

**IN THE HIGH COURT OF JHARKHAND AT RANCHI**  
**Cr. Appeal (DB) No. 73 of 1996**

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**Against the judgment of conviction dated 22.11.1995 and order of sentence dated 29.11.1995, passed by learned 1<sup>st</sup> Additional Sessions Judge, Dumka, in Sessions Case No. 114 of 1994 / 37 of 1994.**

Jhari Kisku @ Ram Jhari Kisku

..... Appellant

Versus

The State of Bihar (now Jharkhand)

.... Respondent.

**PRESENT**

**HON'BLE MR. JUSTICE APARESH KUMAR SINGH**

**HON'BLE MR. JUSTICE KAILASH PRASAD DEO**

For the Appellants

:Mr. Durga Charan Mishra, Advocate

For the State

:Mr. Pankaj Kumar, Additional Public Prosecutor

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***Per Kailash Prasad Deo:-*** Heard learned counsel for the appellants, Mr. Durga Charan Mishra, and learned counsel for the State, Mr. Pankaj Kumar, learned Additional Public Prosecutor.

2. The instant criminal appeal is directed against the judgment of conviction dated 22.11.1995 and order of sentence dated 29.11.1995, passed by learned 1<sup>st</sup> Additional Sessions Judge, Dumka in Sessions Case No. 114 of 1994 / 37 of 1994, whereby the appellant alongwith two others have been convicted for the offence committed and punishable under Sections 302/34, 342/34, 386/511/34 of the Indian Penal Code and awarded imprisonment for life for the offence committed and punishable under Section 302/34 of the Indian Penal Code, rigorous imprisonment for one year for the offence committed and punishable under Section 342/34 of the Indian Penal Code and rigorous imprisonment for two years for the offence committed and punishable under Sections 386/511/34 of the Indian Penal Code. However, all the sentences are directed to run concurrently.

3. The prosecution case is based upon fardbeyan of the informant, Bhagat Rai (P.W.8) recorded on 22.02.1994 at 20 Hours by A.S.I., Shyam Narayan

Prasad (P.W.11) at Mathachak, where the informant has stated that he is giving his statement in the house of Village Pradhan Lakhan Marandi @ Tunua Marandi, Son of Late Gogho Marandi before the officer-in-charge, stating therein that on 21.02.1994 in the night he has sent his son, Babu Rai (victim) to bring some liquor as guests have come to his house and thereafter his son went to *Niche Tola* of the village for bringing the same, but after lapse of longtime, he did not return with liquor in the night. In the meantime, there was a storm and rain in the night, as such informant did not go out to search his son. It is stated that in the morning of 22.02.1994 (Tuesday) when the informant started searching for his son, he found his son lying in courtyard of the house of Village Pradhan, Lakhan Marandi @ Tunua on a cot in an injured and unconscious condition. On inquiry from his son, when he regained his consciousness, disclosed that he has been assaulted by co-villager, Lodo Kisku son of Matal Kisku, Gress Kisku son of Late Hargar Kisku, Jhari Kisku son of Deba Kisku, Chunu Hembram (parentage not known) and Village Pradhan Lakhan Marandi, all have assaulted him near the house of Lodo Kisku, causing serious injury and brought him to the house of village Pradhan. The informant has further stated that occurrence took place, as alleged by the villagers that his son has in illicit relation with one of the girls of Tribal Community of the village and for that he was assaulted causing serious injury due to which he became unconscious and his right hand was fractured. The informant has further stated that when he tried to take his son to his house, all the above named accused persons have not allowed him rather asked him to attend the panchayati. Informant has further stated that villagers and the Village Pradhan Lakhan Marandi @ Tunua Marandi have convened a panchayati.

In the panchayati the son of the informant was held guilty and a fine of Rs.1001/- was imposed against him, which was denied by the informant. The informant has stated that he was going towards the Police Station, in the meantime, A.S.I. came there from the police station and as such, he is giving his statement. The informant has claimed that accused persons Lodo Kisku son of Matal Kisku, Gress Kisku son of Hargar Kisku, Jhari Kisku son of Deba Kisku, Chunu Hembrem and village Pradhan Lakhan Marandi @ Tunua Son of Late Gogho Marandi, all residents of Mathachak, P.S. Jama, District Dumka have assaulted his son, Babu Rai with an intention to kill him and caused injury, due to which he has sustained injury and become unconscious.

4. On the basis of fardbeyan, Police has instituted FIR bearing Jama P.S. Case No.14 of 1994, dated 22.02.1994, under Sections 341/323/325/307/34 of the Indian Penal Code and subsequently vide order dated 23.02.1994, Section 302 of the Indian Penal Code has been added. The FIR has been lodged against the five accused persons namely, (i) Lodo Kisku son of Matal Kisku, (ii) Gress Kisku son of Hargar Kisku, (iii) Jhari Kisku son of Deba Kisku (iv) Chunu Hembrem and (v) Village Pradhan Lakhan Marandi @ Tunua Marandi Son of Late Gogho Marandi all residents of Mathachak, P.S. Jama, District Dumka.

5. On completion of investigation, the police has submitted charge sheet vide charge sheet no.25 of 1994, dated 19.05.1994, under Sections 302/386/342/34 of the Indian Penal Code against all the five named accused persons.

6. The cognizance of the offence has been taken vide order dated 24.05.1994 and the case has been committed to the court of sessions vide

order dated 07.06.1994.

7. The charge has been framed against all the five accused persons under Sections 302/34, 342/34 and 386/34 of the Indian Penal Code on 12.08.1994. The charge has been read over and explained to the accused persons in Hindi to which they have pleaded not guilty and claimed for trial.

During trial accused Gress Kisku has died and the proceeding against him has been dropped vide order dated 05.04.1995.

8. The prosecution, to prove its case, has examined altogether eleven witnesses and also exhibited a number of documentary evidence up to Exhibit-5.

Tunua Rai, brother of the deceased and son of the informant has been examined as P.W.1, Surji Devi, mother of the deceased and wife of the informant, has been examined as P.W.2, Ganesh Baskey has been examined as P.W.3 but has been declared hostile by the prosecution, Sufal Murmu, an inquest witness, has been examined as P.W.4 and has proved his signature on the inquest report, which has been marked as Exhibit-1. Habu Hembrom, has been examined as P.W.-5, Churki Kisku, has been examined as P.W.6 and both these prosecution witnesses have been declared hostile by the prosecution. Dasarath Mirdha, chowkidar, has been examined as P.W.-7, Bhagat Rai, informant of the case and father of the deceased, has been examined as P.W.8, Dr. Sushil Marandi, has been examined as P.W.9, he is the medical officer, who has conducted autopsy on the dead body of the deceased Babu Rai and proved the postmortem report, which has been marked as Exhibit-2, Arjun Sharma, Sub-Inspector of Police has been examined as P.W.10, he is the second investigating officer of the case, who has submitted the charge-sheet against the accused persons. Shyam

Narayan Prasad, A.S.I., has been examined as P.W.11, he is police officer who has recorded the fardbeyan and investigated the case and has proved his handwriting and signature on the fardbeyan of the informant, which has been marked as Exhibit-3. This witness has proved the formal FIR in the hand-writing and in the signature of officer-in-charge, Mahendra Gupta, which has been marked as Exhibit-4 and has also proved the inquest report prepared by him in carbon process, which has been marked as Exhibit-5.

9. After closure of the prosecution evidence, the statement of the accused persons have been recorded under section 313 Cr.P.C., on 27.09.1995 in which they have denied their involvement in the alleged occurrence, but no defence witness or document has been brought on record.

10. After hearing the learned counsel for the parties and on the basis of the materials brought on record, the learned trial court has held the appellant and other accused persons facing trial guilty for the offence committed and punishable under Sections 302/34, 342/34/386/511/34 of the Indian Penal Code, but acquitted one of the accused persons namely, Lakhan Marandi @ Tunua, a Village Pradhan from whose house the victim was recovered by the police.

Being aggrieved at and dissatisfied with the, impugned judgment of conviction and order of sentence, two criminal appeals have been preferred before this Hon'ble Court by the convicts. Lodo Kisku has preferred Cr. Appeal (DB) No.20 of 1996 which has abated vide order dated 10.05.2018.

So far the present Cri. Appeal (DB) No.73 of 1996 is concerned, it has been preferred by two convicts, namely Jhari Kisku @ Ram Jhari Kisku, Son of Deba Kisku and Chunu Hembram, Son of Late Sona Hembram (whose appeal has abated vide order dated 14.03.2019 after death of Chunu

Hembram).

11. Heard, learned counsel for the appellant, Mr. Durga Charan Mishra. Learned counsel for the appellant has submitted that the impugned judgment of conviction and order of sentence is bad in law and cannot sustain in the eyes of law. Learned counsel for the appellant has submitted that admittedly there is no eye-witness to the occurrence and the prosecution case is doubtful, as part of the prosecution case has been disbelieved by the learned trial court by acquitting the co-accused Lakhan Marandi @ Tunua, a village Pradhan, from whose house the victim was recovered in an injured condition lying on a cot. Learned counsel for the appellant has further submitted that the learned trial court has convicted the appellant on the basis of the testimony of the interested witnesses, such as, Tunua Rai (P.W.1), brother of the deceased and son of the informant, Surji Devi (P.W.2)- mother of the deceased and wife of the informant and Bhagat Rai (P.W.8), informant and father of the victim/deceased. Learned counsel for the appellant has further submitted that from perusal of the evidence of P.W.1, P.W.2 and P.W.8, there are vital contradictions in the prosecution case which goes to the root of the prosecution case. Learned counsel for the appellant has submitted that from bare perusal of the Exhibit-2 i.e. Post-mortem report of the victim proved by Dr. Sushil Marandi (P.W.9), who had conducted the post-mortem examination on the dead body of deceased Babu Rai, it transpires that he has found the following injuries on the dead body of the deceased:-

*“(i) Diffused swelling over the left parietal region of the skull. On dissection there was depressed fracture of the left parietal bone. On further dissection connected brain and meninges found lacerated and collection of blood was found in the cranium.*

*(ii) Abrasion 1" x 1/4" over the right cheek below the right eye.*

*(iii) Defused swelling over the right forearm with fracture of radius and*

*ulna. (iv) Abrasion 1 ½ " x 1" over the left knee.*

*Abdomen :-*

*On dissection:-*

*Liver was found ruptured and huge collection of blood was found in abdominal cavity.*

*Doctor (P.W.9) has opined that death was due to haemorrhage and shock as a result of injury nos. (i) and (iv) which were sufficient to cause death in ordinary circumstance. Weapon used might have been hard and blunt substance for all the injuries.*

*Time elapsed since death was within 24 hours."*

**12.** Learned counsel for the appellant has further submitted that by sustaining such injuries on the head and vital part of the body, it is unbelievable that victim who was in unconscious condition has regained consciousness without any medical aid and disclosed the occurrence to the witnesses, such as, P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai). All these three witnesses have however not heard from the victim at one time therefrom. From the evidence of all these three witnesses, it appears that they cannot be relied upon so far disclosure made by victim is concerned. Learned counsel for the appellant has drawn attention of this Court towards Para-1 of the examination-in-chief of P.W.1 (**Tunua Rai**), where he has stated that his brother was sleeping on a cot, whose right hand was fractured and left leg was damaged and he was not in a position to move. His brother, Babu Rai has disclosed that he has been assaulted by Lodo, Gress, Chunu and Jhari, when he came to the village to bring liquor. This witness (P.W.1) has further stated in Para-11 of his cross-examination that his brother was brought to the Police Station from in-front of the house of the Village Pradhan and he went to the police station along with his father and one Tribal, Ganesh and Chowkidar. This witness has further stated that Sub Inspector of Police has said that take the dead-body to the Police Station and thereafter his statement

was recorded. This witness has stated that he has disclosed before the Sub Inspector of Police that he has seen his brother in a small passage and has also disclosed that his brother has sustained fracture on the right hand and damage of one leg. This witness has further stated that he has also disclosed before the Police officer that his brother has been assaulted by four accused persons (by taking the names of accused person).

**13.** Learned counsel for the appellant has submitted that Bhagat Rai (P.W.8), informant and father of the victim has given his fardbeyan before the Police which is the basis of the First Information Report. In the fardbeyan, father of the victim and informant (P.W.8) has claimed that his son has disclosed after regaining consciousness, that he was assaulted by co-villagers, Lodo Kisku, Gress Kisku, Jhari Kisku, Chunu Hembram and Village Pradhan, Lakhan Marandi. If father of the victim has heard the name of five persons, as assailants there is no reason that his son or brother of the deceased, Tunua Rai (P.W.1) has only heard and taken name of four persons, as the perpetrators of crime, as disclosed by the victim. Learned counsel for the appellant has further submitted that from the evidence, it appears that the victim has not disclosed the name of any of the accused rather the prosecution witnesses, P.W.1 (Tunua Rai) and P.W.2 (Surji Devi) have disclosed the name of four persons, which is in contradiction to the fardbeyan of the informant (P.W.8- Bhagat Rai) where he has mentioned name of five persons as perpetrators of crime and subsequently while examining in court as P.W.8, Bhagat Rai has also taken the name of only four persons. The learned trial court

without considering the reliability of the statements of these prosecution witnesses, all of whom have claimed to have heard the name of the assailants from the injured, convicted the appellant on the basis of such evidence and without properly scrutinizing the same. Learned counsel for the appellant has further submitted that Surji Devi (P.W.2), mother of the deceased and wife of the informant while examining as P.W.2, has also stated a contradictory version from P.W.1 (Tunua Rai) and the fardbeyan of her husband Bhagat Rai (P.W.8). This witness (P.W.2) has stated in Para-2 of her examination-in-chief that she saw her son at the door of Lodo and at that time he was in conscious condition and disclosed that he has been assaulted by Lodo, Jhari, Gress and Chunu, but during cross-examination, this witness has stated in Para-11 that she has disclosed to the Police officer that she saw her son at the door of Lodo where after giving some hot massage, he regained his consciousness and disclosed that he has been assaulted by Lodo, Jhari, Gress and Chunu which is contradictory to the statement of P.W.1 (Tunua Rai). The evidence of investigating officer (P.W.11- Shyam Narayan) in Paras-19 and 20 of his cross-examination, contradicts the evidence of P.W.1 (Tunua Rai) and P.W.2 (Surji Devi) where the investigating officer (P.W.11- Shyam Narayan) has denied that the witness, Tunua Rai (P.W.1) has said before him that he saw his brother in the small passage, whose right hand was fractured and one leg was damaged. The Investigating officer has further stated that Surji Devi (P.W.2) has never disclosed before him that she saw her son at the door of Lodo nor has disclosed that after regaining consciousness, the injured has disclosed the names of

perpetrators of the crime, as Lodo, Gress and Chunu. Learned counsel for the appellant has further submitted that the conviction of the appellant is only on the basis of the evidence of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) who all are related and interested and are not safe to be relied upon to convict the appellant. Learned counsel for the appellant has further submitted that Dasrath Mirdha, Chowkidar of the village has been examined as P.W.7 and he has categorically stated in Para-1 of his examination-in-chief that after duty in the night of Monday and Tuesday, he returned to his house and appellant, Jhari Kisku came to his house on Tuesday at 11.00 a.m. and informed that people of his Village- Mathachak have caught a thief and as such, he should come to Mathachak. Thereafter this witness came to Mathachak at around 01.00 p.m. and saw Babu Rai lying on a cot in unconscious condition, whose right hand had sustained injury and was fractured and thereafter he asked from Babu Rai, but he was not in a position to speak. Learned counsel for the appellant has further submitted that chowkidar has not been declared hostile by the prosecution. As per the evidence of the prosecution, accused Jhari Kisku has informed the chowkidar about the thief, who was caught by the villagers and the chowkidar has also testified that at that time the injured was in unconscious condition. Learned counsel for the appellant has further submitted that Tunua Rai (P.W.1) has said, that he along with his father and a village tribal, Ganesh Baskey, (P.W.3) went towards the Police Station to inform the Police, but said Ganesh Baskey who has been examined as P.W.3, has not supported the case of prosecution and was thus, declared hostile by

the prosecution.

**14.** Learned counsel for the appellant has further submitted that Sufal Murmu has been examined as P.W.4. This witness is an inquest witness, who has proved his signature on the inquest report which has been marked as Exhibit-1. Learned counsel for the appellant has further submitted that inquest witness has also disclosed that while he was returning from Dumka, he heard that a thief has been caught in his village. Learned counsel for the appellant has further submitted that from the evidence of the prosecution witnesses, particularly, P.W.4 (Sufal Murmu) and P.W.7 (Dasrath Mirdha), it appears that victim (Babu Rai) has entered into the village for committing theft, but caught by the villagers and sustained injury while fleeing away by hitting on some hard surface and to that effect P.W.4 (Sufal Murmu) and P.W.7 (Dasrath Mirdha) have adduced the evidence, but the prosecution has not declared them hostile and there is no evidence except the so-called disclosure made by the victim after regaining consciousness, as alleged by P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) though their evidence is contradictory to each other. As such, conviction of the appellant is not based on sound material rather on the basis of conjecture and surmises which is not sustainable in the eyes of law. Learned counsel for the appellant has further submitted that P.W.5 (Habu Hembram) and P.W.6 (Churki Hembram) have been declared hostile by the prosecution. Learned counsel for the appellant has further submitted that Bhagat Rai, informant and father of the victim has been examined as P.W.8. This witness has stated that his son went to bring liquor from the '*Niche Tola*', but

did not return in the night, as it was raining. In the morning, villagers have informed through Village Pradhan that his son has been caught in '*Niche Tola*' and thereafter he went there. He saw his son in a small passage, where entire villagers were assembled and his son was kept in sitting position. At that time, his son was in conscious condition and his son has disclosed that he was assaulted by Gress Kisku, Chunu Hembram, Jhari Kisku and Lodo Kisku and has sustained injury on the face, ear and other parts of the body. His right hand was also fractured. His face was also disfigured and there was injury on the chest also, but his son has not disclosed that why the villagers/accused persons have assaulted him? Thereafter this witness has stated that he wanted to bring his son to the village, which was opposed by the villagers, as they have demanded Rs.1001/- (one thousand one rupees), as penalty. Thereafter he went to the Police Station, leaving his son there. His fardbeyan was recorded by the Police officer, he has put his signature on the fardbeyan which has already been marked as exhibit-1/1. Learned counsel for the appellant has further submitted that from perusal of the evidence of the informant (P.W.8), it appears that even though his son who has gone to bring liquor in the night, did not return to his house in the night, but in the morning also his father was not concerned about his son nor started searching his son, rather it is only after the Village Pradhan on the information of the villagers, informed him, then informant went to the '*Niche Tola*' where he saw his son in a small passage where the entire villagers had assembled and they have put a fine of Rs.1,001/- upon his son.

**15.** Learned counsel for the appellant has further submitted that from perusal of the evidence of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai), it appears that all these three witnesses have given different and contradictory description with regard to the injured. As per P.W.8 (Bhagat Rai), in his fardbeyan he saw the injured, Babu Rai lying on a cot inside the courtyard of the house of Village Pradhan in unconscious condition, while during evidence as P.W.8 he has stated that Babu Rai was found in sitting condition surrounded by villagers, on the road near house of Fagu, whereas P.W.2 (Surji Devi) has found her son lying on a cot in-front of the house of the Lodo, Village Pradhan in unconscious condition and P.W.1 (Tunua Rai) has stated that he has seen his brother lying on a cot.

Under the aforesaid circumstances, learned counsel for the appellant has submitted that the learned trial court has convicted the appellant on the basis of the testimony of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) who have claimed that victim (Babu Rai) which seems to be doubtful. Learned counsel for the appellant has further submitted that even the reason for assaulting the victim i.e. teasing the girl of a tribal community has not been proved by the prosecution by examining certain witnesses nor the decision of the Panchayati, the time of Panchayati has been disclosed by the prosecution witnesses. Learned counsel for the appellant has further submitted that from perusal of the fardbeyan, it appears that when informant tried to take his son to his house, he was stopped for Panchayati and thereafter a decision was taken regarding fine of Rs.1001/- (rupees one thousand one rupees)

against his son which was not paid by the informant and as such, the injured-son was not released by the villagers though from the evidence of P.W.8 (Bhagat Rai) while examining in the Court, he has given a different description. He says that he saw the victim and at that time, villagers have put a cost of Rs.1,001/- as fine, as such, under such vital contradiction and in absence of any cogent and consistent material, the appellant has been wrongly convicted by the learned trial court. Learned counsel for the appellant has further submitted that Dr. Sushil Marandi (P.W.9), Medical Officer who has conducted post-mortem examination upon the dead-body of the deceased (Babu Rai) has found such injuries which may cause unconsciousness or death of a person, but those injuries cannot be of such nature, where a person can initially become unconscious and subsequently regain consciousness without any medical assistance or medical treatment. As such, the prosecution evidence of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) are nothing, but an exaggeration, embellishment and improvement in the prosecution case to falsely implicate the appellants and others who are the villagers and have caught the son of the informant while committing theft. Learned counsel for the appellant has further submitted that Arjun Sharma being the Investigating officer has been examined as P.W.10 and he has submitted the charge-sheet, but he has not investigated the case. Learned counsel for the appellant has further submitted that A.S.I, Shyam Narayan (P.W.11) who has recorded fardbeyan of the informant and has investigated the case, has proved the fardbeyan recorded in his hand-writing as Exhibit-3, Formal F.I.R. as Exhibit-4 and inquest report as Exhibit-

5. This witness (P.W.11 Shyam Narayan Prasad) has categorically denied about disclosure made by P.W.1 (Tunua Rai) in Para-19 of his cross-examination and about P.W.2 (Surji Devi) in Para-20 of his cross-examination.

Learned counsel for the appellant has thus, submitted that the appellant cannot be convicted under Sections 302/34, 342/34 or 386/511/34 of the Indian Penal Code on such evidence which is not consistent and also not proved the guilt of the accused against the appellant beyond all reasonable doubt. Learned counsel for the appellant has further submitted that in absence of seizure of weapon of assault or the proof of the place of occurrence, the appellant has been wrongly convicted by the learned trial court and as such, the impugned judgment of conviction and order of sentence requires interference by this Hon'ble Court by setting aside the same.

**16.** Heard, Mr. Pankaj Kumar, learned Additional Public Prosecutor appearing for the State. Learned counsel for the State has submitted, that the impugned judgment of conviction and order of sentence is based on the materials available on record and the learned trial court has rightly convicted the appellant. Learned counsel for the State has further submitted, that son of the informant has gone to bring liquor, as some guests have arrived in his house but he did not return from the *Niche Tola* in the night because of the storm and heavy rain. In the morning when the father, mother and brother went there to search, they have found injured Babu Rai lying in a cot in the house of the Village Pradhan. The victim Babu Rai has disclosed the name of four persons as the

perpetrators of the crime, such as, Lodo Kisku, Gress Kisku, Jhari Kisku and Chunu Hembram alongwith village Pradhan, Lakhan Marandi @ Tunua who have been named as accused in the FIR. After investigation police found the complicity of five persons, as such they have been charge-sheeted and sent-up for trial. During trial one of the accused Gress Kisku has died and case against him has been dropped. Subsequently, witnesses have not adduced any evidence, so far village Pradhan Lakhan Marandi @ Tunua is concerned, as such the learned trial court has rightly acquitted the Village, Pradhan Lakhan Marandi @ Tunua from whose house the victim was recovered and also rightly convicted Lodo Kisku, Jhari Kisku and Chunu Hembrem, as the assailants. Learned counsel for the State has further submitted that these four persons are the assailants as disclosed by the victim Babu Rai before his brother, Tunua Rai (P.W.1), mother, Surji Devi (P.W.2) and Bhagat Rai (P.W.8) informant and father of the victim, there are sufficient materials for holding the appellant and others guilty under Sections 302/34, 342/34, 386/511/34 of the Indian Penal Code. As such this Court may not interfere with the findings recorded by the learned trial court and the same may be upheld and affirmed by this Court.

**17.** Heard, learned counsel for the appellant, Mr. Durga Charan Mishra and learned counsel for the State, Mr. Pankaj Kumar, Additional Public Prosecutor and perused the materials brought on records i.e. first informant report, framing of charge, the evidence of eleven prosecution witnesses, five prosecution exhibits, the statement of the appellant recorded under Section 313 Cr.P.C

and impugned judgment of conviction and order of sentence. While re-appreciating the prosecution evidence, this Court has scanned the evidence of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) who are brother, mother and father of the victim, Babu Rai. From perusal of the evidence of three witnesses, this Court has reason to believe that there are vital contradictions in the evidence of these prosecution witnesses P.W.1, Tunua Rai has said that he went to search his brother and found his brother lying in small passage in an injured condition. He disclosed that he was assaulted by four accused persons namely, Lodo Kisku, Gress Kisku, Jhari Kisku and Chunu Hembrem, but his mother, Surji Devi (P.W.2) has found her son in an injured condition in front of the house of Village Pradhan, where he found her son to be in an unconscious condition but after giving some hot massage, he regained his consciousness and disclosed the name of four persons. Both P.W.1 and P.W.2 are never claiming that in their joint presence the victim has disclosed about the occurrence, meaning thereby P.W.1 (Tunua Rai) has learnt from the injured at a different time then P.W.2 (Surji Devi) who has learnt from the victim at a different time. When the evidence of P.W.1 and P.W.2 are compared with the evidence of P.W.8 (Bhagat Rai), it appears that there are vital contradictions in their evidence. The informant Bhagat Rai (P.W.8) has categorically stated that he found his son in the passage in sitting condition and he disclosed the name of four persons, but he was not allowed by the villagers to bring the victim to his house as the villagers had convened a panchayati and in the panchayati Rs.1001/- was put as a fine, which he has not paid and thereafter he went to the police

station and informed the police. From perusal of the evidence of P.W.7 (Dasarat Mirdha) and P.W.4 (Sufal Murmu), it appears that villagers have caught one thief and thereafter Jhari Kisku has informed the village chowkidar at 11:00 A.M. who went there and saw the victim in an unconscious condition and informed the police. Thereafter A.S.I. came and recorded his fardbeyan. As per the evidence of P.W.1 (Tunua Rai), this witness has stated that he alongwith his father and one Tribal, Ganesh Baskey and chowkidar went to the police station. This fact has not been supported by the prosecution witnesses namely, P.W.3 (Ganesh Baskey, the Tribal), who has been declared hostile by the prosecution. From perusal of the evidence of P.W.8 (Bhagat Rai), it appears that he was informed by the Village Pradhan about his son, who was caught by the villagers while he was trying to commit theft in the *Niche Tola*. The entire villagers of the *Niche Tola* have assembled and kept the son of the informant in a small passage in a sitting position.

Under the aforesaid circumstances, it appears that evidence of P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) are not consistent rather their evidence are contradictory and these vital contradictions in the prosecution evidence goes to the root of the prosecution case. As per the evidence of P.W.7 (Dasarat Mirdha) and P.W.4 (Sufal Murmu), who are chowkidar and inquest witness, a thief was caught by the villagers and though these two witnesses have given a contradictory evidence from the prosecution case, but prosecution has not declared them hostile.

**18.** From perusal of the post-mortem report, which has been brought on record as Exhibit-2, it appears that victim has sustained

serious grievous injury on his head. There was diffused swelling over the left parietal region of skull and on dissection there was depressed fracture of the left parietal bone. On further dissection connected brain and meninges found lacerated and collection of blood was found in the cranium. These injuries are such that an unconscious person cannot be expected to regain his consciousness without any medical aid. As such, theory propounded by P.W.1 (Tunua Rai), P.W.2 (Surji Devi) and P.W.8 (Bhagat Rai) that victim has regained consciousness and thereafter disclosed the name of the accused persons is not fit to be accepted by this Court. Moreso in view of evidence of P.W.7, Dashrath Mirdha, Chowkidar, who found the victim not in a position to speak. Moreover, evidence of all these three witnesses are contradictory to each other and no other witnesses have been examined in this case, to prove the prosecution case of assault made by these accused persons and not by other villagers nor motive for assault has been proved by the prosecution by examining or adducing such evidence.

Under the aforesaid circumstances, considering the materials brought on record as discussed above, we are of the opinion that the impugned judgment of conviction and order of sentence warrant interference from this Court.

Considering the discussions as made above, this Court is of the opinion that prosecution has miserably failed to prove the charge against the appellant. As such, the appellant is acquitted of the charge and conviction under Sections 302/34, 342/34, 386/511/34 of the Indian Penal Code.

Accordingly, the judgment of conviction dated 22.11.1995 and

order of sentence dated 29.11.1995, passed by learned 1<sup>st</sup> Additional Sessions Judge, Dumka in Sessions Case No. 114 of 1994 / 37 of 1994, is hereby set aside.

**19.** In the result, the present criminal appeal is allowed.

**20.** The appellant, who is on bail, is discharged from liability of his bail bonds.

**21.** Let the lower court record be sent along with a copy of this judgment to the court concerned, at once for necessary action.

**(Aparesh Kumar Singh, J.)**

**(Kailash Prasad Deo, J.)**