

(2018) 07 PAT CK 0075

In the Patna High Court

Case No : Criminal Appeal (Db) No. 1041 Of 2010

Parmeshwari Mukhiya And Anr

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 24-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 207, 302, 304, 307, 323, 324, 325, 341
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2018) 3 PLJR 871

Hon'ble Judges : Rakesh Kumar, J;Arvind Srivastava, J

Bench : Division Bench

Advocate : Arun, Sanjay Kr. @ S.K., Ajay Mishra

Final Decision : Disposed Of

Judgement

1. Both the appellants were convicted by judgment dated: 19.08.2010 for commission of offence under Sections 341, 323 & 302 of the Indian Penal Code, 1860 (hereinafter referred to as the I.P.C.) and on the same date i.e. on 19.08.2010 both the appellants were sentenced to undergo imprisonment for life for commission of offence under Section 302 of the I.P.C. and imposed fine of Rs. 5,000/- each. In default of payment of fine, they were further directed to undergo rigorous imprisonment for four months. Under Section 341 of the I.P.C. both were sentenced to undergo imprisonment for one month and to pay a fine of Rs. 200/- each and in default of payment of fine for offence under Section 341 of the I.P.C. both were directed to further undergo imprisonment for seven days. Under Section 323 of the I.P.C. both were sentenced to undergo imprisonment for one year and imposed fine of Rs. 500/- each. In default of payment of fine under Section 323 of the I.P.C. they were directed to further undergo

imprisonment for two months. All the sentences were directed to run concurrently. The judgment of conviction and sentence was passed by Sri Om Prakash Rai, learned Additional Sessions Judge Fast Track Court- II, Supaul (hereinafter referred to as the "trial judge") in S.Tr. No. 72 of 2008 , arising out of Chhatapur P.S. Case No. 75 of 2007.

2. Both the appellants in the same night of occurrence were arrested and by order dated: 02.06.2007 they were remanded to judicial custody and both the appellants remained in custody till conclusion of the trial. After their conviction, they preferred the present Appeal, which was admitted on 07.09.2010. While admitting, appellant no. 2 (Hira Lal Mukhiya) was directed to be released on bail and since then he is continuing on bail. So far appellant no. 1 (Parmeshwari Mukhiya) is concerned, his prayer for bail was rejected. Meaning thereby, that appellant no. 1 (Parmeshwari Mukhiya) is in custody since the date of his first remand i.e. 02.06.2007.

3. Short fact of the case is that on 01.06.2007 at about 7.30 P.M. Sub-Inspector of Police Sri Ram Chandra Singh (P.W. 12) recorded

"statement" of Dasharath Mukhiya (P.W. 15) . The said "statement" was recorded in Primary Health Centre, Chhatapur. In the

"statement" the informant disclosed that on 01.06.2007 in day time at about 2.00 P.M. Hira Lal Mukhiya (appellant no. 2) was cutting bamboo

from bamboo orchard of the informant and at that very time Parmeshwari Mukhiya (appellant no. 1) was standing there. After noticing this fact,

daughter of the informant namely: Chandan Devi (not examined) asked as to why the appellants were cutting bamboos. Thereafter, Parmeshwari

Mukhiya (appellant no. 1) slapped her. Subsequently, younger daughter of the informant, namely: Phulo Kumari (not examined) came to the

KAMAT [cattle shed/ residential area] and informed the informant regarding assault given by Parmeshwari Mukhiya on Chandan Devi. After getting

information the informant , his wife Sumitra Devi (P.W. 13), father "in-law / Devi Lal Mukhiya (P.W. 8) and his mother " in law/ Kago @

Kagwati Devi (deceased) rushed to the house and enquired from the daughter of Parmeshwari Mukhiya i.e. Tariya Devi about the reason for assault.

Immediately thereafter, Parmeshwari Mukhiya carrying spade in his hand and Hira Lal Mukhiya carrying root portion of bamboo (MUNGRA)

arrived there and with intent to kill mother " in "law (Kago @ Kagwati Devi)

and Devi Lal Mukhiya gave blow from spade and MUNGRA causing injury. The informant stated that Parmeshwari Mukhiya gave spade blow on the head of his mother-in-law with intent to kill her whereby blood started oozing out. The informant after noticing the same started fleeing away then Parmeshwari Mukhiya and Hira Lal Mukhiya caught him after some chase and slapped him. Parmeshwari Mukhiya and Hira Lal Mukhiya with intent to kill his father âin-law assaulted him whereby due to the said assault he received fracture injury on his right hand. The informant stated that his wife also after noticing assault fled away. In the meanwhile, Rekha Devi- daughter of Parmeshwari Mukhiya too arrived carrying MUNGRA and she also assaulted the informant. It was claimed by the informant in his âfardbyanâ that the occurrence was seen by his co-villagers namely : Gopal Yadav (P.W. 10), Chandra Deo Yadav (P.W. 7) and Shiv Nandan Mukhiya (P.W. 9) and other number of persons. Thereafter, the informant carried his mother âin-law and father â in â law on a âthelaâ to Primary Health Centre, Chhatapur for their treatment where treatment was going on. On the said âfardbyanâ Dasharath Mukhiya put his signature as a witness. On the basis of the said âfardbyanâ on 01.06.2007 at 20.00 Hours (8.00 P.M.) a formal F.I.R . vide Chhatapur P.S. Case No. 75 of 2007 was registered for offence under Sections 341/323/324/325/307 of the I.P.C. against both the appellants and Rekha Devi (daughter of appellant no. 1 / Parmeshwari Mukhiya). Subsequently, after death of injured -Kago @ Kagwati Devi, on 02.06.2007 Section 302 of the I.P.C. was added.

4. During investigation accusation against both the appellants was found true, and as such, on 24.08.2007 charge- sheet was submitted keeping investigation pending against Rekha Devi (another F.I.R. named accused person). On 25.08.2007 learned Chief Judicial Magistrate , Supaul took cognizance of the offence and after completion of formalities under Section 207 of the I.P.C. the case was committed to the court of Sessions on 13.03.2008, and as such, the case was numbered as Sessions Trial No. 72 of 2008. On 25.04.2008 charge under Sections 341, 323, 307 and 302 of the I.P.C. was jointly framed.

5. The prosecution to establish its case examined altogether sixteen witnesses. Out of sixteen witnesses, P.W. 7 - Chandra Deo Yadav (co-villager);

P.W. 8 - Devi Lal Mukhiya (husband of deceased and injured), P.W. 13 - Sumitra Devi (wife of informant) and P.W. 15 -Dasharath Mukhiya (son

â?" in â?" law of the deceased) were examined as eye witnesses to the occurrence. P.W. 9 -Shiv Nandan Mukhiya (brother of P.W. 8) and P.W. 14

- Laddu Mukhiya were examined as hear- say witnesses. P.W. 16 -Dr. Lallan Kumar Thakur, who had examined the injuries on the person of Devi

Lal Mukhiya has proved injury report and X-ray report in respect of injuries of Devi Lal Mukhiya, which were marked as Ext. 5 and 5/1 respectively.

P.W. 11 - Dr. Arun Kumar Singh had conducted post- mortem examination on the dead body of the deceased and he proved the post -mortem

examination report, which was marked as Ext. 1, whereas, P.W. 12 -Ram Chandra Singh, Sub- Inspector of Police was the Investigating Officer of

the case and during evidence he proved â??fardbyanâ??, marked as Ext. 2, endorsement on â??fardbyanâ??, which was marked as Ext. 2/A ,

inquest report marked as Ext. 3 and also injury report in respect of injuries of Devi Lal Mukhiya , which was marked as â??Aâ?? for its

identification. However, P.W. 1 - Dayanand Mukhiya (co-villager) , P.W. 2 - Shyam Deo Mukhiya (co- villager) , P.W. 3 - Visundeo Mukhiya (co-

villager) , P.W. 4 - Ram Deo Mukhiya (co- villager) , P.W. 5 - Yogendra Mukhiya (co- villager), P.W. 6 - Arun Mukhiya (co-villager) and P.W. 10 -

Gopal Yadav (co-villager) did not support the prosecution case, and as such, they were declared as hostile witnesses.

6. After conclusion of the prosecution evidence, on 09.12.2009 circumstances and evidences collected against the appellants were explained to them

and their statement under Section 313 of the Cr.P.C. was recorded in which they claimed innocence and pleaded to lead defence evidence and in

defence, two witnesses were examined, namely: Upendra Sharma (D.W.1) and Gaya Nand Mallah (D.W. 2). In defence a stand was taken that

deceased Kago @ Kagwati Devi died due to fall from stairs.

7. Sri Arun, learned counsel for the appellants after placing entire evidence submits that both the appellants were falsely implicated in the present case

due to old animosity. It was argued that appellant no. 1 (Parmeshwari Mukhiya) is full brother of P.W. 8 - Devi Lal Mukhiya , whereas, appellant no.

2 (Hira Lal Mukhiya) is the son-in-law of the appellant no. 1. According to learned counsel for the appellants though partition in between the parties

had already taken place long back, but dispute regarding some portion of land was continuing in between the parties and in the present case on trivial issue occurrence has shown to be occurred . He submits that it is case of prosecution that since the appellants had cut portion of the bamboos which was falling on the land of the appellants dispute arose and thereafter, it was alleged, as if both the appellants assaulted the mother â?"in-law of the informant of the present case and his father- in- law and in the occurrence mother â?"in-law of the informant died in hospital and father â?"in-law (P.W. 8) received injury relating to right elbow fracture. Sri Arun, learned counsel for the appellants taking clue from the evidence of P.W. 1 to 6 & 10, who were co-villagers and declared hostile submits that the manner of occurrence is not like alleged by the prosecution witnesses, but it was a case of accidental death and due to old animosity the appellants were fixed by the informantâ??s side. He further submits that in this case one of the own brother of the appellant no. 1 as well as own brother of P.W. 8 (Devi Lal Mukhiya) namely: Gaya Nand Mallah (D.W. 2) has come forward to depose as defence witness (i.e. D.W. 2) and he himself has stated that death has occurred due to fall from stairs. He submits that one another own brother of the appellants has come forward as prosecution witness to support the prosecution case. In sum and substance, it has been argued that due to old animosity, in a case of accidental death, a false case was instituted. Alternatively, it has been argued by Sri Arun, learned counsel for the appellants that in any event, it was not a case under Section 302 of the I.P.C. since during evidence none has come forward to depose as to whether the deceased was given repeated blow. He submits that even if it is presumed that occurrence, as alleged by the prosecution, is true, in absence of repetition as well as in view of the fact that it is the case of the prosecution that appellant no. 1 gave blow from back side of the spade, makes it clear that in any event, there was no intention to kill the mother â?"in-law of the informant. He submits that had there been any intention to kill, there was no reason to use back portion of the spade , instead of using sharp portion of the spade , however, it is not the case of the prosecution that the appellants used sharp portion of the spade. He further submits that in a spur of moment, it appears that occurrence had taken place but without any repetition, blow was given causing injury to the mother â?"in-law of the informant, who subsequently died in hospital. Accordingly, it has been argued that firstly

the Appeal is required to be allowed on the strength of absence of specific evidence and alternatively, it has been argued that in any event, it can not

be a case under Section 302 of the I.P.C., rather the appellants can be held guilty only for commission of offence under Part II of Section 304 of the

I.P.C.

8. Sri Ajay Mishra, learned Additional Public Prosecutor submits that the prosecution has established its case beyond all reasonable doubt since the

mother of the informant was done to death in the occurrence by the appellants. He further submits that on record there is evidence that in

the occurrence due to blow given by Hira Lal Mukhiya (appellant no. 2) P.W. 8 received injuries and in the occurrence his right elbow had fractured,

accordingly, the appellants were required to be convicted under Section 325 of the I.P.C., but the learned trial judge has not held them guilty for

offence under Section 325 of the I.P.C. Sri Ajay Mishra, learned Additional Public Prosecutor however accepts that there is no evidence of repetition

of blow. Accordingly, he has not seriously opposed the submission of learned counsel for the appellants that hardly it was a case for offence under

Section 304 Part II of the I.P.C.

9. Besides hearing learned counsel for the parties, we have examined entire evidence on record. Before proceeding, it would be necessary to discuss

the evidence of the informant - P.W. 15 (Dasharath Mukhiya), who was the son-in-law of the deceased Kago @ Kagwati Devi. This witness in

consonance with the fact disclosed in his statement has deposed that due to cutting of bamboos Parmeshwari Mukhiya (appellant no. 1) had

assaulted his daughter and thereafter, the informant was informed and then the informant enquired from Tariya Devi daughter of Parmeshwari

Mukhiya. In the meanwhile, his mother-in-law and father-in-law also arrived. Parmeshwari Mukhiya and Hira Lal also arrived there. Behind Hira

Lal, Parmeshwari Mukhiya was there. Hira Lal gave MUNGRA blow on his mother-in-law and Parmeshwari Mukhiya also gave blow from spade on

his mother-in-law. In the occurrence the informant started fleeing away but he was chased and apprehended by Hira Lal. Parmeshwari gave blow

from back side of the spade. He was captured by the appellants however, when Gaya Nand arrived there and asked to go and see his old persons, he

was freed and then he with the help of others carried the injured to Chhatapur

hospital on 22.06.2007. In hospital Police recorded his statement. He identified his signature on the statement, which was marked as Ext. 4. From hospital he went to the house for arranging money and when he returned back he saw that the old lady had already died. Thereafter, the dead body was sent for post-mortem examination. This witness was cross-examined at length, however, on examination of entire cross-examination it appears that nothing could be extracted to raise doubt on his evidence. Similarly, P.W. 8 -Devi Lal Mukhiya (husband of the deceased and also injured) has deposed. This witness was also cross-examined at length but nothing could be drawn to create any doubt on his evidence. In this case, consistent evidence was given by P.W. 13 - Sumitra Devi (wife of informant). Besides this, one of the co-villagers P.W. 7 (Chandra Deo Yadav) has also deposed similar to the evidence of other ocular witnesses. P.W. 9 - Shiv Nandan Mukhiya (brother of P.W. 8 as well as appellant no. 1) is hear-say witness. Similarly, P.W. 14 (Laddu Mukhiya) was examined as hear say witness. P.W. 16 (Dr. Lallan Kumar Thakur) at the relevant time was posted as Medical Officer, Primary Health Centre, Chhatapur, Supaul. He had examined the injuries of Devi Lal Mukhiya (P.W. 8) and found the following injuries:-

(i) piercing wound $1\frac{1}{2}$ x $1\frac{1}{4}$ x cavity deep on the outer aspect of Right Elbow.

(ii) as per X-ray report it shows the fracture of upper portion of Right Ulna. Injury was considered grievous.

He proved the reports, which were marked as Ext. 5 and 5/1.

10. P.W. 11 (Dr. Arun Kumar Singh) at the relevant time was posted as Medical Officer in Sadar Hospital, Supaul and on 02.06.2007 at 2.20 P.M. he

conducted post-mortem examination on the person of Kago Devi @ Kagwati Devi and found the following injuries:-

(A) External Examination

(1) Stitched wound on scalp five in numbers in the region of frontal bone.

(2) A bruise on lower part of body trunk on posterior surface in the region of lower thoracic vertebrae 2 $1\frac{1}{2}$ x $1\frac{1}{2}$

(B) Internal Examination

On dissection "diffused haematoma under skin in the region of frontal bone. Frontal bone was fractured and depressed. On opening the skull vault

brain matter was lacerated and covered with blood clots.

Cause of death â?" Due to shock and haemorrhage caused by head injuries mentioned above.

Time elapsed since death â?" within 24 hours.â??

He proved the post- mortem examination report, which was marked as Ext. 1. On examination of the evidence of P.W. 11 as well as Ext. 1 i.e. post-

mortem examination report, it is evident that the submission of learned counsel for the appellants has got some substance since there was no repetition

of injuries. Only two injuries were found. One was stitched wound and another was bruise. It was case of the prosecution that one blow was given by

means of spade and one blow by another appellant was given by MUNGRA.

11. On examination of the entire evidence on record it is difficult to accept the submission of learned counsel for the appellants that it was a case of

false implication, rather there is consistent evidence that both the appellants had participated in the occurrence and in the occurrence mother â?"in-law

of the informant was done to death. However in the entire evidence nothing has come to suggest that either of the appellants had given repeated blow

either on the person of the mother â?"in-law or fatherâ?"in-law of the informant. Even evidence suggests that spade was used from back side not

from the sharp portion of the spade. The entire circumstances suggest that in any event, in the occurrence there was no intention on the part of either

of the appellants to cause death of the mother- in-law of the informant , rather it appears that in spur of moment occurrence had taken place in which

injuries were given to both mother-in-law and father â?"in-law of the informant, but in any event, it can not be said that it was a case of giving assault

with intent to kill the injured. In absence of such material, we are in agreement with the submission of learned counsel for the appellants that instead of

convicting the appellants under Section 302 of the I.P.C., they were required to be held guilty for commission of offence under Section 304 Part II of

the I.P.C.

12. Accordingly, the judgment of conviction dated: 19.08.2010 passed by Sri Om Prakash Rai , learned Addl. Sessions Judge Fast Track Court - II,

Supaul in connection with S. Tr. No. 72 of 2008 arising out of Chhatapur P.S. Case No. 75 of 2007 is modified and their conviction and sentence

under Section 302 of the I.P.C. is hereby set aside and it is altered and the

appellants are held guilty for commission of offence under Section 304 Part II of the I.P.C. However there is no reason for interference with judgment of conviction and sentence in respect of offence under Section 323 and 341 of I.P.C. The appellant no. 1 has remained in custody since 02.06.2007 and still he is in custody. So far appellant no. 2 is concerned, on examination of the record it is evident that he has remained in custody for more than three years and three months, and as such, since the occurrence had taken place in the year 2007 , considering the period of custody, we are of the opinion that period of custody of both the appellants can serve the purpose , and as such, the sentence is reduced to period already undergone by both the appellants. Accordingly, the appellant no. 2, who is on bail, is discharged from liability of his bail bond. Since the appellant no. 1 is in custody and we have reduced the sentence as period undergone, the appellant no. 1 is directed to be released forthwith, if not required in any other case.

13. With above modification in conviction and sentence, the Appeal stands disposed of.