9 p.m. after taking meal in the feast in the house of Ram Pukar Das he returned to his house with his son Lakchman Das aged about two years. His son slept on the varanda. He felt pain in his waist. His wife Tiliya Devi came and started massaging k. oil on his waist. His daughter Punita Devi raised alarm that his son Lakchman Das, aged two years was taken away by Birja Das. He searched his son in the night but he could not trace out. In the morning some people went to ease towards north who came and informed him that Ganji of Lakchman Das was found near the bandh. He went there and found dead body of his son Lakchman Das in the field of Jogendra Narain Maliick. The head was smashed and the legs were fractured. He and the villagers started searching Birja. He was found concealed in the heap of straw of one Jogi Manjhi. On question he did not say anything. He informed the Chaukidar of the village who came at the place of occurrence. Sometimes Birja used to come to his darwaza and used to eat tiles.

3. On the aforesaid fardbeyan formal First Information Report was drawn, investigation was taken up, after completion of investigation charge-sheet was submitted against the appellant. On receipt of charge-sheet cognizance was taken and the case was committed to the Court of Sessions for trial. The trial Court convicted the appellant as indicated above.

4. The defence of the appellant was that he was innocent. He did not commit any offence. His son Lakchman Das was taken away by the animals and he has falsely been implicated in the case.

5. The prosecution in support of its case examined 11 witnesses, out of whom P.Ws. 3, 4 and 8 were tendered. P.Ws. 1, 2, 5 and 7 were hear-say witnesses. P.W. 6 claimed to have seen the occurrence and P.W. 9 the informant also claimed to have seen the occurrence. P.W. 11 has proved fardbeyan, Ext. 3, inquest report, Ext. 4, dairy from paras 1 to 42, Ext. 5. P.W. 10 is Doctor who held post-mortem over the dead body.

6. The occurrence took place on 20-2-1995 at about 9 p.m. The fardbeyan was recorded in the next day i.e. 21-2-1995 at 11 a.m. i.e. after 14 hours. P.Ws. 9 and

6 claimed to have seen the occurrence. Their evidence is relevant and important to come to a conclusion in the case. P.W. 9 is father of the deceased Lakchman Das aged about two years. His evidence is that he was at the house at the relevant time. He felt pain in his body. His wife, P.W. 6, leaving her son Lakchman Das aged about 18 months sleeping on the varanda of the house, started massaging k. oil on his body. In the meantime Birja Das came and put off Dhibri burning on the varanda and took away his son. He raised alarm and he along with P.Ws. 5 & 7 searched the child but he could not be traced out. In the morning one Charitra Das, not examined, informed that his son is lying dead in the field of Jogendra Narayan Mallick. He went there and found the dead body of his son. He informed the Chaukidar and the Chaukidar informed the police. The police came and he gave his fardbeyan before the police. In cross-examination the witness stated that Soman Das, his son aged about 7 years, his daughters Motki, Nazri and Punita aged about 5 years, 3 years and 10 years respectively were also sleeping on the varanda near his son Lakchman Das, the deceased. He himself was sleeping in a room. He heard alarm of his daughter Punita in the room and then he went to the place where his son, the deceased, was sleeping but by that time his son had already been taken away. He did not inform the Mukhia, Sarpanch or the Dafadar about the occurrence. He searched his son near the house itself. The eyes of the boy were found taken out. Flesh from neck to waist was also not on the dead body. Suggestion given to the witness that no body had seen taking away the deceased has been denied. He also denied the suggestion that the boy was taken away by the animals in the night and in the morning the dead body eaten by the animal was found. It appears from the evidence of the witness that in examination-in-chief he stated that he had seen Birja taking away Lakchman Das, the deceased, but in cross-examination the witness stated that he was not there and he came at the place of occurrence on the alarm raised by his daughter Punita and when he came to the place of occurrence the boy had already been taken away. Therefore, it is evident that he was not eye witness to the occurrence. Punita who raised alarm has not been examined in this case to establish that in fact she had been taking away the deceased and she raised alarm.

7. P.W. 6 is mother of the deceased. Her evidence is that her son Lakchman Das was aged about two years. He was taken away by the appellant from the varanda of her house. At that time her son Soman, her daughter Nazri, Chandrakala and Punita were in the Court-yard but none of them have been examined as witness in this case. Her husband was sleeping in the Da/an. She had also seen taking away the deceased, She raised alarm on which Sri Das, Kamla Das and Ram Narayan came. However, Ram Narayan and Kamla have not been examined in this case. Her husband had also seen the occurrence. In the night she searched her son but he could not be traced out. In the morning she learnt that dead body of her son is lying in the field of Jogi Babu. Her husband had gone there. She also went there and found the dead body of her son. The appellant was caught on the same day. In cross-examination the witness stated that darwaza of the house is different from the courtyard of the house. On the darwaza her husband was sleeping. She had gone to the house of her relation Lichhia Devi to call her for treatment of waist pain of her husband. In the meantime in her absence from the house her son, the deceased, was taken away. There was no flesh on the stomach and head of the dead body. Eyes were also missing. It appears from the evidence of the witness as discussed above that in examination-in-chief she claimed to be eye-witness but in cross-examination she stated that in her absence her son, the deceased, was taken away. Therefore, it is evident that the witness is not eye witness to the occurrence.

8. Besides the aforesaid witnesses, P.Ws. 1, 2 and 7 have been examined. They are not eye witnesses. They have stated that they learnt about the occurrence. However, it appears that suggestion was given that the deceased was taken away by the animals in the night which the witnesses denied.

9. P.W. 10 is Doctor who held post-mortem over the dead body on 22-2-1995 at 11.30 a.m. The Doctor found that the body was partly eaten by animals. Head, anterior abdominal and posterior abdominal wall were found missing. The abdominal viscera, lungs and heart were found absent. The injuries were anti-mortem and were caused by pressing with some hard blunt object. No definite opinion regarding cause of death was possible because of absence of some part of the body. The time elapsed since death was 18 to 36 hours. In cross-

examination the witness denied that the body was taken away by the animals. The Investigating Officer has not been examined in this case.

10. On consideration of evidence as discussed above, this much is obvious that, there is no eye witness to the occurrence. P.W. 6 and P.W. 9 claimed to have seen the occurrence but in cross-examination their claim to be eye witnesses has been demolished. P.W. 6 stated that in her absence the boy was taken away. P.W. 9 stated that he came at the place of occurrence on hearing alarm of his daughter Punita and when he came at the place of occurrence the boy had already been taken away. The other witnesses are hear-say witnesses. However, P.W. 7 stated that when he went near the place of occurrence the informant did not disclose the name of the appellant. The suggestion was given to the witnesses that in the night the boy was taken away by the animals and in the morning the dead body eaten by the animal was found which they denied. The Doctor who held post-mortem also said in his evidence that he held post-mortem over the dead body eaten by the animal. However, he denied that the boy had been taken away by the animals. Since there is no eye witness or any cogent evidence on the record to establish that the appellant had taken away the boy, in our opinion, the conviction of the appellant cannot be sustained and as such the appeal is allowed. The judgment and order of conviction are hereby set aside. The appellant is directed to be released forthwith if not required in any other case.

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