

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction, dated 08.12.2010, and order of sentence, dated, 14.12.2010, passed by Shri A. K. Pathak, learned Sessions Judge, Vaishali at Hajipur in Sessions Trial No. 151 of 2009, arising out of Hajipur (Town) P.S. case No. 602 of 2008)

Criminal Appeal (DB) No.176 of 2011

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Tinku Chaudhary, Son of Late Nanhak Chaudhary, Resident of Mohalla- Bagmalli,
P.S.- Town Hajipur, District- Vaishali. Appellant

Versus

The State of Bihar Respondent

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Appearance :

For the Appellant/s : Mr. Neeraj Kumar @ Sanidh, Amicus Curiae

For the Respondent/s : Mr. A. K. Sinha, Addl. P.P.

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 24-11-2016

The instant appeal is directed against the judgment of conviction, dated 08.12.2010, and order of sentence, dated, 14.12.2010, passed by A. K. Pathak, learned Sessions Judge, Vaishali at Hajipur in Sessions Trial No. 151 of 2009, arising out of Hajipur (Town) P.S. case No. 602 of 2008, whereby the sole appellant Tinku Chaudhary has been convicted under Sections 302 and 307 of the Indian Penal Code and sentenced to undergo R.I. for life and a fine of Rs.10,000/- and in default of the same to undergo R.I. for three years under section 302 of the Indian Penal Code. The appellant has been further sentenced to undergo R.I. for five years under Section 307 of the Indian Penal Code. However, both the sentences have been



directed to run concurrently.

2. The prosecution case as made out in the Fardbeyan of Rashmi Kumari (P.W.9), daughter of late Nanhak Chaudhary, resident of Village Bagmali, P.S. Hajipur Town, District- Vaishali recorded on 16.11.2008, at about 1.15 P.M. at Sadar Hospital, Hajipur in short is that on 16.11.2008, at about 12.30 noon, she was in her house along with her mother Bhuli Devi (P.W.8) and her two brothers, namely, Tinku Chaudhary (appellant) and Mohan Kumar (deceased). One of her brothers, namely, Tinku Chaudhary, wanted to marry as per his own will and used to pressurize her mother to hand him the money for the same to which her mother did not accede, as her mother had kept the money for her marriage. As her mother refused to hand over the money, Tinku Chaudhary struck his mother with Fasuli. Seeing her mother, being attacked, the other brother, namely Mohan Chaudhary, tried to intervene. However, Mohan Chaudhary was also attacked by Tinku Chaudhary (appellant) by Fasuli, on account of which blood started oozing from the wound. In the meantime, Jai Kishun Sah, Dilip Sah, Bablu Sah and Soni also came and instigated Tinku Chaudhary to assault his brother. Tinku Chaudhary threatened the family members not to disclose the incident to any one. The cause of occurrence is that Tinku Chaudhary wanted to marry the daughter-in-law of Jai Kishun Sah, which fact was not acceptable to his mother. After the incident, her brother Mohan Chaudhary was being carried to



hospital , where he was declared dead.

3. On the basis of the Fardbeyan of Rashmi Kumari, Hajipur Town P.S. case no. 602 of 2008 was registered under Sections 302 and 307 of the Indian Penal Code along with other allied sections of the Indian Penal Code against Tinku Chaudhary.

4. The police after investigation submitted charge-sheet under Sections 302 and 307 of the Indian Penal Code. The learned Magistrate took cognizance of offence and committed the case to the Court of Sessions. Thereafter, the charges were framed under Sections 302 and 307 of the Indian Penal Code, to which the appellant pleaded not guilty and claimed to be tried.

5. The prosecution in support of the case, examined as many as 11 witnesses. P.W. 1 is Jagarnath Chaudhary, P.W.2 is Jagdish Prasad Singh, P.W. 3 is Bachcha Chaudhary, P.W. 4 is Subhash Kumar Nirala, P.W. 5 is Sujit Kumar Singh, P.W.6 is Krishna Chaudhary, P.W. 7 is Ganesh Rajak, P.W. 8 is Bhuli Devi, P.W. 9 is Rashmi Kumari (informant), P.W. 10 is Sadhu Sharan Thakur (I.O.) and P.W.11 is Rajendra Prasad Khetan.

6. Out of these 11 witnesses, P.W.8, who is the mother of the informant, turned hostile and has not supported the prosecution case. P.W. 9 Rashmi Kumari is the informant herself. P.W.10 is the second investigating officer, who simply submitted charge-sheet. P.W.11 is Dr. Rajendra Prasad Khetan, who conducted the post-



mortem examination on the dead body of Mohan Chaudhary as well as prepared injury report of Bhuli Devi (P.W.8). Besides examining 11 witnesses, the prosecution also exhibited the following documents: Ext.1 is signature of Jagarnath Chaudhary on the inquest report, Ext.2 is signature of Rashmi Kumari on Fardbeyan, Ext.2/1 is signature of Jagarnath Chaudhary on the fardbeyan. Ext.3 is the post-mortem report, whereas Ext. 4 is injury report of Bhuli Devi (P.W.8).

7. The defence did not examine any witness in its support nor adduced any document. The case of the defence in the statement under Section 313 Cr.P.C. is complete denial of the occurrence. However, on consideration of materials on record, the learned trial court convicted the appellant under Section 302 and 307 of the Indian Penal Code and sentenced him, as mentioned in the earlier paragraph.

8. The appellant while assailing the judgment of conviction submits that except for the informant, no other witness has supported the prosecution case, rather all of them have been declared hostile. He further submits that as per the informant (P.W.9), the appellant is alleged to have given one blow on the person of Mohan Chaudhary, whereas the doctor found two injuries, one on his face and the other on his chest. Elaborating his submissions, learned counsel for the appellant submits that the prosecution has been able to explain only the injury on the chest on the person of deceased, whereas there



is no explanation for the injury on the face. He next submits that the evidence of the prosecution is based on the solitary testimony of P.W. 9, who is informant and sister of the deceased, which is not fit to be relied upon, in the background of inconsistencies in her own evidence.

9. Learned counsel further submits that in the Fardbeyan, this witness stated that the occurrence took place in the house, whereas in her evidence before the Court, she stated that the occurrence took place in Varanda. Furthermore, the place of occurrence has also not been substantiated in the background of non-examination of the investigating officer. He next submits that this witness has tried to develop the prosecution case in her evidence. In her evidence, she stated that Fasuli blow hurled by the appellant hit her mother Bhudi Devi (P.W.8), whereas in her evidence before the Court, she stated that the same hit the shoulder of Bhuli Devi (P.W.8) to make the prosecution case in consonance with the medical report. He next submits that the evidence of P.W. 9 also becomes untrustworthy of reliance in the background of evidence of P.W.8, the mother of the deceased, who has not supported the case of the prosecution, much less of the injury sustained by her.

10. On the other hand, counsel for the State submits that it is well settled that the conviction can be sustained on the solitary evidence of an eye witness, if the same is worthy of reliance. Learned counsel submits that there happens to be no material exaggeration or



contradictions in the statement of P.W.9 before the police as well as evidence before the Court. He submits that in fact there is no contraction, as in the Fardbeyan, the informant stated that the occurrence took place inside the house, whereas in her evidence she stated that occurrence took place in the Varanda, which is the part of the house itself. He submits that in any view of the matter, the discrepancy would be only minor, which will not cut at the root of the prosecution case. He next submits that in case of deviation between oral evidence and medical evidence, the oral evidence would prevail and the appellant has not drawn the attention of P.W.9 with regard to the other injury on face of the deceased.

11. We have heard the counsel for the parties and perused the materials on record. From the materials available on record, it is evident that both the parties are non-else, rather own family members. The deceased is one of the brothers of the appellant. P.W.8 is the mother and P.W.9 is the sister. Remaining witnesses are outsiders, save and except P.W.3, who claimed himself to be maternal uncle of the deceased as well as the appellant. The whole scenario and the appreciation of evidence coupled with the part played by the appellant is to be seen in the aforesaid background and to properly adjudicate the same, the evidence of P.W.11, the doctor is to be looked into.

12. There is no dispute to the fact that the death of the



appellant was caused by ante-mortem cut injuries perpetrated by Fasuli. Furthermore, the defence has not disputed that the occurrence did not take place in the house. The explanation of defence was that there was an altercation between both the brothers and on account of fall on the Fasuli, the deceased suffered cut injuries and died. The motive for the occurrence in a way has been admitted by the defence that there was dispute between the deceased and the rest of the family members, namely, the mother (P.W.8), the informant (P.W.9) and the deceased Mohan Chaudhary, whereas the latter three wanted to preserve the money for the marriage of the informant P.W.9, whereas the appellant wanted the money so that he can perform his marriage with the daughter-in-law of one Jai Kishan Sah.

13. In the backdrop of the aforesaid evidence, the defence at least has not disputed the place of occurrence, the possible motive for the occurrence, the time of occurrence. The dispute is being raised only with respect to manner of occurrence. According to the defence, the deceased died on account of fall on the Fasuli. In support of his submission, the defence has heavily relied upon the evidence of mother of the deceased (P.W.8), who stated that in course of altercation, the deceased fell on Fasuli and sustained injuries, supported by some of the hostile witnesses. However, we find that informant Rashmi Kumari (P.W. 9) has been consistent in her statement both in the Fardbeyan as well as before the Court that this



appellant first assaulted her mother with Fasuli for giving money, which was kept for her marriage and when the deceased tried to intervene, he (appellant) hurled Fasuli blow on him causing injury on his chest. The doctor (P.W.11) too found injury possible by Fasuli on Bhuli Devi (P.W.8) as well as the Fasuli injury on the chest of the deceased.

14. The main contention of the appellant is that as per the evidence of doctor, the deceased had sustained one more injury on his face, which has not been explained by the prosecution and on that very basis they have challenged the manner of occurrence.

15. In order to appreciate the rival contention of the parties, it would be necessary to notice the evidence of Dr. Rajendra Prasad Khetan, who conducted post-mortem on the dead body of Mohan Kumar Chaudhary, on 16.11.2008, at 2.25 P.M. The doctor in his evidence found the following ante-mortem injuries on the person of the deceased:

(i) Incised wound $\frac{1}{2}$ " x $\frac{1}{2}$ " x muscle deep on left side of cheek on angle of mouth.

(ii) Incised wound 1" x $\frac{1}{2}$ " x cavity deep on left side of upper chest.

On dissection of injury no.1 the doctor found incised wound $\frac{1}{2}$ " x $\frac{1}{2}$ " x muscle deep on left side of cheek. Mouth was full of blood and blood clot. Tongue found intact, but facial bone found



fractured. All the vessels and nerves of that area found severed.

On dissection of chest, the doctor has found incised wound 1" x ½" x cavity deep on left side of chest. On opening of chest, left clavicle found fractured. Right bones cage was intact. No fracture of rib was found. On opening of chest, left cavity of chest found filled up with blood and blood clot. Left Jugular vein and artery found severed. The time elapsed since death was within six hours and the death was caused due to shock and haemorrhage on account of above injuries.

16. On the same day, the doctor examined Bhuli Devi at 1.10 P.M., aged about 45 years, wife of Nanhe Chaudhary of Village Bagmali, P.S.- Town, District- Vaishali in Sadar Hopsital, Hajipur and found the following injuries on her body.

(i) Incised wound 2"x ½" x muscle deep on left shoulder. The injury is simple in nature.

17. Learned counsel for the appellant has vehemently referred to injury no.1, which is on the side of cheek, which has not been referred to either in the fardbeyann of the informant or in her evidence before the Court. The aforesaid submission of the appellant has to be considered in the background of the fact that no attention of this witness has been drawn with respect to explanation of injury no.1. In absence of any such attention drawn to P.W.9 to the said injury on which the defence wants to take advantage has deprived P.W.9 and



the prosecution to explain the presence of the said injury. Furthermore, the defence has also not drawn the attention of the doctor that injury no.1 was not possible in the same transaction vis-à-vis injury no.2. In case of anomalies between the medical evidence and the ocular evidence, the latter would prevail. P.W.9 consistently stated in her fardbeyan and evidence that Tinku Chaudhary hurled Fasuli blow on Mohan Chaudhary, which caused Fasuli injury on his chest. Furthermore, the prosecution has not been able to draw any contradictions worth the name to discard the evidence of this witness. Counsel for the State has rightly pointed out that the conviction can be sustained on the evidence of a solitary witness, if the same inspires confidence and is worthy of reliance. Section 134 of the Evidence Act is also to the same effect.

18. Situated thus, and in view of the evidence discussed above, we find and hold that the deceased sustained injury on account of assault made by this appellant and not by fall, as suggested by the defence. We find that it is the prosecution case that the appellant struck one Fasuli blow on the person of P.W.8 also, which, however, has not been supported by P.W.8 herself. She has also denied any such injury caused by this appellant, though the doctor has found cut injury on the shoulder of P.W.8. But seeing the nature of injury, as also supported by P.W.9 in his evidence, we are of the view that the conviction under Section 307 of the Indian Penal Code is not tenable



and we accordingly alter the conviction into one under Section 324 of the Indian Penal Code, for which we sentence him to undergo R.I. for two years.

19. We are also of the view that though the prosecution has been able to establish that Fasuli blow hurled by the appellant has caused injury on the chest of the deceased, but nonetheless, we find that the aforesaid injury was perpetrated without any premeditation and knowledge that the said injury would cause death of the deceased.

20. From the evidence on record, we find that the occurrence took place on the spur of moment when the mother of the appellant refused to give him money, which she had kept for her daughter's marriage, as such we are of the considered view that the trial court erred in convicting the appellant under Section 302 of the Indian Penal Code, instead of convicting him under Section 304 Part-II of the Indian Penal Code, as there was no prior intention to cause death or that the injury was inflicted with any such knowledge that it would cause death to the deceased.

21. We, accordingly, modify the conviction from Section 302 of the Indian Penal Code to Section 304 Part-II of the Indian Penal Code and sentence him to undergo R.I. for 10 (ten) years as well as fine of Rs.10,000/- and in default thereof to undergo further simple imprisonment for six months. The amount of fine, if deposited, would be paid to the informant of the case, in terms of Section 357



Cr.P.C. Both the sentences would run concurrently.

22. With the aforesaid modification, the appeal is partly allowed.

23. We also observe that Patna High Court Legal Aid Committee would pay a sum of Rs.2500/- to Mr. Neeraj Kumar @ Sanidh, as he assisted the Court as Amicus Curiae in this case.

24. Let first and last page of the judgment be also handed over to Mr. Neeraj Kumar @ Sanidh for needful.

(Samarendra Pratap Singh, J.)

(Aditya Kumar Trivedi, J.)

Uday/-

AFR/NAFR	NAFR
CAV DATE	NA
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