

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.457 of 2016

Arising Out of PS. Case No.-32 Year-2001 Thana- BARHAT District- Jamui

Manoj Besara, son of Chhotey Lal Basera, resident of village-Bhurkunda,
P.S.- Barhat, District-Jamui.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Neeraj Kumar Sanidha, Amicus Curiae
For the Respondent/s : Mr. A.K. Sinha, A.P.P.

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
and
HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 16-09-2017

We have heard parties and have perused the records of this case.

This jail appeal has been filed assailing the judgment of conviction dated 2.07.2008 and order of sentence dated 5.07.2008 passed by 1st Additional Sessions Judge, Jamui in Sessions Trial No. 974 of 2001 arising out of Barhat P.S. Case No.32/2001 by which the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life with a fine of Rs.2000/- and in default of payment of fine, he would have to further undergo simple imprisonment for three months.



The prosecution case, in brief, is that, on 10.05.2001 at about 5.30 A.M. in the morning, the nephew of the informant, namely, Tinku came to his house and told him that at preceding night some altercation took place between the accused and his wife and in course of that, the accused assaulted at the head of the deceased with blunt portion of spade, which resulted into instantaneous death of the deceased. It has been disclosed in the fardbeyan that the marriage between the accused and the deceased was solemnized 15 years back and out of that wedlock, five children were born. When the informant went to the house of his sister, he saw her dead body lying on a cot. The villagers, namely, Ganesh Besara, Naresh Besara and Babu Lal Besara told the informant that due to some altercation between the husband and wife, the accused-appellant committed the murder of his wife by blunt portion of spade on her head.

On the basis of aforesaid fardbeyan, the police registered Barhat P.S. Case No. 32/2001 against the appellant for the offence punishable under Section 302 of the Indian Penal Code.

After investigation, the police submitted charge sheet against the appellant for the offence punishable under Section 302 of the Indian Penal Code. Thereafter, cognizance had been taken against the appellant under Section 302 of the Indian Penal Code. The case



was committed to the court of sessions, where charges were framed, to which, the accused person pleaded not guilty. Thereafter, trial started.

During trial, the prosecution has examined altogether six witnesses in support of its case. P.W. 1 is Dr. Suchi Prasad Singh, P.W. 2 is Ram Baran Yadav, P.W. 3 is Naresh Besara, P.W. 4 is Ganesh Besara, P.W. 5 is Babulal Besara and P.W. 6 is Ajay Kumar Marandi.

The defence has not examined any witness on its behalf.

The trial court after hearing learned counsel for the parties and considering the evidence on record came to the conclusion that the prosecution has been able to prove the charges against the appellant

Mr. Neeraj Kumar Sanidhya, learned Amicus Curiae took up the deposition of the witnesses and tried to argue that the prosecution has miserably failed to establish its case and, as such, conviction is not sustainable. It is urged that in fact there is no eye witness to the occurrence. The conviction is based only on the basis of circumstantial evidence, however, several links in the circumstantial evidence are completely missing.



Learned counsel has submitted that altogether six witnesses have been examined on behalf of the prosecution in support of its case. No witness has been examined on behalf of defence.

P.W.1 is Dr. Suchi Prasad Singh. She has stated in her evidence that she has done the post mortem examination on the dead body of the deceased Talo Devi and she found three external injuries on her person. According to the post-mortem report, there were three incised wounds upon the head and face of the deceased. The allegation is of assaulting by spade (Kudal). P.W. 2 Ram Baran Yadav has proved the FIR. P.W. 3 Naresh Besara appears to be a chance witness as he was passing through the house of Manoj Besara (appellant) then he saw that three sons of Manoj Besara were crying and when he entered into the house then he found that the wife of Manoj Besara was lying on the cot and blood was oozing out of her neck. Obviously, he is not the eye witness of the occurrence. P.W. 4 Ganesh Besara has stated that on the fateful morning, he was in his house and heard the cry of the children of Manoj Besara then he came to the place and saw that all the three sons of Manoj Besara were crying and dead body of Talo Devi was lying on the cot. The children of Manoj Besara informed him that their father has killed their mother by spade (kudal). The Kudal (spade) was seized by the police. However, he has stated in his cross-



examination that his statement was never recorded by the police under Section 161 Cr. P.C. Deposition of P.W. 5 is also almost on the same line. P.W. 6 Ajay Kumar Marandi, who happens to be the 'bahnoi' (brother-in-law) of the appellant and own brother of deceased Talo Devi, has stated that his Bhagina, i.e., the son of Manoj Besara came to his house at about 5.30 in the morning and stated that Manoj Besara had killed his mother by spade due to some quarrel between them. The Investigating Officer of the case has not been examined by the prosecution. However, the trial court while convicting the appellant under Section 302 of the Indian Penal Code has stated that in view of the other evidences available and being sufficient to prove the case against the convict, non-examination of Investigating Officer in the present case would not be fatal.

Learned Amicus Curiae has submitted that son of Manoj Besara, namely, Tinku, who has informed the P.W. 6 regarding the occurrence, appears to be the sole eye witness but he has not been examined in the case.

On analysis and scrutiny of the evidence available on record, we do not find any flaw in the findings recorded by the trial court as all the witnesses have stated that Manoj Besara had killed her wife and there is no theory propounded by anybody.



However, the question remains as to whether he could have been convicted under Section 302 of the Indian Penal Code or he could have been guilty under Section 304 Part II of the Indian Penal Code? The Post mortem report shows that there were three incised wounds on the head and face, however, P.W. 6 Babulal Besara has said that he has found only one wound on the head of the deceased. He has also stated that some quarrel was going on between the husband and wife. Thus, it appears that during such quarrel, due to sudden provocation, Manoj Besara could have assaulted his wife by spade. As such, this may be a culpable homicide as committed without premeditation in a spur of moment in the hit of passion upon the sudden provocation and may come under Exception 5 to Section 300 of IPC and fall under Section 304 Part II of the Indian Penal Code.

Since the appellant has already completed 15 years in imprisonment, in our view, it is a fit case in which conviction has to be upheld but with modification that in place of under Section 302 IPC it would be treated to be under Section 304 Part II of IPC.

Accordingly, the appeal preferred by the appellant is dismissed with the aforesaid alteration in conviction from Section 302 of the Indian Penal Code to Section 304 Part II of the Indian



Penal Code and the sentence is reduced to the period already undergone by him in custody.

The appellant is already on bail. He is discharged from the liability of his bail bonds.

The Legal Services Authority shall make payment to Sri Neeraj Kumar Sanidhya, learned Amicus Curiae as per schedule.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
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