

(2017) 01 PAT CK 0018

In the Patna High Court

Case No : Criminal Appeal (DB) No. 342 of 2011, (Arising out of P.S. Case No.-03 Year-2010 Thana-Banmankhi District-Purnia)

Khajanchi Rishi

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 27-01-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2017) 2 ECRC 485

Hon'ble Judges : Mr. Kishore Kumar Mandal and Mr. Sanjay Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Ajit Ranjan Kumar and Mr. Neeraj Kumar @ Sanidh, Advocates, for the Appellants; Mr. S.C. Mishra, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

Mr. Kishore Kumar Mandal, J. (CAV) - The two appellants herein are father and son respectively. They were charged for having committed murder of the wife of the informant P.W.7 on the relevant date in furtherance of common intention. At the trial, the charges were found proved and they were convicted under Section 302/34 of the IPC and sentenced to undergo rigorous imprisonment for life vide judgment dated 24.02.2011 and the order of sentence dated 26.02.2011 passed by learned Additional Sessions Judge, Fast Track Court No.-IV, Purnea in Sessions Trial No. 461 of 2010/Trial No. 49 of 2010.

2. The aforesaid trial arose out of Banmankhi P.S. Case No. 03 of 2010 registered on 13.01.2010 at 2.00 P.M. by the Officer-in-Charge of Banmankhi police station. The fardbeyan was lodged by the husband of the victim, namely, Mahant Rishi (P.W.7) on 13.01.2010 at about 2.00 P.M alleging that on the date of occurrence he came home from the field and found his own brother and his son (appellants herein) engaged in exchange of abuses/hot words with his wife (deceased.) Appellant no.1 was accusing her as "Dian" who had practised witchcraft as a result thereof, the wife of appellant no.2 had fallen ill/was ailing. The same was

being retorted by the victim. Unrelenting accuseds, started grappling with the deceased. This was protested by the informant where after they also started abusing him and pushed him aside and continued scuffling with the deceased and in the process, the appellant no.1 Khajanchi Rishi who was armed with Kulhari (axe) inflicted one blow on her which landed on the head of the victim. On receiving the assault, she fell down and later succumbed to the injury. Upon seeing that the victim had fallen down, both the appellants fled from the place of occurrence, concealed the weapon and escaped from the house. It is alleged specifically that both the accuseds and the informant being close relatives reside side by side. On hulla, the witnesses arrived at the place of occurrence to whom the entire episode was narrated. Upon recording the fardbeyan at the place of occurrence, a formal FIR (Ext-9) was drawn by the SHO and investigation was assigned to PW-9. As the prosecution case, further develops, the two appellants were soon apprehended by the villagers from the nearby place and the police went to the said place and arrested them. A search was carried of the house of the appellants wherefrom the axe (Kulhari) containing blood stained marks was recovered and seized under a seizure memo (Ext-8). The blood stained soil from the place of occurrence was also collected by the I.O. under a seizure memo (Ext-7). The inquest report was drawn of the dead body (Ext-7) where after, the Investigating Officer dispatched the dead body for postmortem examination which was conducted by Dr. Indra Narayan (PW-8) who submitted the P.M. Report (Ext-4). The doctor found the following ante-mortem injuries on the person of the deceased :-

(i) One sharp cut wound over the back of head 3?"x 1?" x leading the scalp cavity. No other injuries were detected over her body. Migor morfic were present in all four limbs.

On dissection-Head and neck bones-sharp cut wound of the occipital bone corresponding of the brain and meninges with lacerations. Skull cavity contained blood.

Chest-bones normal, lungs pale, heart-pale and both chambers empty.

Abdomen-liver, spleen and kidney-pale, stomach contains semi digested rice etc. Intestine contains foul and smelling gasses and faeces. Urinary bladder empty. Uterus normal. Time elapsed since death within 24 hours.

3. After recording the statements of the other witnesses and finding the case true against the accuseds, the Investigating Officer submitted the charge-sheet whereupon cognizance was taken and the case was later committed to the Court of Sessions for trial. The same was ultimately placed on the file of the learned trial Judge who formally framed the charges and read over and explained to the appellants to which they pleaded not guilty and claimed to be tried. The defence of the appellants was their false implication on account of previous land dispute.

4. As many as nine witnesses have been examined by the prosecution. PW-1 Randhir Rishi Deo, PW-2 Leela Devi, PW-3 Jhunia Devi, PW-4 Bhola Rishi, PW-5

Bikram Rishi and PW-6 Mahanth Rishi Deo are relatives of the informant. They have supported the prosecution case as hearsay witnesses. Their evidence also indicates the recovery of the Kulhari (axe) from the house of the appellants and arrest of both the appellants soon after the occurrence. PW-7 deposed as the eye witness. He is also the maker of the fardbeyan. On critically analysing their evidence, the trial Court found the appellants guilty of the charges, and convicted in the manner stated above.

5. Heard Mr. Ajit Ranjan Kumar, for the appellants and Mr. S.C. Mishra, APP for the State.

6. The judgment impugned in the case has been assailed on the ground that except PW-7, no other witness produced at the trial has supported the prosecution case as an eye witness to the occurrence. There is no support to the prosecution case by independent witnesses. The prosecution has made a discernable improvement in the case during trial in order to indicate active participation of appellant no.2 in the commission of crime. It is further submitted that the conviction recorded against the appellants is contrary to the evidence on record. The prosecution has not been able to prove the case beyond shadow of reasonable doubts. It has also been strenuously argued that even if the case put by the prosecution during the trial is held acceptable proving the guilt of the appellants their conviction under Section 302/34 of the IPC would not be sustainable in law. On scanning the relevant evidence, it would appear that actually and in fact admittedly axe ("Kulhari") blow was not repeated by the appellant no.1. The circumstances preceding the actual assault clearly discernible from record would show that the appellants did not intend to commit murder of the victim.

7. Mr. S.C. Mishra, in contra, submits that the judgment of conviction recorded against the appellants is based on the correct appreciation of evidence on record which proved the guilt of the appellants. The appellants have not been able to discredit the ocular evidence of PW-7 who is consistent and flawless so far as the time, place and manner of occurrence is concerned. His evidence in the light of the objective finding of the doctor clearly establish the implication of the appellants in the crime. The attending circumstances proved at the trial unequivocally prove the guilt of the appellants. From the evidence of PWs.3, 4 and 5, it shall appear that the weapon of assault was immediately recovered from the house of the appellants which was produced at the trial by the prosecution as Material Ext-I.

8. In the light of the submission of the parties, we proceed to carefully scan the evidence on record. On going through the evidence of PW-8 Dr. Indra Narayan, we have no manner of doubt that it was a case of homicide as owing to the injury caused by the sharp cutting weapon sustained by the deceased, which was ante-mortem in nature, the death had caused. We further find from his evidence that solitary injury caused by the sharp cutting weapon was found on the head of the deceased which was found leading to sculp cavity. The doctor did not find

fracture of occipital bone. In the cross-examination, the doctor opined that the injury was caused by sharp cutting heavy weapon.

9. Adverting to the evidence of PW-7, we find that this witness in his deposition has convincingly supported the prosecution case. He has deposed that while he was at his house, the exchange of hot words/abuses had started between the deceased and the appellants who were at their roof top. Immediately thereafter they entered into the courtyard of the house and started scuffling with the victim which was being seriously retorted by her. PW-7 tried to intervene but was pushed aside by the appellants and they continued with the exchange of abuses/blames and hot words. In the meantime, the appellant no.2 caught the deceased where after appellant no.1 who was armed with axe inflicted one blow on the victim which hit on the head of the deceased as a result of which, she dropped in the courtyard (Osara) and died. His evidence read with the evidence of the I.O. (PW-9) and the evidence of other witnesses establish that he was present at the place of occurrence and had seen the actual assault. It has vehemently been argued on behalf of the appellants, while criticizing his evidence, that the specific overt-act assigned to the appellant no.2 during his deposition was not stated or alleged by the informant in the fardbeyan (Ext-3). Maker of the fardbeyan can be discredited by referring to his statement made in the fardbeyan. The submission made on behalf of the appellants has some force. His deposition, to that effect is an improvement and the said improvement made by him at the trial may not be fully reliable. But on this count, the entire evidence of this witness who is the husband of the victim and not expected to spare the real culprits would not be brushed aside. His evidence, in rest part, seems unimpeachable.

10. PW-3 is the daughter-in-law of the deceased. During relevant date and time, she was at her house. On going through her entire deposition, it is found that she has not actually seen the actual assault on the deceased but she immediately came out from her room on the "Osara" after the assault was made and supported the other aspects which prove presence of the appellants in the house on the relevant date and time and their retreat therefrom after the assault was made on the victim. Her evidence therefore lends full support to the prosecution case. PW-1 Randhir Rishi Deo, PW-2 Leela Devi, PW-4 Bhola Rishi, PW-5 Bikram Rishi and PW-6 Birju Kumar Rishi have admitted that they are not the eye witness to the occurrence but reached the place of occurrence soon after the commission of the crime. They have narrated the events which took place immediately thereafter including arrest of the two appellants from the nearby place and recovery of the weapon of assault containing blood stain marks from the house of the appellants. The I.O. (PW-9) in his deposition has explained the entire circumstances which attended to the case soon after the actual assault. On a careful evaluation of the evidence on record, we find that the prosecution is able to prove the charge beyond reasonable doubts against the appellants that on the relevant date and time they entered into the courtyard of the informant, involved themselves in quarrel with the victim which continued for some time and thereafter appellant no.1 inflicted Kulhari blow which hit the deceased on her

head as a result thereof, she died. Accepting the submission of the counsel of the appellants, we are inclined further to hold that the over-act of holding the victim by appellant no.2 while the appellant no.1 assaulted her, would not be considered as fully established. However, presence of both the appellants at the place of occurrence on the relevant date and time of occurrence and engaged in exchange of hot-words/abuses followed by assault by means of Kulhari by appellant no.1 on the victim has been proved beyond any doubt.

11. This takes us to the second submission of the appellants which has been seriously canvassed based on the proved facts particularly the nature of injury sustained by the deceased/victim and at the trial the attending circumstances preceding thereto demonstrated at the trial. Whether the appellants, on the basis of the evidence on record, can be held guilty under Sections 302/34 of the IPC or not ?

12. PW-8, the doctor, stated in his evidence that one sharp cut injury on the occipital part of the victim leading to scalp cavity was found. He further specifically opined that the said injury was caused by sharp cutting heavy weapon. The postmortem report (Ext-4) supports his evidence. From the evidence of the prosecution witnesses particularly, the informant, PW-7, it is found that before actual assault was made the appellants were involved in exchange of abuses/hot words blaming the deceased. Such verbal duo started when both the appellants were at their roof top which, as per the prosecution case, is adjacent to the house of the informant. Subsequently, they came down and entered into the Angan (courtyard) of the informant and continued with the scuffle in which allegations/blames and counter allegations/blames were being exchanged. Initially, it started as minor scuffle (Bakjhak) between the appellants and the deceased. The informant at this juncture arrived in the house and tried to intervene and pacify the matter where after, the appellants pushed him aside and the "Bakjhak" (minor scuffle) continued between the appellants and the deceased. In the meantime, the appellant no.1 who was armed with Kulhari (axe) wielded a blow on the deceased which unfortunately landed on the head of the deceased. The victim upon receiving the injury fell on the ground. Seeing the same, both the appellants fled away from the place of occurrence. There is no plausible evidence on record to show that there was any impending circumstance which prevented the appellant no.1 from repeating the axe blow and to make sure that the victim was dead or that there was no chance of her survival. On the other hand, we find the evidence to the effect that seeing the victim dropping on the ground both of them immediately took off from the place of occurrence. According to the doctor, the weapon used was a heavy sharp cutting weapon. A blow with full force could have, in all probability, caused fracture of the occipital bone of the victim which is not the case. The doctor has not found the injury sufficient in the ordinary course of nature to cause death.

13. In *Buddhu Singh and others v. State of Bihar (now Jharkhand)* reported in (2011) 14 Supreme Court Cases 471, the allegation against the appellant(s) was

that one of the accused pushed the victim down, where after appellant Buddhu Singh dealt an axe blow which landed on the head of the deceased. Another accused, thereafter kicked the deceased. On account of the injury so sustained, the deceased later died. The Apex Court on analysing the attending facts of the case proved at the trial held that seeing his father and brother grappling with the deceased, the appellant dealt with an axe blow which could not be said to be intended towards the head. The element of intention was thus ruled out. The Hon"ble Supreme Court found weight in the submission of the appellants that no axe blow was repeated and held him guilty under Section 304 Part-II of IPC.

14. In *Mavila Thamban Nambiar v. State of Kerala* (AIR 1997 SC 687), the Apex Court observed that Section 304 Part-II would be attracted when it is proved that even if the accused had no intention to cause such bodily injury as was likely to cause death but had the knowledge that the injury was likely to cause death the solitary blow on the chest of the deceased was not held constituting the clear intention to cause death. It would, in such circumstance, reasonable to infer that the accused had knowledge that an injury on a vital part of the body of the deceased was likely to cause death of the recipient thereof.

15. On critically analysing the evidence on record, we find that there was no intervening circumstance which prevented the appellant no.1 from repeating the axe blow. However, the appellants had entered into the house. One of them was armed with a dangerous weapon which they knew, in case of use for assault, was likely to cause death of the victim of the assault. The evidence of the prosecution clearly proved beyond reasonable doubt that both of them on the relevant date and time, following the exchange of hot words/abuses between them and the victim entered into the courtyard (Osara) of the house of the informant. Appellant no.1 was armed with axe (Kulhari). He on being aggravated gave one axe blow to the victim which landed on her head as a result thereof she fell down and died. The appellants without ascertaining the effect of the injury escaped from the place of occurrence. The Doctor has also found only one injury found to scalp cavity on back portion of head and except that no other injury was found on her body. The evidence on record suggests that the appellants had no pre-meditation to kill the victim and everything happened in a spur of moment. The appellant no.1 and the informant are full brothers having their houses side by side. There is nothing on record to show that they ever indulged in scuffle on previous occasion or had enmity. In evidence, it has come that they are poor labourers. So in the above circumstance, probabilities of the appellants having lost their control over scuffle can not be completely ruled out. It can thus be reasonably drawn that both the appellants had the common intention to assault the deceased which unfortunately proved fatal. They had, however, the knowledge that the weapon in the hand of the appellant no.1, if used for assault, was likely to cause death of the recipient of the assault.

16. Seen thus, while upholding the findings of guilt recorded by the learned trial Court, we modify the findings of the learned trial Court and convert the

conviction of the appellants from Section 302/34 of the IPC to Section 304 Part-II IPC read with Section 34 of the IPC and sentence each of them to undergo rigorous imprisonment for eight years (08) years. The bail bond of appellant no.1 is cancelled. He shall surrender and serve the remainder period of sentence.

17. The appeal is allowed in part as indicated above.

Sanjay Kumar, J.—I agree.