

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.339 of 2009

Arising Out of P.S.Case No. 108 Year- 2007 Thana –Tariyani District- SITAMARHI

Sattan Mahto son of Bhawan Mahto, resident of village-Kushhar, Purvi Tola, P.S. Tariyani, District-Sheohar.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 154 of 2009

Arising Out of P.S.Case No. 108 Year- 2007 Thana –Tariyani District- SITAMARHI

1. Bigan Mahto son of Sattan Mahto,
2. Dulari Devi wife of Sattan Mahto, all resident of village-Kushhar, Purvi Tola, P.S. Tariyani, District-Sheohar.

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

(In CR. APP (DB) No. 339 of 2009)

For the Appellant : Shri Bikramdeo Singh, Advocate.

For the Respondent : Shri S.N.Prasad, APP.

(In CR. APP (DB) No. 154 of 2009)

For the Appellants : Shri Bikramdeo Singh, Advocate.

For the Respondent : Smt. Shashi Bala Verma, APP.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI. JUSTICE DHARNIDHAR JHA)

Date: 02-04-2015

The two appeals arise out of judgment of conviction dated 29.01.2009 and order of sentence passed on 02.02.2009 in Sessions Trial No.141 of 2008/24 of 2008 by the learned Presiding Officer, Fast Track Court No.I, Sheohar at Sitamarhi by which the learned Judge convicted appellants Bigan Mahto and Dulari Devi of



committing offences under Sections 323/34, 325/34 and 341/34 Indian Penal Code. Appellant Sattan Mahto, besides being convicted under the above Sections of the Penal Code was convicted also under Section 302 of the Indian Penal Code. The three appellants were heard on sentence and while appellant Sattan Mahto was directed to suffer rigorous imprisonment for life as also to pay a fine of Rs.10,000/-, else to suffer rigorous imprisonment for one year, no separate sentence was passed upon him on account of having been held guilty of committing offences under Sections 323/34, 325/34 and 341/34 of the Penal Code. As regards appellants Bigan Mahto and Dulari Devi, they were directed to suffer rigorous imprisonment for one year and simple imprisonment for three months under Sections 323/34 and 341/34 Indian Penal Code respectively. They were further directed to suffer rigorous imprisonment for three years as also to pay a fine of Rs.1,000/-, else to suffer rigorous imprisonment for three months. The two appeals having been preferred by the appellants against the same judgment, we have heard them together and are disposing them of by this common judgment.

2. The prosecution story is contained in fardbeyan of P.W.3 Ganaur Sah. It was stated by the informant that on 06.09.2007 at about 7 P.M. while he was taking his meal, he heard the alarms raised by his mother P.W.2 Raj Kumari Devi. He came out of his house to find that the three appellants were assaulting his mother with



piece of bamboo or *lathi* and that his mother had been injured. The informant intervened to save his mother when he was also assaulted by the three appellants by *lathi* or pieces of bamboo and fists, as a result of which, he received a bleeding injury on his head. While the *Marpit* was going on, it was, appellant Sattan Mahto who picked up the three year old daughter of the informant by her neck and threw her into water of a ditch, as a result of which, she died of drowning.

3. As may appear from the evidence of P.W.8 S.I. Jiwat Ram that on 07.01.2007 at about 6.45 A.M., he received O.D. slip from Primary Health Centre, Narwara and, accordingly, he reached the Health Centre and recorded the fardbeyan (Ext-3) of Ganaur Sah (P.W.3) on which basis the FIR of the case was drawn up. Before the investigating officer, P.W.8 had proceeded to the Primary Health Centre, he had entered the facts of receiving the O.D. slip from the Primary Health Centre into the Station Diary Entry no.127 of 2007 dated 07.09.2007. He looked to the bodies of P.W.3 and his mother Raj Kumari Devi (P.W.2) and issued injury certificates for their medical examination and for obtaining the medical report. The requisition submitted by P.W.8 for examination of the two injured, i.e., P.Ws.2 and 3 were marked Exts.5 and 5/1. P.W.8 held inquest upon the dead body of the deceased and prepared the inquest report in presence of the informant and one Pramod Sah. He despatched the dead body of Rupa Kumari for postmortem examination to



S.K.M.C.H., Muzaffarpur and thereafter came to the place of occurrence and inspected the same. The incident had occurred as per the evidence of P.W.8 on the *Kacchi* road which was running in front of the house of the informant and he found that the south of the house of the informant was so situated a ditch which was filled with water. He recorded the statements of witnesses, obtained the copy of the post mortem examination report, also arrested appellant Sattan Mahto and after completing the investigation, sent the accused persons up for their trial which ended in the impugned judgment.

4. The defence of the appellants, as appears from the cross-examination of P.W.3, the informant Ganaur Sah, was that the accused persons were innocent and they had falsely been implicated and the facts of the matter was that the deceased Rupa Kumari had herself fallen into water-filled-ditch. The people of the village had attempted to salvage her from water but she died of drowning. The further plea was that the implication of the appellants was on account of admitted land dispute between the parties.

5. Eight witnesses were examined by the prosecution, out of whom, P.W.1 Dr. Mumtaz Ahmad had held post mortem examination of the dead body of Rupa Kumari and had prepared the post mortem examination report (Ext-1). P.W.6 Dr. R.S.Prasad had examined P.Ws.2 and 3 for their injuries and had prepared the injury certificates (Exts-2 and 2/1). P.W.2 Raj Kumari Devi was the mother

of the informant and had been injured during the same incident. P.W.3 Ganaur Sah, we have already noted, was the informant of the case and was also injured in the same incident. P.W.4 Soni Devi was the wife of the informant and she had also given eye witness account to the occurrence. P.W.5 Savita Devi was declared hostile and P.W.7 Prabhu Sahni was tendered for cross-examination.

6. The defence did not examine any witness nor did it produce any document in support of its plea.

7. We were taken through the deposition of witnesses by Shri Bikramdeo Singh, learned counsel appearing on behalf of the appellants and it was contended that the three appellants had allegedly assaulted the mother of the informant, namely, Raj Kumari Devi (P.W.2). However on examination of her person P.W.6 Dr. R.S.Prasad had found a solitary abrasion measuring 1/4"x1/4" on the left side of her forehead which injury was simple in nature. As regards P.W.3, the informant, he was allegedly assaulted by the three appellants by *lathi* and *danda* and he was found bearing two injuries, and abrasion measuring 1/4"x1/4" on the right side of the forehead and the other swelling with tenderness measuring 2"x1/2" on left forearm caused by hard and blunt substance and the doctor had found that the radius had been fractured on account of the blow received by P.W.3. It was contended that the allegations were as general and omnibus as not to specifying as to whose blow had caused the fracture



injury on P.W.3 and it is very difficult to exactly say as to who could have caused the solitary injury on P.W.2 and the other injury in the form of abrasion on P.W.3. Submission was that the conviction of the appellants by virtue of Section 34 of the Indian Penal Code under Sections 323 and 325 of the Penal Code appears not sustainable. So far as the complicity of appellant Sattan Mahto was concerned, Sri Singh fairly conceded that the evidence was as clear and cogent as to pointing out his complicity as regards his acts of picking up the three year old daughter of the informant by her neck and flinging her into the water. Submission also was that the evidence of P.W.1 does indicate that there were marks of injury somewhere around the neck of the deceased child and that she died of ante-mortem injuries. However, it was contended that the evidence may not be making out a case under Section 302 Indian Penal Code rather it could be a case under Section 304 of the Penal Code.

8. The above contention has been contested by Susri Sashi Bala Verma, the learned Additional Public Prosecutor and it was contended that as regards the two appellants, namely, Bigan Mahto and Dulari Devi, the evidence may not be clear as to who had given blows either to causing the fracture or to causing the injury to P.W.3 or solitary abrasion to P.W.2 and it may be a case of extending the benefit of doubt to the two appellants Bigan Mahto and Dulari Devi, but as regards the submission of the learned counsel for the defence



that it may not be an offence under Section 302 Indian Penal Code and may be covered by the definition of culpable homicide not amounting to murder. Susri Verma was drawing our attention to Illustration (a) appearing after clause *Thirdly* and explanation appended to Section 300 and was submitting that it was definitely a case under Section 302 Indian Penal Code.

9. We have gone through the evidence of with the aid of learned counsel appearing for the parties. Out of the three witnesses, P.Ws.2 and 3 were injured. There is no denial to this fact that they had been injured in the course of the same transaction and the defence was only suggesting to both the witnesses P.Ws.2 and 3 that they had been implicated on account of the old land dispute which was admitted by both P.Ws.2 and 3. The dispute was there as appears from the evidence of P.Ws.2 and 3 but that was of such a class that there was a serious element of animus between the two parties could not be pointed out to us. It was also not shown or brought on record validly that there was any pending litigation between the parties. The very incident appears to be the culmination of some sort of differences between the parties, may be for property, and as appears from the evidence of three witnesses, the three accused persons had come to assault the mother and had indeed assaulted her. When P.W.3 intervened after coming out of his house where he was taking his meal, he was also assaulted. However, the evidence does not indicate



as to which of the three appellants had assaulted P.W.2 to cause the solitary abrasion on her forehead or who among the three appellants had caused a solitary abrasion to the forehead of the informant and had further inflicted the fracture injury to him. Thus, the evidence lacks clarity as regards the author who could have caused injuries to P.Ws.2 and 3. In this anomalous position of the oral evidence, it appears quite a difficult task for this Court to specifically hold some one responsible either for causing an injury to the mother of P.W.3 or injuries to himself. The evidence creates a situation of uncertainty and this uncertain situation creates a doubt, in our mind that appellants Bigan Mahto and Dulari Devi should have been convicted under Sections 325, 323 and 341 with the add of Section 34 of the Penal Code. In our opinion, the benefit of doubt which was arising out of the omnibus, uncertain evidence produced by the prosecution was to accrue to the two appellants and, accordingly, we allow Cr.Appeal (DB) No.154 of 2009 by acquitting appellants Bigan Mahto and Dulari Devi by giving them benefit of doubt. The judgment of their conviction and the sentences passed upon them are hereby set aside. Both of them are on bail, they need not surrender to their bonds.

10. So far as the case of appellant Sattan Mahto is concerned, the three witnesses, i.e., P.W.2 Raj Kumari Devi, P.W.3 Ganaur Sah and P.W.4 Soni Devi, who happened to be the wife of Ganaur Sah (P.W.3), were consistent in pointing out that when the



accused persons had assaulted Raj Kumari Devi and when Ganaur Sah had intervened to save his mother Raj Kumari Devi while accused persons were giving blows to Ganaur Sah, appellant Sattan Mahto picked up the three year old daughter of Ganaur Sah by her neck and flung her into the water of the ditch which was situated by the side of his house. We have found while considering the evidence of P.W.8, the investigating officer that a ditch filled with water was situated to the south of the house of P.W.3. The evidence of P.Ws.2 and 3 were consistently stated that it was appellant Sattan Mahto who had committed the acts of picking up the three year old child by her neck and throwing her into the water of the ditch. P.W.1 Dr. Mumtaz Ahmad had found abrasions on the central part of the neck measuring 1 cm. x 1 cm., on left side of neck 1" below left angle of mandible measuring 1 cm. as also on the front of neck 1" below left angle of the mandible measuring 1 cm. as also on the front of the neck measuring 1" below and 1" right to chin measuring 1 cm. x 1 cm. The evidence of P.W.1 further indicates that these abrasions were not continuous indicating that these could have been caused on account of the pressure of the fingers on the neck of the little child. After he had dissected the lungs of the deceased, he found that it was voluminous and oedematus and on cutting exuded frothing blood mixed with water and the stomach was containing watering fluids. In his final opinion, P.W.1 stated that the death of the child had occurred as a



result of ante-mortem drowning. During cross-examination, P.W.1 was very clear that when the child was drowned into water, she was not dead and she died only when she was inside the water and as such, the cause of her death was drowning. We have already referred to the consistent evidence of the three witnesses that it was appellant Sattan Mahto who had picked up the child to throw her into water.

The question which was agitated before us by Sri Singh, the learned counsel appearing on behalf of the appellants, was as to whether the facts could constitute an offence under Section 302 I.P.C. or the offence constituted could be that under Section 304 I.P.C. We have already noted that the three accused persons are said to have initially assaulted the mother of the informant and thereafter, the informant himself when he had intervened in order to rescuing his mother. The child was sitting at the Varanda of the house. P.W.2, mother of the informant stated that the child was eating something, while P.W.3 does say that she was taking any food. However, it is the consistent evidence of the three witnesses, i.e., P.Ws. 2 , 3 and 4 that all on a sudden, appellant Sattan Mahto picked up the child by her neck and flung her into the ditch. This was the reason for the learned trial Judge that in spite of having charged all the accused persons with the aid of Section 34 Indian Penal Code, he was convicted only appellant Sattan Mahto under Section 302 Indian Penal Code. We fully concur with the view of the learned trial Judge as in case of the



evidence which is available to us, we find it very difficult to infer that all the accused persons were acting in furtherance of the common intention. It was the individual act of appellant Sattan Mahto who all on a sudden was acting in the manner as alleged and established by evidence. It was contended by Sri Singh that the appellant could have very well choked the child to death after pressing her neck when he had caught her than to flinging her into water. This submission, in our opinion is imagining a situation which situation could never been imagined in the light of the evidence which is now available to us. We have to judge the act of appellant Sattan Mahto strictly within the four corners of the evidence which was produced by the prosecution in proof of the charges. Traversing down the evidence by imagining various situations could be conjectivising and that liberty does not lie with us. We have to evaluate the act of the appellant and its ultimate consequences purely on evidence. The appellant on the day of the occurrence was some where around 58 years of age as his age recorded in the judgment was 60 years. He was quite a prudent man and he has to be presumed to know the consequences of his act. It is true that it was a sudden act but it was an intentional act. No prudent man of 58 years could be picking up a child of three years by her neck to throw her into water and then to plead in the court that he was not knowing the consequences of the act. Section 300 *4thly* takes into account two aspects of commission of an offence. The first to be



considered is the 'act' and the knowledge of the offender that the 'act' which he had committed was so imminently dangerous that it must, in all probabilities, cause death. The other factor which is taken into account by Section 300 *4thly* is the bodily injury which is inflicted by the doer of the act and the knowledge of the offender that such bodily injuries were likely to cause death. The difference between Section 299 and 300 is that while the third part of Section 299, i.e., "or with the knowledge that he is likely by such act to cause death" indicates towards some uncertain consequences of the act. The very use of the word 'likely' in the above part of Section 299 itself indicates that the knowledge of the offender must not be as certain as it has to be in case of Section 300 *4thly* where the word "knows" indicates towards some certain and definite consequence or result of the act committed by the offender. The word 'likely' while points out to in-definiteness, the word 'knows' as against that points out towards some definite-concrete-result and then imparts the knowledge as regards the commission of the acts, consequences of which is taken into account by both the sections as regards acts of the offender. As soon as the offender has the definite knowledge that the consequence of the act which he was likely to commit or which he has already committed was as definite as in all probabilities it must cause death, it has always to be an offence under Section 302 Indian Penal Code.

We have already pointed out that the appellant was a



prudent man of about 58 years on the day he was picking up a child of three years by her neck. The other part of his act that he was flinging the child into water. He must be knowing with quite some certainty about the probable result of his act, that the child on account of being thrown into water was bound to sink and thereby there was all probabilities that she should die. There was no uncertainty as regards the final imminently dangerous consequence of the act which was committed by the present appellant. As such, in our opinion, it was a case which was definitely one under Section 302 Indian Penal Code.

11. We may better quote Illustration (a) which appears after clause *Thirdly* and explanation just below it, which are appended to Section 300 Indian Penal Code.

(a) A, under the influence of passion excited by a provocation given by Z., intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation."

This very illustration itself takes care of the submission of Sri Singh as regards the constitution of the offence on the facts of the present case as the little child of three years was not only completely oblivious of what was going on around it, she was quite incapable of giving any provocation to anyone to do what was perpetrated upon her.

12. In the result, we find that appellant Sattan Mahto of Cr. Appeal (DB) No.339 of 2009 was rightly convicted under Section

302 Indian Penal Code. Because, we have acquitted appellants Bigan Mahto and Dulari Devi under Sections 323, 325 and 341 each read with Section 34 Indian Penal Code, we acquit appellant Sattan Mahto also for those offences. With the above alteration as regards the conviction of appellant Sattan Mahto, we uphold the judgment of conviction as against him and dismissed his appeal.

(Dharnidhar Jha, J)

(Amaresh Kumar Lal, J)

Brajesh Kumar/V.K.Pandey
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