

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1039 of 2008

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(AGAINST THE JUDGMENT OF CONVICTION, DATED 24TH JUNE, 2008, AND THE ORDER OF SENTENCE, DATED, 25TH JUNE, 2008 PASSED BY SHRI ADITYA KUMAR TRIVEDI, SESSIONS JUDGE, KHAGARIA, IN SESSIONS CASE NO. 294 OF 2006, ARISING OUT OF KHAGARIA POLICE STATION CASE NO. 576 OF 2005, CORRESPONDING TO G.R.NO. 1451 OF 2005).

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Shambhu Mahto, son of Dhaneshwar Mahto, Mohalla Uttari Hazipur, P.S. & District Khagaria

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance:

For the Appellant : None

For the Respondent: Mr. Ajay Mishra, APP

Mr. Praveen Kumar, Advocate as Amicus Curiae

=====

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 03-04-2015

As human beings, we all want to be happy and free from misery. We have learnt that the key to happiness is inner peace. The greatest obstacle to inner peace are disturbing emotions, such as, anger, attachment, fear and suspicion, while love and compassion and a sense of universal responsibility are the sources of peace and happiness.

Dalai Lama

This appeal presents a sad story of a man, who suspected the fidelity his wife and, consequently,



suspected the legitimacy of his child too. His level of suspicion rose to its zenith making him oblivious of the love and compassion, which were expected of him, resulting into the death of his child, who had much better things to see in this world, but for the sheer frustration of the man, who not only wanted to disown the child, but his level of hatred touched the nadir making him feel that nothing short of putting an end to the child's life would given him peace. He, therefore, put to an end the life of the child looking for peace; but peace would, perhaps, always elude him. When the man lived a happy and peaceful life with his family, neither he nor his family had ever imagined that such a dreadful fate was awaiting the family. Suspicion can, indeed, bring such a disaster. Though rare, such a tragedy, in a family, consequent upon suspicion, is not completely unknown to mankind.

2. By the judgment, dated 24.06.2008, passed, in Sessions Case No. 294 of 2006, by learned Sessions Judge, Khagaria, the appellant, Shambhu Mahto, stands convicted under Section 302 of the Indian Penal Code. In consequence of his conviction, the appellant stands, under the order, dated 25.06.2008, sentenced to suffer imprisonment for life.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:



(i) Accused Shambhu Mahto is the husband of the informant, Bobby Devi. On 17.11.2005, when the informant woke up, at about 5.00 O'clock in the morning, her husband (i.e., the accused) started making accusation against her by saying that some unscrupulous persons had been visiting his house in his absence with whom the informant had illicit relation and if she did not disclose about those persons with whom she had been maintaining illicit relationship, he (accused) would kill the informant and their son, Ankit Kumar, aged about 8 years. Though the informant pleaded that she be trusted and that she had not been maintaining illicit relation with anyone, the accused did not believe and gave few slaps to the informant and pushed her away.

(ii) At about 7.00 O'clock in the morning on that very day (i.e., 17.06.2005), the accused left his house and while leaving his house, he also took away Ankit Kumar with him.

(iii) Out of fear, the informant, too, went, along with her daughter, Neha Kumari, aged about 5 years, to her parental house, at Dan Nagar, and, at about 11.00 AM, on that very day (i.e., 17.11.2005), her husband made a telephone call to her and asked her (i.e., the informant) to disclose to him (accused) the name of the person visiting her or else, he would kill Ankit Kumar, whereupon the informant

told her husband to come with Ankit Kumar so that she could reveal the truth, but the accused disconnected the call.

(iv) The informant remained, on 17.11.2005, at her parental house and, on the following day, i.e., 18.11.2005, at about 06.00 O'clock in the morning, her husband made a call to her (i.e., the informant) again and told her that as she had not been disclosing the name, he was sending Ankit Kumar after killing him and, having told the informant thus, the accused disconnected the telephone line, but telephoned, once again, at about 8.00 AM, on that very day, i.e., 18.11.2005, and this time the call was received by the informant's sister-in-law, Baby Raj (PW 3), and the accused told her that Bobby Devi (i.e., the informant) was a woman of bad character and, in his absence, some unscrupulous person had been visiting her and that Ankit was not his son, whereupon PW 3 (Baby Raj), i.e., the informant's sister-in-law, asked the accused to come to Dan Nagar, but the accused disconnected the line and, at about 9.00 AM, on that very day (i.e., 18.11.2005), upon hearing *hulla* that dead body of a young boy, aged about 8-10 years, had been found lying by the side of river, at Sidhi Ghat, the informant went to Sidhi Ghat with her brother, Raj Kumar Patel (PW 4), and saw lying there the dead body of her son, Ankit Kumar.

(v) From the mark seen on the neck of the



said deceased, the informant (PW 5) suspected that Ankit Kumar had been strangled to death. In the meanwhile, upon receiving the information that dead body of a young boy had been found by the side of river at Sidhi Ghat, police came to the place, where the said body was lying, and it was there that the informant (PW 5) orally reported to Officer-in-Charge, Khagaria Police Station, the whole occurrence alleging therein that her husband had killed Ankit Kumar and thrown Ankit's dead body into the river. The information, so given by the informant, was reduced into writing in the form of *fardbeyan* and treating the said *fardbeyan* as the First Information Report, Khagaria Police Station Case No.576 of 2005, under Sections 364/302 of the Indian Penal Code, was registered, on 18.11.2005, against accused Shambhu Mahto.

(vi) During investigation, inquest was held over Ankit Kumar's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid, under Sections 364/302 of the Indian Penal Code, against accused Shambhu Mahto.

4. At the trial, charges, under Sections 302 and 364 of the Indian Penal Code, were framed against the present accused-appellant, Shambhu Mahto. To the charges so framed, the accused pleaded not guilty.



5. In support of their case, prosecution examined altogether 12 (twelve) witnesses including the doctors, namely, Dr. Dinanath Prasad (PW 6) and Dr. Kamal Kishore Roy (PW 7), who had conducted the *post mortem* examination. The accused was, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial. No evidence was adduced by the defence.

6. Having, however, found the accused guilty of the offence, under Section 302 of the Indian Penal Code, learned trial Court convicted him accordingly and passed sentence against him as mentioned above. While so convicting the accused under Section 302 of the Indian Penal Code, the learned trial Court acquitted the accused of the charge framed against him, under Section 364 of the Indian Penal Code, on the ground that the accused, being father of the deceased, Ankit Kumar, could not have been held to have kidnapped his own son.

7. Aggrieved by his conviction and the sentence, which has been passed against him, the accused, as a convicted person, has preferred this appeal.

8. We have heard Mr. Praveen Kumar, learned

Counsel, appearing as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. Before we come to, and deal with, the ocular evidence on record, let us, first, take note of the medical evidence on record.

10. From the evidence of the two doctors, namely, Dr. Dinanath Prasad (PW 6) and Dr. Kamal Kishore Roy (PW 7), it transpires that a medical board was constituted, which comprised of PW 6 and PW 7, to conduct *post mortem* examination on Ankit's dead body and these two doctors accordingly conducted, on 18.11.2005, at 3.00 PM, *post mortem* examination on the dead body of Ankit Kumar and found following *ante mortem* injuries:

"On External Examination:

"(i) *On external examination, the face was congested, lips were glue, blood clots in both nostril body was mud-stain. A well defined slightly depressed mark ½" in breadth in circling the whole neck upper portion and completely except nape of neck marks was two to three in number at same places over the next base of the mark was reddish with ecchymosed margin. It was dry hard and parchment dry.*

On Internal Dissection:

(ii) *Extravasations of blood into subcutaneous tissue under ligature mark.*

Muscle underneath ligature mark was lacerated. Larynx and trachea were congested. All the viscerae example, brain, lungs, liver, kidneys and spleen were congested. Both sides chamber of heart was filled with blood. Stomach contain about 1 to 2 or semi digested food material. Bladder was empty."

11. In the opinion of the doctors, the cause of death was *asphyxia* due to *strangulation* leading to cardio respiration failure caused by hard blunt, but flexible object.

12. Apart from the fact that findings of the doctors and their opinion with regard to the cause of death of the said deceased have not been disputed by the defence, we, too, notice nothing inherently incorrect or improbable in the evidence given by the doctors and their evidence clearly shows that Ankit died, because of *cardio respiratory* failure caused as a result of *asphyxia*, because of *strangulation*.

13. Bearing, therefore, in mind that Ankit Kumar's death was *homicidal* in nature, let us, now, turn to the evidence of Ankit's mother (PW 5), who has been treated as the informant. According to the evidence of Bobby Devi (PW 5), the accused is her husband and they had two children, a son, Ankit Kumar (since deceased), and a daughter, Neha Kumari.

14. It is worth pointing out that the fact that

Ankit was son of the accused has not been disputed at the trial.

15. It is in the evidence of PW 5 that her husband used to work as a driver and he came back home from Bombay after about two years.

16. As regards the occurrence, PW 5 has deposed that on 17.11.2005, when she woke up, at about 5.00 O'clock in the morning, her husband accused her by saying that she had illicit relation with someone and kept insisting on her that she must disclose the identity of the person with whom she had been maintaining illicit relationship and threatened her that if she did not disclose to him the identity of the person with whom she had been maintaining illicit relationship, he would kill Ankit Kumar. Though PW 5 told her husband that she never maintained any illicit relation with anyone, the accused gave two-three slaps and went away from his house taking, however, along with him, their son, Ankit Kumar, and while leaving his house, her husband told her (PW 5) that he was going to police station.

17. It is in the evidence of PW 5 that she, then, came to her parental house, at Dan Nagar, and narrated the entire occurrence to her mother, brother and sister-in-law and her brother went to look for the accused and Ankit.

18. It is also in the evidence of PW 5 that the

accused, then, called, on telephone No.224295, which was received by her, and told her that if she did not disclose the truth, he would kill Ankit Kumar, whereupon she told him to come with Ankit Kumar and she would reveal all the facts, but the accused disconnected the call.

19. It is the further evidence of PW 5 that her husband (i.e., the accused), again, called, on the same phone number, at about 6.00 to 6.30 AM, (i.e., on the following day) and told her that he was giving Ankit intoxicant and if she still did not disclose to him the truth, he would kill him (Ankit Kumar) and send to her Ankit's dead body and, by so telling her, the accused disconnected the line again.

20. PW 5 has deposed that the accused, once again, called at 8.00 AM, but this time, his call was received by her sister-in-law (PW 3) and her sister-in-law was told by the accused that PW 5 had been maintaining illicit relation, whereupon her sister-in-law (PW 3) told the accused that there was no such relationship and asked him to come with Ankit and the matter would be settled, but the accused told her (PW 3) that he was sending Ankit after killing him and disconnected the line.

21. PW 5 has also deposed that at about 9.00 AM, on that very day (i.e., 18.11.2005), she heard that dead body of a boy was lying, at Sidhi Ghat, by the side of Budhi

Gandak river, whereupon she went, with her brother, Raj Kumar Patel, to Sidhi Ghat and saw the dead body of Ankit Kumar, she noticed marks on his neck and suspected that Ankit had been strangled.

22. PW 5 has further deposed that police came to Sidhi Ghat and recorded her *fardbeyan* and, on having read over to her the *fardbeyan*, as she found the *fardbeyan* to have been correctly written, she put her signature thereon. She has proved her *fardbeyan* as Exhibit-1 and her signature thereon as Exhibit 1/1.

23. Close on the heels of the evidence of Bobby Devi (PW 5) is the evidence of her sister-in-law, Baby Raj (PW 3), who is wife of Raj Kumar Patel (PW 4), elder brother of the informant (PW 5).

24. The evidence of PW 3 is that after their marriage, the accused and his wife used to visit her house, she never had complain against them and till before two months of the occurrence, both the husband and wife, i.e., the accused and the informant (PW 5), used to visit her house.

25. As regards the occurrence, PW 3 has deposed that Bobby Devi (PW 5) came to the house of PW 3 with her daughter and told them that an altercation had taken place in the morning between her and her husband and that her

husband had left the house with their son, Ankit, asking his wife (i.e., PW 5) to reveal the truth, failing which he would kill Ankit.

26. It is in the evidence of PW 3 that a telephone call, from the accused, at about 6.00 O'clock, in the morning, on 18.11.2005, was received by Bobby Devi (PW 5) and accused Shambhu asked her to reveal the truth or else, he would kill Ankit and throw his dead body and, then, accused disconnected the call.

27. It is also in the evidence of PW 3 that thereafter, the accused made a second call at 8.00 O'clock in the morning, but this time, it was she (PW 3), who picked up the phone, and the accused told her (PW 3) that Bobby Devi (PW 5) had illicit relation with another person and told her (PW 5) that he would kill Ankit if the truth was not revealed.

28. It is the further evidence of PW 3 that at about 9.00 O'clock in the morning of that very day, dead body of a child, aged about 8-10 years, was found lying on Sidhi Ghat and her husband (PW 4), along with Bobby Devi (PW 5) went to Sidhi Ghat and saw the dead body.

29. While considering the evidence of PW 3 and PW 5, what needs to be pointed is that as regard the conversations, which, according to these witnesses, had taken place between them and the accused, prosecution did not

elicit from them if they had revealed to each other the conversation, which they individually had, on telephone, with the accused.

30. Be that as it may, even if the evidence of PW 5 as to what the accused had told PW 3 on telephone and the evidence given by PW 3 as to what the accused had told PW 5 are kept excluded from the purview of consideration as *hearsay*, the fact remains that the evidence, given by PW 5, as to what the accused had told her (PW 5) and the evidence given by PW 3 as to what conversation the accused had with her (PW 3) remained admissible in evidence.

31. What may, now, be noted is that though these two witnesses (PW 3 and PW 5) were put to cross-examination by the defence, nothing really was elicited from either of them to make the Court disbelieve their evidence and/or not to rely upon their evidence.

32. Having remained unshaken on material particulars, the evidence of PW 3 and PW 5 induce great confidence and their unshaken evidence, which is natural, consistent and coherent, reveal that on 17.11.2005, when PW 5 woke up, at about 5 O'clock in the morning, the accused told her that she had been maintaining illicit relation with someone and though she pleaded that she never maintained any such relationship, the accused insisted on PW 5 to

disclose to him the identity of the person with whom, according to the accused, PW 5 had been maintaining illicit relation or else, he would kill Ankit Kumar.

33. The unshaken evidence of PW 5 also shows that on hearing the denial from his wife (PW 5) that she had ever maintained any illicit relation with anyone; the accused gave a few slaps on her (PW 5) and left his house by taking with him Ankit Kumar. Thereafter, PW 5 came to her parental house at Dan Nagar, where she narrated the occurrence to her mother, elder brother and her elder brother's wife (PW 3) and, thereafter, her brother went to look for the accused and Ankit Kumar and that after sometime, the accused called, on the telephone, at the parental house of PW 5, the call was received by PW 5 and the accused asked PW 5 to reveal to him the truth or else, he would kill Ankit Kumar and throw his dead body. To the threat so given by the accused, PW 5 told the accused to come, with Ankit Kumar, to her parental house and, then, she would tell him the entire truth, but the accused disconnected the line.

34. It has also surfaced from the evidence of PWs 3 and 5 that the accused called on the said telephone at about 6.00 to 6.30 AM on the following day i.e., 18.11.2005 and told PW 5 that he was giving intoxicant to Ankit Kumar and if she did not reveal the truth, he would kill Ankit Kumar



and send the dead body to her and, then, disconnected the telephone line, but the accused called, again, at 8.00 AM, on that very day, i.e., 18.11.2005, and this time, the call was received by PW 3 (i.e., sister-in-law of PW 5), and the accused asked PW 3 to reveal the identity of the person with whom PW 5 had been maintaining relationship and despite the fact that PW 3 tried to convince the accused that no such relationship was being maintained by PW 5, the accused disconnected the line by telling her that he would kill Ankit.

35. It has further surfaced from the evidence on record that on 18.11.2005, at about 9.00 AM, *hulla* was raised that dead body of a boy was lying at Sidhi Ghat, whereupon PW 5, accompanied by her elder brother (PW 4), went to Sidhi Ghat and found that dead body of Ankit lying there. The doctors conducted *post mortem* on the said dead body and they found that Ankit had died, because of asphyxia caused by strangulation.

36. The fact that the accused-appellant made the telephone calls to the parental house of his wife (PW 5) has not been disputed by the defence. This apart, we do not see any reason not to believe the evidence of PW 3 and PW 5 as to what conversations they had with accused-appellant on telephone.

37. From the narration of facts, as discernible



from the evidence of PW 5 and PW 3, what clearly transpires is that the accused had questioned the chastity of PW 5 and demanded to reveal to him the identity of the person with whom she (PW 5) had allegedly been maintaining relationship and threatened to kill Ankit and, upon denial of his wife that she had not maintained illicit relation with anyone, the accused slapped her and, threatening to kill Ankit, left his house along with Ankit.

38. In fact, the fact that the accused and PW 5 had some altercation, in the morning of 17.11.2005, stands corroborated by the evidence of PW 1, who was the owner of the house, where the accused used to live with his family inasmuch as PW1 (Vivek Kumar) has deposed that, on 17.11.2005, when they were sleeping in the morning, an altercation took place between the accused and his wife and after about an hour of the altercation, which had taken place between the couple, the accused went away with Ankit.

39. Though PW 1 has deposed that PW 5 came to him and told him that accused had left the house with Ankit saying that he would kill him (Ankit), we keep this piece of evidence, given by PW 1, outside the purview of our consideration as *hearsay* inasmuch as the evidence of PW 5 does not show that she reported the occurrence to PW 1.

40. It is also in the evidence of PW 1 that PW 5



went to her parental house, at Dan Nagar, with her daughter, Neha Kumari, and the accused came to the house of PW 1 about 9 or 10 O' clock in the evening, the accused was visibly nervous, the accused took him (PW 1) near the Red Cross building and he asked him (PW 1) as to who were visiting his house in his absence and when PW 1 replied by saying that no one had come, the accused started beating him (PW 1).

41. It is also in the evidence of PW 1 that the accused had a knife in his hand and wanted to kill him by the knife, but the blow, given by the accused by means of his knife, failed and he (PW 1) prayed to the accused to spare him. It is the further evidence of PW 1 that thereafter, when his grand-mother and mother came there, the accused fled away leaving PW 1 bleeding and, then, he (PW 1) went to hospital at about 11.00 O' clock on 18.11.2005 and heard that a dead body of a child was lying and found that the said dead body was of Ankit.

42. Notwithstanding the cross-examination to which PW 1 was subjected, nothing really emerged from his cross-examination to show that what he had deposed was untrue or false.

43. There is, therefore, no reason for us to disbelieve the evidence of PW 1 and his evidence clearly lends supports to the evidence of PW 5 as regards the altercation,

which had taken place between PW 5 and the accused in the morning of 17th November, 2005, and also the fact that PW 5 had left the house with her daughter to her parental house, whereas the accused had left the house with Ankit.

44. Even from the evidence of PW 1, it transpires that the accused suspected the fidelity of his wife and was insisting upon PW 1 to reveal as to who, in the absence of the accused, had been visiting the house of the accused and that on the denial of PW 1 that anyone had been visiting the house of the accused, the accused attempted to stab PW 1, but PW 1 escaped without any serious injury.

45. Coming to the evidence of PW 4 (Raj Kumar Patel), brother of PW 5, we notice that according to him, PW 5 is his married sister, who used to live at her matrimonial house, she had a son, Ankit Kumar, and a daughter, Neha Kumari. It is in the evidence of PW 4 that the accused was a driver, the accused used to quarrel with PW 5 by accusing that she (PW 5) had been illicit relation with someone.

46. It is also in the evidence of PW 4 that on 17.11.2005, his sister (PW 5) came to his house and told him that when she woke up in the morning, the accused started beating her saying that she had illicit relation with someone and he would kill Ankit and went away with Ankit. It is the further evidence of PW 4 that he went to look for the accused

and Ankit, but could not trace them out and, then, when he returned home, his sister (PW 5) told him that accused had called her on phone and asked her to tell the truth or else, he would kill Ankit.

47. PW 4 has deposed that on 18.11.2005, another call was made to their telephone, which was received by PW 5, the accused told her that there was still time to tell the truth of her illicit relationship and PW 5 told the accused to come and, then, the problem would be solved.

48. PW 4 has also deposed that on the same day, i.e., 18.11.2005, at about 9.00/9.30 AM, *hulla* was heard that dead body of a boy was lying at Sidhi Ghat, he went there with his sister (PW 5) and saw the dead body of Ankit Kumar, who had been taken away by accused on 17.11.2005, and he (PW 4) came to know that Ankit was strangulated to death.

49. Even the evidence of PW 4 remained unshaken in cross-examination and his evidence, too, lends support to the evidence of PW 5 and corroborated her evidence.

50. From the combined reading of the evidence of PW 9, PW 10, PW 11 and PW 12, it is noticed that on 18.11.2005, when PW 9 was functioning as Officer-in-Charge, Khagaria Police Station, he wrote down the *fardbeyan*

(Exhibit-1/2) of Bobby Devi (PW 5), he took up the charge of investigation, he held *inquest* over the dead body of Ankit Kumar and prepared inquest report and to this inquest report, PW 4 is a witness.

51. From the unshaken evidence on record, which we have discussed above, what clearly emerges is that the accused-appellant was the one, who had taken Ankit Kumar with him, while leaving the house in the morning of 17.11.2005, and he had, repeatedly, been threatening that he (accused) would kill Ankit Kumar if the truth was not revealed to him as to who the person was with whom PW 5 had been maintaining illicit relation. It also clearly transpires from the evidence on record that accused-appellant not only suspected fidelity of his wife, but also suspected that Ankit was not his son.

52. Further-more, the fact that Ankit Kumar was in the custody of accused-appellant on 17.11.2005 and until the time Ankit died, Ankit remained in the custody of the accused-appellant has surfaced wholly unshaken from the evidence on record.

53. While considering the present appeal, it needs to be pointed out that there is, admittedly, no eyewitness to the occurrence of strangulation of Ankit leading to his death. The entire case of the prosecution rests on circumstantial



evidence. When a case is based on circumstantial evidence, every incriminating circumstance must be independently proved beyond any pale of doubt. The convincingly proved circumstances must form a complete chain pointing unerringly to the accused as the guilty one. The evidence, adduced by the prosecution, in a case, which is based on circumstantial evidence, must be consistent with the hypothesis of guilt of the accused and must also be inconsistent with the hypothesis of innocence of the accused.

54. On considering the evidence on record, as a whole, the following incriminating circumstances are found to have been clearly proved:

(a) The accused-appellant is the husband of Bob Devi (PW 5) and they used to live with their son, Ankit Kumar, aged about 8-10 years, and daughter, Neha Kumari, aged about 5 years.

(b) In the house, where the accused-appellant used to live with his family, Vivek Kumar (PW 1) also lived.

(c) The accused-appellant was driver in Bombay and came back to Khagaria about two years before the death of Ankit Kumar.

(d) On 17.11.2005, when the informant woke up, at about 5 O'clock in the morning, the accused-appellant started making accusations against her by saying that she had

been maintaining illicit relation and wanted to know the identity of the man with whom she had been maintaining illicit relation.

(e) Though the accused-appellant's wife (PW 5) pleaded before the accused-appellant that she had not been maintaining illicit relation with anyone, the accused-appellant did not believe and, in fact, reacted by giving a few slaps to his wife.

(f) On that very day, i.e., on 17.06.2005, at about 7 O'clock in the morning, the accused-appellant left his house and, while leaving his house, he took away with him Ankit Kumar.

(g) Before leaving his house, on 17.06.2005, in the morning, along with Ankit Kumar, the accused-appellant threatened that he would kill Ankit Kumar unless he was told by PW 5 the identity of the man with whom she had, according to the accused-appellant, been maintaining illicit relation.

(h) Out of concern and fear, the informant (PW 5), too, went, along with her daughter, Neha Kumari, to her parental house, at Dan Nagar, and, at about 11.00 AM, on that very day (i.e., 17.11.2005), her husband (i.e., the accused-appellant) made a telephone call to her and asked her (i.e., the informant) to disclose to him (accused) the name

of the person visiting her or else, he would kill Ankit Kumar, whereupon the informant told her husband to come with Ankit Kumar so that she could reveal the truth, but the accused disconnected the call.

(i) The informant remained, on 17.11.2005, at her parental house and, on the following day, i.e., 18.11.2005, at about 06.00 O'clock in the morning, her husband (i.e., the accused-appellant) made a call to her (i.e., the informant) again and told her that as she had not been disclosing the name, he was sending Ankit Kumar after killing him and, having told the informant thus, the accused-appellant disconnected the telephone line, but telephoned, once again, at about 8.00 AM, on that very day, i.e., 18.11.2005, and this time the call was received by the informant's sister-in-law, Baby Raj (PW 3), and the accused told her that Bobby Devi (i.e., the informant) was a woman of bad character and, in his absence, some unscrupulous person had been visiting her and that Ankit was not his son, whereupon PW 3 (Baby Raj), i.e., the informant's sister-in-law, asked the accused-appellant to come to Dan Nagar, but the accused-appellant disconnected the line and, at about 9.00 AM, on that very day (i.e., 18.11.2005), upon hearing *hulla* that dead body of a young boy, aged about 8-10 years, had been found lying by the side of river, at Sidhi Ghat, the

informant went to Sidhi Ghat with her brother, Raj Kumar Patel (PW 4), and saw lying there the dead body of her son, Ankit Kumar.

(j) Post mortem, carried out on the dead body of Ankit Kumar, revealed that he (Ankit Kumar) died because of asphyxia due to *strangulation*.

55. When the incriminating circumstances, proved above, are considered together, the cumulative effect thereof is that the accused-appellant suspected, for undisclosed reason, that his wife (PW 5) had been maintaining illicit relation with someone during his absence from Khagaria and that Ankit Kumar was not his son and he wanted to know the identity of the man with whom, according to the accused-appellant, PW 5 had been maintaining illicit relation and though PW 4 and even her sister-in-law (PW 3) tried to explain to the accused-appellant and convince him that no such illicit relation was maintained by PW 5, the accused-appellant did not believe them.

56. Coupled with the above, since the time, Ankit Kumar was taken away by the accused-appellant, Ankit was not proved to have been seen with anyone and, hence, it can be safely held that Ankit had remained in the custody of the accused-appellant and he was also killed, while in the custody of the accused-appellant, inasmuch as Ankit died,

according to the *post mortem* report, because of asphyxia due to *strangulation* and his death was *homicidal* in nature.

57. In the circumstances indicated above, though there is no direct evidence of any witness, who had seen the accused-appellant strangulating Ankit to death, the circumstantial evidence, as depicted above, clearly proves, beyond any shadow of doubt, that it was none, but the accused-appellant, who had strangled to death Ankit suspecting that Ankit was not his son.

58. To put it a little differently, the fact that the accused-appellant had caused the death of his son, Ankit Kumar, and committed thereby offence of *murder* punishable under Section 302 of the Indian Penal Code stands well proved.

59. We, therefore, see no reason to interfere with the order of conviction and also the order of sentence, which has been passed against the accused-appellant. In fact, the sentence passed against him is not in conformity with the provisions of Section 302 of the Indian Penal Code inasmuch as he ought to have been, apart from being sentenced to suffer imprisonment for life, sentenced to pay fine of such amount as the learned trial Court considered reasonable and appropriate. The learned trial Court appears to have not noticed that corporal punishment, coupled with fine, is the

punishment prescribed for offence of *murder* punishable under Section 302 of the Indian Penal Code. The sentence is, therefore, not in excess of the punishment prescribed by law.

60. In the result, this appeal is dismissed and the conviction of the accused-appellant and the sentence passed against him are hereby upheld.

61. The Registry shall send back the Lower Court Records along with a copy of this judgment and order.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

A.I./Mkr./AFR

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