

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.784 of 2006

Against the judgment of conviction and order of sentence, dated 15.06.2006, passed by Shri Vijay Prakash Mishra, Additional Sessions Judge, Fast Track Court, III, Saran at Chapra, in Sessions Trial No. 435 of 2003/11 of 2005 arising out of Isuapur P.S. Case No. 39 of 2001, G.R. No. 1481 of 2001

Triveni Sah @ Lalji Sah, son of Sri Pashupati Sah, resident of village Usri, P.S. Isuapur, district Saran at Chapra Appellant

Versus

The State of Bihar Respondent

Appearance :

For the Appellant : Shri Arun Kumar Tripathi, Adv. Amicus Curiae
For the Respondent : Shri Dilip Kumar Sinha, APP

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 10-02-2015

The present appeal arises out of judgment of conviction and order of sentence, dated 15.06.2006, passed by the learned Presiding Officer of Fast Track Court, III, Saran at Chapra, in Sessions Trial No. 435 of 2003/11 of 2005 by which the appellant was held guilty of committing offence under Section 302 of the Indian Penal Code and was directed to suffer rigorous imprisonment for life.

2. The statement of the deceased was the basis for drawing the first information report initially under Sections 341, 324, 307, 326 and 504 of the Indian Penal Code to which Section 302 of the Indian Penal Code was added up by an order dated 04.06.2001.

3. The deceased, Sunil Sah, had himself given the statement before the Sub Inspector of Police of Isuapur Police Station stating that while he was sitting in his house with his family members on 23.05.2000, this appellant arrived there at about 02.00 P.M. carrying a *Chhura* with him and stated that he was to kill the deceased. The deceased attempted to snatch the weapon from the hand of the appellant, but, the appellant succeeded in putting the deceased down on the ground and, further, succeeded in sitting on his chest to give a blow in his belly

with the *Chhura* in his hand so as to causing serious injury to the deceased. The deceased stated that he bled profusely and wretched in pain and his omentum had also come out. His wife and other family members started shouting which attracted persons of the neighbourhood, but, in the meantime, the appellant had also self inflicted few injuries to himself with his weapon. However, seeing the villagers coming to the place of occurrence, the appellant attempted to run away from there, but, he was caught at the spot. The villagers attempted further to bandage the injury of the deceased with some clothes so as to stopping bleeding and, further informed the *Chowkidar* who probably called the Sub Inspector of Police who recorded the statement of the informant.

4. On the basis of the fardbeyan of the deceased, Isuapur P.S. Case No. 39 of 2001 was registered and as may appear from the evidence of P.W. 7, the wife of the deceased, the injured Sunil Sah was brought to Chapra Hospital for treatment from where he was referred to Patna Medical College Hospital for treatment. It appears that Sunil Sah died in Patna Medical College Hospital and information being given to Pirbahore Police Station, an officer of that Police Station held inquest upon the dead body of Sunil Sah. P.W. 8, Dr. Arun Kumar Singh, who was posted as Tutor in the Department of Forensic Medicine in Patna Medical College Hospital, Patna, held post-mortem examination on the dead body to issue the post-mortem report (Exhibit 1).

5. The non-examination of the Investigating Officer deprives us from the benefit of knowing as to how the investigation had proceeded and finally concluded, but, at any rate the lower Court records indicate that the appellant being tried after being charged with commission of offence under Section 302 of the Indian Penal Code, was convicted as noted above.

6. The defence of the appellant which appears from the suggestion given to P.W. 7, the wife of the deceased was that of false implication.

7. Out of eight witnesses examined during the trial,

none, but, P.W. 7, who happened to be the wife of the deceased came to support the prosecution story. Other witnesses, like P.W. 1 Shanker Singh, P.W. 2 Dashrath Sah, P.W. 3 Amar Kumar Singh, P.W. 4 Dhrupati Devi, P.W. 5 Teras Thakur and P.W. 6 Simariya Devi all gave one line evidence that they did not know anything about the occurrence, but, what appears undisputed is that Sunil Sah was attacked in the manner and was killed. The solitary evidence of P.W. 7 Kaushalya Devi, who happened to be the wife of the deceased, is the basis, thus, upon which the whole prosecution was based and the judgment was passed.

8. However, what we find from the consideration of the impugned judgment is that the learned trial Judge, who passed the judgment was also considering the statement of the deceased, Sunil Sah, in paragraph 15 of the judgment and was holding that it was of much important as the deceased had also implicated this appellant in his statement as the person, who had given *Chhura* blow in his abdomen. This finding, in our opinion, is based on inadmissible evidence inasmuch as in absence of the examination of the officer who had recorded the statement of the deceased-informant telling the Court that the deceased had made the statement and that statement was recorded verbatim by him renders the statement inadmissible and the value of this statement in our opinion could not be better than what is proposed to be that of statement under Sections 161 read with Section 162 of the Criminal Procedure Code. It was a mere statement made before a Police Officer which could be used only for corroboration or contradiction purposes and it could never have the value of being a dying declaration in absence of the evidence of the person, who had recorded it.

9. Having said on the merits of the finding recorded by the learned trial Judge, we propose to consider the evidence of P.W. 7. It is true that she was the wife of the deceased, but, from the record we could not find that she had any particular motive or purpose in coming forward to depose in the case so as to implicate the appellant for any particular motive. What P.W. 7 stated that the appellant had attempted

to stab his wife which was obstructed by the deceased and, as such, he came there into the room where the deceased was lying to stab him and the deceased got up to snatch the *Chhura* and in that attempt the blow was given to the deceased. There is some variance in the statement of the deceased, which is contained in the fardbeyan, but as we have already noted we are not going to use that statement in order to testing the evidence of P.W. 7 except within the permissible limits of Section 162 of the Criminal Procedure Code. There was nothing brought on record through cross examination of P.W. 7 to point out that in her statement there was exaggeration or improvements in complaint to the earlier statement made before the Investigating Officer. She was stating that the deceased had saved the wife of the appellant from being stabbed by the appellant and it was a retaliatory act of the appellant that he had, instead, stabbed the deceased. Other parts of the narration which forms the evidence of P.W. 7, in our opinion, do not carry or bear any fact which could diminish the value of evidence of P.W. 7. We have already noted that we did not find nor anything was shown to us imputing the motive to the witness, P.W. 7, for coming forward for deposing falsely. The witness appears trustworthy.

10. The evidence of the witness points out that it was a single blow, wielded by the appellant and that blow given to the deceased, had resulted in as severe an injury as appears, described by the lady also in paragraph 11 of her deposition when she stated that her husband had an injury measuring in eight fingers and that he had bled profusely and further that the bleeding was as profuse as to splash all around and finally that the deceased had died after twenty four hours in Patna where he was shifted for better treatment. These lines of evidence appear from paragraphs 11 to 15 of the deposition of P.W. 7 and that particular evidence appears getting support from the evidence of P.W. 8 Dr. Arun Kumar Singh, who had held post-mortem examination on the dead body of Sunil Sah on 25.05.2001 at about 03.00 P.M. and had found the following ante mortem injuries :

- (i) One stitched wound of 7" length on left

paramedian plane, 4" above from pubic bone and 2" below from xiphisternum.

- (ii) One stitched wound of 3" length on left side of abdomen obliquely 2" from umbilicus, 6" below the left nipple and 2" from mid line.

P.W. 8 had found a drainage tube inserted in the right flank of the abdomen of the deceased which was 5" towards right from the umbilicus and 9" below the right nipple. On dissection P.W. 8 found pus in the abdominal cavity. Transverse colon was stitched in 1" length and small gut was stitched in 1(1/2)" length, straw colour fluid was present in chest cavity.

In opinion of P.W. 8 death had occurred within approximately 6 to 24 hours from the time of holding post-mortem examination by P.W. 8 and it was caused by septicemia. As regards the nature of weapon which had caused injury, P.W. 8 opined that the Doctor who had first attended the wound of the deceased could be the person to elicit that opinion from.

11. Thus, what we find is that evidence of P.W. 7 in paragraph 11 that it was an incision of about eight fingers length appears almost measuring up to the length of the injury described by P.W. 8 in his evidence. The severity of the blow could be gauged from the fact that the internal organs like colon with small gut were damaged at many places as per the evidence of P.W. 8. However, the evidence of P.W. 8 does not indicate that the blow had damaged any organ like kidney, liver or lungs so as to hasten the death of the deceased and, further, that the death had been occurred on account of septicemia (infection). Thus, on considering the medical evidence what we find is that the appellant might have been infuriated on account of the obstruction created by the deceased to save his wife and might have a rush of blood into his head to bring him to the deceased so as to give a blow, in that fit of rage to the deceased. There were damages to the colon and in small gut. As we have noted from evidence of P.W. 8, there did not appear any severe

damage to any important organ, like kidney, spleen, liver etc. A voluntary act was there, but that act was also misguided by some sort of impulse arising out of the obstruction which had been put by the deceased while the appellant had attempted to stab his wife. Voluntariness may be derived from the fact that the appellant may not have intended to know as to what he was doing and what could be the result of such voluntary act, as such, we are of the opinion that the conviction of the appellant under Section 302 of the Indian Penal Code may not be called for under the facts of the case. Attributing the knowledge about the result of the act which was being committed by the appellant could be enough to suggest that it could be a case covered by Section 326 of the Indian Penal Code because a dangerous sharp cutting weapon like *Chhura* causing some injuries in the gut part which must be dangerous to life and, as such, we hold the appellant guilty for committing an offence under Section 326 of the Indian Penal Code.

12. The question then is as to what could be the sentence to be inflicted upon the appellant. We refer to Section 386 second proviso of the Criminal Procedure Code, which reads as under :

“.....Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

13. Thus, what is proposed by the Legislature is that an Appellate Court coming to the conclusion requiring the alteration in the finding of guilt, it has to pass a sentence not in excess of what the offence would have invited to be passed by the Court which could have been competent to pass it. An offence under Section 326 of the Criminal Procedure Code is triable by a Magistrate of First Class and a Magistrate of First Class is competent to inflict a sentence in the maximum of three years.

14. We, as such, sentence the appellant to rigorous imprisonment for three years, but, under the facts of the case we also direct him to pay a fine of Rs.10,000/-, in default of payment of which he shall also be undergoing further rigorous imprisonment for one year. At any rate the appellant had served 14 years of imprisonment, as we find that the appellant had been remanded to custody by the Chief Judicial Magistrate, Saran at Chapra, on 24.05.2001 and he is continuously in custody. As such, we direct his release forthwith as he appears to have served the sentences substantively and in lieu of payment of fine as well. Let him be released forthwith, if not wanted in any other case.

15. The appeal is dismissed with the above modification in finding of guilt and sentence.

(Dharnidhar Jha, J)

(Gopal Prasad, J)

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