IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.111 of 1996

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1. Rambilash Mahto, s/o- Bhagwat Mahto
2. Brahmdeo Mahto, s/o- Ramdeo Mahto
3. Shiv Kumar Mahto, s/o- Bhagwat Mahto
4. Pheku Mahto, s/o- Bhagwat Mahto
5. Ram Swarath Matho, s/o- Madhukar Mahto
6. Harey Ram Mahto, s/o- Shambhu Mahto
7. Narayan Mahto, s/o- Baleshwar Mahto

(**Appeal against appellant Nos. 5 and 7 stands abated vide order 22.08.2023**)

Nos. 1 to 4 and 7 are resident of village- Dumra Tola Chhota,

Nos. 5 and 6 are resident of village- Bhaduar, P.S.- Andhara Tharhi, District- Madhubani.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 116 of 1996

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Ramashis Yadav, son of Late Maujelal Yadav, resident of village Motipur, P.S. - Jhanjharpur, District- Madhubani.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :

(In CRIMINAL APPEAL (DB) No. 111 of 1996)

For the Appellant/s : Mr. Amish Kumar, Advocate
Mr. Shankar Kumar Choudhary,
Mr. K.C. Jha, Advocate
Mr. P. Thakur, Advocate
Mr. Rajan Prakash, Advocate
Mr. Lal Babu Singh, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In CRIMINAL APPEAL (DB) No. 116 of 1996)

For the Appellant/s : Mr. Amish Kumar, Advocate
Mr. Shankar Kumar Choudhary,
Mr. K.C. Jha, Advocate
Mr. P. Thakur, Advocate
Mr. Rajan Prakash, Advocate
Mr. Lal Babu Singh, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 04-09-2023

This criminal appeal has already been abated against the appellant Nos. 5 and 7 of Cr. Appeal (DB) No. 111 of 1996, as both of them died during pendency of this appeal.

2. Both the criminal appeals have been filed in the year 1996 i.e. 27 years ago. They arise out of common judgment of conviction and order of sentence dated 01.03.1996. Therefore, after being heard together, they are being disposed of by a common judgment.

3. By the judgment of conviction and order of sentence dated 01.03.1996, passed by Sri Sohailur Rahman, learned Sessions Judge, Madhubani in S.T. No. 160/81, arising out of Andhratharhi P.S. case No. 6/80, G.R. No. 519/80 the appellants, namely, namely Ram Bilas Mahto, Brahmdeo Mahto, Shiv Kumar Mahto and Feku Mahto (appellant Nos. 1, 2, 3 and 4 respectively) in Cr. Appeal (DB) No. 111 of 1996) have been convicted under Section 147 of the Indian Penal Code (for short 'I.P.C.) and appellants Ramashis Yadav (appellant in Cr. Appeal (DB) No. 116 of 1996) and Harey Ram Mahto (appellant No. 6 in Cr. Appeal (DB) No. 111 of 1996) have been convicted under

Section 148 of the I.P.C. Further appellant Ramashis Yadav has been convicted under Section 302/34 and the appellants Ram Bilas Mahto, Brahmdeo Mahto, Shiv Kumar Mahto, Pheku Mahto and Harey Ram Mahto have been convicted under Section 302/149 of I.P.C. Further appellant Ramashis Yadav has been convicted under Section 324 of the I.P.C. Appellants Ram Bilas Mahto, Brahmdeo Mahto, Shiv Kumar Mahto, Pheku Mahto have also been convicted under Sections 323 as also under Sections 325/34 of the I.P.C. Appellant Ramashis Yadav has been sentenced to undergo rigorous imprisonment for life under Section 302/34 of the I.P.C. and other appellants viz. Ram Bilas Mahto, Brahmdeo Mahto, Shiv Kumar Mahto, Pheku Mahto, Harey Ram Mahto have been sentenced to undergo rigorous imprisonment for life under Section 302/149 of the I.P.C. No separate sentence was awarded with regard to the other offences.

4. The prosecution case, as per the fardbeyan of the informant, namely, Harey Ram Mahto is that on 29.08.1980 at about 6 a.m. while the informant was going to ease himself towards the south of village and when he reached near the house of Ramsharan Yadav, he saw that five ploughs were being run on his land bearing S.P. No. 1391, 1394 and 1395 on which he had sown paddy seedlings. The informant further stated that seven of

the accused persons were standing on the ridge. When the informant reached near the field, he found Ramdeo Mahto, Bhagwat Mahto, Ram Bilas Mahto, Brahmdeo Mahto and Jagdeo (since deceased) were present there and they were getting the field ploughed. The informant stated that they had already ploughed about 6 kathas of land. On seeing the informant, Shiv Kumar Mahto, and Bhagwant Mahto (since deceased), armed with garasa and lathi respectively, Palat (deceased) and Hare Ram armed with garasa and Narayan armed with lathi were standing on the adjacent field. The informant protested to Ramdeo and Bhagwat as to why they were getting his crop damaged upon which they replied that the land belonged to them and asked him to go from there otherwise he would be killed. In the meantime, the other accused persons chased him. The informant ran away from the place but at some distance, he tumbled down. The informant further stated that accused Ramdeo Mahto came there from behind and assaulted with a garasa on his head. According to the prosecution, Domi Mahto and Mahanth Mahto (deceased), who were working in the nearby field, rushed to rescue the informant. Pheku and Domi Mahto also came to rescue the informant and they laid themselves down on the body of the informant. It is further stated that in the meantime all the other accused persons

also rushed to that place. According to the prosecution, Domi Yadav was assaulted by Ram Swarth with garasa and Bhagwat by bhala. The other accused persons also assaulted Domi Yadav with lathi, bhala and garasa. It is further stated that Mahanth Mahto was assaulted by Ramdeo, Bhagwat Mahto, Rambilas Mahto, Brahmdeo Mahto, Jagdeo, Shiv Kumar, Pheku Mahto and Narayan Mahto. It is stated that on hearing the hulla, Domi Mahto, Udai Chandra Mahto, Fekan Yadav Fusiyahi Paswan came who were also assaulted by the accused persons. The informant stated that Jhauli Yadav, Ram Awtar Yadav, Sagar Paswan have witnessed the occurrence. When the villagers arrived at the place of occurrence, the accused persons fled away. The villagers took the injured to the police station.

5. On the basis of fardbeyan of informant, Andhratharhi P.S. case No. 6/80 was instituted. The police after investigation submitted charge-sheet against the accused persons. The cognizance of the offence was taken and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellants on which they pleaded not guilty and claimed to be tried.

6. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as

thirteen witnesses, namely, PW1 Uday Chandra Mahto, PW2 Ramautar Yadav, PW3 Sagar Paswan, PW4 Fekan Yadav, PW5 Domi Mahto, son of Gidhan Mahto, PW6 Domi Mahto son of Laukhai Mahto, PW7 Choudhary Mahto, PW8 Harey Ram Mahto (informant), PW9 Rameshwar Prasad Yadav, PW10 Shiv Ram Mahto, PW11 Dr. V.S. Verma, PW12 Dr. Uday Chandra Jha, PW13 Abhiram Mahto. The prosecution has also produced exhibits namely Ext. 1 -signature of Domi Yadav on fardbeyan, Ext. 2 to 2/2 Kewalas executed in favour of Choudhary Mahto, Ext. 3 to 3/9 Rent receipts, Ext. 4 post mortem report, Ext. .5 to 5/6 injury report, Ext. 6 affidavit dated 7.7.79, Ext. 7 survey purchas, Ext. 8 certified copy of order of SDM dated 10.11.80 in M.R. Case No. 533/80, Ext. 8/1 certified copy of the order of SDM dated 4.1.74 in M.R. Case No. 579/73, Ext. 9 certified copy of order passed by Anchaladhikari dt. 19.8.88. Ext. 10 certified copy of judgment passed in C.R. No. 266/83 passed by Sri R.K. Srivastava, J.M., Jhanjharpur at Madhubani, Ext. 11 certified copy of order of ADM dated 25.7.79 passed in Dakhil Kharij Case No. 22/78-79. The defence has produced two witnesses in its support viz. D.W. 1 Prem Lal Yadav and DW2 Manikant Choudhary. The defence has also produced two documents viz. Ext. A -Kewala executed by Bihari Paswan in favour of Rambilash Paswan on

7.4.71 and Ext. B- Khatiyan. Thereafter, the statements of the appellants were recorded under section 313 of the Cr.P.C and after conclusion of the trial, the learned trial Court convicted the appellants in the manner stated above.

7. Learned counsel for the appellants submits that the judgment of conviction rendered by the learned trial Court suffers from several infirmities and the learned trial Court has overlooked relevant points of consideration which fall in favour of the appellants. Learned counsel for the appellants has drawn the attention of this Court to the fact that the accused persons have not been afforded a fair opportunity to defend their case, particularly concerning their flawed examination under Section 313 of the Cr.P.C., which has caused significant prejudice to the appellants' case and, as a result, has tainted the trial. Another argument advanced by learned counsel for the appellants is that the learned trial court has also failed to appreciate that during trial, the prosecution has not produced the Investigating Officer of the case for examination as a prosecution witness and no explanation in this regard has been put forth, which has caused prejudice to the defence of the appellants. Therefore, it has been argued that on these scores the judgment of conviction, assailed in the present

appeal, be set aside, the appellants be acquitted of the charges and set free from custody.

8. On the other hand, learned A.P.P. appearing for the State has rebutted the arguments advanced by learned counsel for the appellants. Learned A.P.P. has submitted that the judgment of conviction and order of sentence under challenge requires no interference as the prosecution has been able to prove its case beyond all reasonable doubts. It has been submitted that objections regarding omissions or defects in recording statements under Section 313 of the Cr.P.C. must be raised at the earliest opportunity. The fact that they are being raised now itself shows that no prejudice has been caused. Further, it has been argued that non-examination of the Investigating Officer would per se not make the appellants liable for acquittal and there has been no demonstration of any prejudice which has been caused to the appellants due to non-examination of the Investigating Officer. From the evidence, which has been adduced by the prosecution, the guilt of the appellants is satisfactorily proved and there is no infirmity in the judgment of conviction and order of sentence rendered by the Trial Court.

9. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination

of the entire material available on the record, the following issues arise for consideration in the present appeal:

I. Whether the defective examination under section 313 of Cr.P.C. really prejudiced the accused persons in conveying them as to what was required by them to be explained, thus causing serious prejudice to the defence?

II. Whether the non-examination of Investigating Officer by the prosecution has resulted in prejudice to the defence of the appellants?

10. With reference to the first issue as formulated above, we have given our anxious consideration to the examination of the accused persons under Section 313 of Cr.P.C. It is trite law that the examination of accused under this section should not be held in a perfunctory manner. The accused must be afforded reasonable opportunity to explain the circumstances appearing against him. Therefore, while examining the accused, trial Court should be mindful of the object underlying this provision. The Hon'ble Supreme Court, through a series of judgments, has consistently underscored the significance of Section 313 of the Cr.P.C., which grants accused individuals a valuable right to establish their innocence. In the case of ***Reena Hazarika v. State***

of Assam, reported in ***(2019) 13 SCC 289***, the Hon'ble Apex Court has held the following:

> *"19. Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC...."*

Further, in the case of ***Jai Prakash Tiwari vs State of Madhya Pradesh*** reported in ***2022 SCC OnLine SC 966,*** the Hon'ble Supreme Court has observed the following:

> *"20. This Court in the case of Satbir Singh v. State of Haryana, (2021) 6 SCC 1, while emphasising upon the significance of Section 313 CrPC, has delineated the duty of the trial Court and held thus:*
>
> *22. It is a matter of grave concern that, often, trial courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice — "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the court to question the accused fairly, with care and caution. The court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the*

accused to prepare his defence, since the inception of the trial, with due caution…"

(emphasis supplied)

26. The purpose of Section 313 CrPC is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial. A reasonable opportunity entails putting all the adverse evidences in the form of questions so as to give an opportunity to the accused to articulate his defence and give his explanation.

27. If all the circumstances are bundled together and a single opportunity is provided to the accused to explain himself, he may not able to put forth a rational and intelligible explanation. Such, exercises which defeats fair opportunity are nothing but empty formality. Non-fulfilment of the true spirit of Section 313 may ultimately cause grave prejudice to the accused and the Court may not have the benefit of all the necessary facts and circumstances to arrive at a fair conclusion."

Now, we will apply the principles enunciated in the aforementioned legal precedents, to the facts of the present case. Learned counsel for the appellants contended that the charge framed by the learned Court below was improper and defective, and even worse, when the Court was examining the appellants. Before we address this contention, it is imperative for us to review the charges framed under section 302/34 and 302/149 I.P.C. against the appellants by the learned court below.

CHARGE UNDER SECTION 302/34 I.P.C.

"That you, on or about the 29th day of August, 1980 at village- Dumra, tola Dhalia, P.S.- Andhratharhi, within district- Madhubani, in furtherance of common intention did commit

murder by intentionally or knowingly causing the death of Mahant Mahto."

CHARGE UNDER SECTION 302/149 I.P.C.

"That you, on or about the 29th day of August, 1980 at village- Dumra, tola Dhalia, P.S.- Andhratharhi, within district- Madhubani, were members of an unlawful assembly, and in the prosecution the common object of which, viz in assaulting Hareram Mahto (the informant), Dovi Mahto S/o Lukhai Mahto, Fekan Yadav, Udai Chandra Mahto, Kusiahi Paswan, Dovi Mahto S/o Girdhari Mahto, and to cause the murder of Mahant Mahto, accused Ramdeo Mahto, Ramasis Yadav and Bhagwat Mahto who were members of the unlawful assembly, committed the murder of the said Mahant Mahto and you are thereby under section 149 I.P.C. guilty of causing the said offence of murder punishable under section 302 I.P.C."

11. As is evident from the reading of the above indicated charges that there is conspicuous absence of any weapons with which the accused persons had intentionally and knowingly caused the death of Mahant Mahto and assaulted others. Thus, charges under sections 302/34, 302/149, 323, 325/34 and 147 of the Penal Code fail to clarify whether the appellants were accused of using the same weapon, different weapons, or no

weapon at all in committing the offense. Concerning the other charges, namely those under section 324 I.P.C. and section 148 I.P.C., they mention the use of *Gadasa* and *Bhala* as weapons. However, on turning our attention to the questions posed to the appellants during their examination under Section 313 of the Cr.P.C. by the learned trial Court, we have found that the statements of the appellants were simultaneously recorded, and the same set of questions were posed to all the appellants. The whole of the questions put to the accused Ramashis Yadav is extracted herein below:

EXAMINATION OF ACCUSED RAMASHIS YADAV

प्रश्न- गवाहों का बयान है की दिनांक 29-08-80 को आप अन्य मुदालयों के साथ नाजायज मजमा बनाकर दंगा फसाद किया तथा महन्थ महतो की हत्या कर डाली और हरे राम महतो , डोमी महतो, फेकन यादव इत्यादि को मारा पीटा | आपको इस संबंध में कुछ कहना है ?

उत्तर- नहीं

प्रश्न- सफाई में आपको कुछ कहना है?

उत्तर- लिखकर देंगे |

12. From the analysis of the questions posed, it appears that the suggestions which have been put forth show a general and omnibus allegation on the appellants in regard to the commission of offence and no suggestions have been put to the appellants with respect to their individual act in the commission of offence for which they have been charged and convicted. Additionally,

the questions completely omit any mention of the weapons the appellants were purportedly involved with in committing the offenses. Upon the conjoint reading of the charges and the questions posed under section 313 Cr.P.C., it is sufficiently clear that neither the charges under sections 302/34, 302/149, 323, 325/34 and 147 of the Penal Code nor the questions put forth in examination under section 313 Cr.P.C. specify the weapons used by each of the appellants. Secondly, the charges under section 148 and section 324 of the penal code did specify the *Gadasa* and *Bhala* to be the only weapons used, but the question put forth in the examination under section 313 Cr.P.C. make no mention of any assault weapons. Thus, it could never be said that appellants were sufficiently informed about what they were required to explain regarding the circumstances that could have appeared against each of them. Hence, the questions framed by the trial court do not serve the intendment of Section 313 of the Code. The coordinate bench of this court in ***Baleshwar Sah vs The State of Bihar*** reported in ***2010 SCC OnLine Pat 139*** has held in paragraph 16 of the judgment as follows:

> *"16. We have already extracted the description of charge no. 1 and whole of question no. 2 put to appellants Baleshwar Sah during his examination under Section 313 Cr. P.C. We could, in one line, say that the two did not go hand in hand as was required by the Supreme Court in the case of Hate Singh Bhagat*

Singh (Supra). The charge, firstly, does not specify that appellants Baleshwart Sah had intentionally and knowingly committed the murder of Kalhi Devi by assaulting her with Dabia. The charge rather reads as if Dabia had been used by all the four appellants and thereby Kalhi Devi had been murdered. As against the above, when appellants Baleshwar Sah or other appellants were being examined under Section 313 Cr. P.C. question no. 2 was intentionally put to each of them and as may appear from the extracted question already quoted above, that the weapon Dabia did not appear in that question rather it was lathi and bhala which were the weapons said to have caused the murder of Kalhi Devi which was put to appellants Baleshwar Sah as being used in causing her death. The question was completely in infraction of the charge framed against the accused generally and appellants Baleshwar Sah particularly. We do not have any hesitation in upholding the contention of Shri Kumar that the whole exercise was not only misconceived but completely in arrogance of the decision of the Supreme Court. It could never be said that it was sufficient for the appellants to know clearly as to what they were required to explain as to the circumstances which could have appeared against each of them or any of them on evidence adduced by the prosecution. The result of the faulty examination under Section 313 Cr. P.C. could be that the accused could be acquitted. The Court may also record that the trail has been vitiated because the examination of the accused at the end of the trial really prejudiced the accused in conveying to him or to them as to what was required by them to be explained. The above defect, in our opinion, entitles the appellants to acquittal in spite of the fact that the evidence on record appears complete and acceptable."

Even if we assume that the defect or irregularity could be rectified, the crucial consideration arises: Can the appellants-

accused be reasonably expected to elucidate the mentioned circumstance at this juncture? Over 42 years have elapsed since the incident occurred. Given the significant passage of time, it would be unjust to compel the appellants, at this advanced stage, to revisit the case and provide further statements under Section 313 of the Cr.P.C. Considering the specifics of the case, it is unreasonable to demand answers pertaining to an event that transpired 42 years ago. Therefore, in the light of law laid down by the Hon'ble Supreme Court and from appreciation of evidence on record, this Court has come to the conclusion that the appellants have been denied a fair opportunity to defend their case and thereby a prejudice has been caused to the appellants, that would be no doubt a serious infirmity.

Accordingly, the issue no. I is decided in ***affirmative***.

13. So far, the second issue is concerned, it is a matter of record that the Investigating Officer of the present case has not been examined. It is a trite principle of law that mere non-examination of the Investigating Officer would not entail any benefit to the accused unless it is shown that such non-examination has caused prejudice to the case of the accused. However, in the facts of the present case, none of the prosecution witnesses have stated in their depositions that the Investigating

Officer (I.O.) had inspected the place of occurrence. Remarkably, the judgment records at para-6 that the I.O. did the inspect the place of occurrence and recorded the statement of witnesses. Further, PW 5 in his deposition has stated that blood was present at the scene of incident. Thus, it becomes relevant to examine the I.O. of the case to elicit the incriminating material, which has been gathered against the appellants during investigation and the mode thereof. Also, during the trial, prosecution witnesses admitted that the appellants had filed a counter case relating to the same occurrence against them. However, they consistently denied that the appellants had suffered any injuries during the occurrence. Thus, the examination of the Investigating Officer was necessary to ascertain the truthfulness of the incident, as he could have provided crucial information regarding the details of the counter-case and whether the appellants sustained injuries during the same transaction. Further, Due to non-examination, the appellants have also been deprived of the opportunity to bring on record the material contradictions and improvement made by the witnesses in their depositions. Therefore, in such circumstances, the examination of the Investigating Officer becomes important as he would have been the most competent witness to throw light on the manner in which the investigation

was carried out and to explain the entire gamut of evidence brought on record. However, the prosecution has, without any explanation, not examined the Investigating Officer of this case which has caused prejudice to the case of the defence and is fatal to the case of prosecution. At this stage we would gainfully rely on the case of ***State Of Karnataka versus Bhaskar Kushali Kotharkar And Ors., (Cr. Appeal no. – 498 of 1998)*** wherein the Hon'ble Supreme Court while highlighting the importance of examination of Investigating Officer, observed:

> *"It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or if mere is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C."*

We also put reliance on the decision rendered by Hon'ble Supreme Court in the case of ***Ravishwar Manjhi v. State of Jharkhand,*** reported in ***(2008) 16 SCC 561,*** wherein the Hon'ble Apex Court in paragraph 27 has held as follows:

> *"27. The investigating officer in a case of this nature should have been examined. His examination by the prosecution was necessary to show that there had been a fair investigation. Unfortunately, even no site plan was prepared. There is nothing on record to show as to*

> *the exact place where the occurrence had taken place. It is stated that the house of the parties is divided by a road. If that be so, it was all the more necessary to pinpoint the exact place of occurrence to ascertain who was the aggressor."*

Therefore, applying the aforesaid proposition of law as held by the Hon'ble Supreme Court in the given facts of the case, we reach to the conclusion that in the present case, the non-examination of the Investigating Officer undeniably prejudiced the defence of the appellants, as the actual place of occurrence remains unverified, and the appellants have been deprived of the opportunity to challenge the credibility of the prosecution witnesses through questioning of the Investigating Officer. Therefore, in our considered opinion, the failure to examine the Investigating Officer in this case constitutes a significant flaw that has resulted in prejudice to the case.

Accordingly, the Issue no. II is decided in ***affirmative***.

14. In view of the findings arrived at on the issues formulated above, the present criminal appeal is allowed and the judgment of conviction and order of sentence dated 01.03.1996 passed by Sri Sohailur Rahman, learned Sessions Judge, Madhubani in S.T. No. 160/81, arising out of Andhratharhi P.S. case No. 6/80, G.R. No. 519/80, are set aside. Since the appellants, namely, Ram Bilas Mahto, Brahmdeo Mahto, Shiv Kumar Mahto, Feku Mahto and Harey Ram Mahto (appellant

Nos. 1, 2, 3, 4 and 6 respectively) in Cr. Appeal (DB) No. 111 of 1996) and Ramashis Yadav (appellant in Cr. Appeal (DB) No. 116 of 1996) are on bail, they are discharged from the liabilities of their respective bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

AFR/NAFR	NAFR
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