

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.67 of 2015

Arising Out of PS. Case No. -73 Year- 1985 Thana -BHABHUA District- BHABHUA (KAIMUR)

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PAPPU JAISWAL S/O SACHHIDANAND JAISWAL RESIDENT OF WARD
NO. 14, BHABHUA, P.S. BHABHUA, DISTRICT KAIMUR (BHABHUA).

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Vikramdeo Singh, Adv.
Mr. Manoj Kumar, Adv.

For the State : Mr. S.A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 7-11-2017

Appellant, Pappu Jaiswal has been found guilty for an offence punishable under Section 304 Part-II/34 of the IPC and sentenced to undergo R.I. for seven years, fined of Rs.5000/- in default thereof, to undergo S.I. for six months, additionally vide judgment of conviction dated 15.01.2015 and order of sentence dated 21.01.2015 passed by Ad-hoc Additional Sessions Judge, IIIrd, Kaimur at Bhabhua in Sessions Trial No.187 of 1984/194 of 2013.

2. Nandlal Prasad, PW.4 gave his fardbeyan on 19.04.1985 in front of his tea stall alleging inter alia that in usual way, at about 09:00 PM while he was preparing tea, his brother Mahavir Prasad (deceased) was serving tea to the customers as well as was cleaning the cup, plates, glass etc. At that very moment Subhash Jaiswal, Nehal Ansari, Uttam Jaiswal, Pappu Jaiswal along with one another, whom he had not identified came, out whom, Uttam Jaiswal called his brother Mahavir Prasad, mama kindly give me a glass of water which huffed his brother. His brother forbidden him



but, they continued whereupon, his brother began to abuse. Aforesaid person continued with their activity and during course thereof, they dragged Mahabir Prasad outside the shop and began to assault with fist and slap repeatedly. His brother, on being mercilessly assaulted fell down and died. All the accused escaped therefrom.

3. After registration of Bhabhua P.S. Case No.73/1985 investigation commenced, continued and concluded by way of submission of charge sheet whereupon, the trial facilitated and concluded in a manner, having subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither oral evidence nor documentary evidence has been adduced.

5. In order to substantiate its case prosecution had examined altogether four PWs out of whom PW.1-Lal Babu Keshri, PW.2-Rajendra Prasad Keshri, PW.-3 Ram Lal Araya, PW.4-Nand Lal Prasad. Prosecution had also exhibited Ext.I Series-Signature of informant Nand Lal Prasad over the fardbeyan as well as inquest report.

6. While assailing the judgment of conviction and sentence recorded by the learned lower court, it has been submitted on behalf of appellant that on account of prevalence of infirmities persisting on the record, did not justify the finding recorded by the lower court. In order to buttress such plea, it has been submitted that neither doctor nor



I.O. has been examined and on account thereof, the interest of appellant is found highly prejudiced, apart from the fact that due to non-examination of doctor cause of death is not on the record. So, it cannot be said that even accepting the prosecution version for a moment, that assault by means of fist and slap was made could not found connected with the death of the deceased. It has also been submitted that so many factors would be responsible for the death including that of heart failure, or ailment, for which appellant could not be held responsible.

7. In likewise manner it has also been submitted that non-examination of I.O. has also caused prejudiced to the interest of the appellant in the background of the fact that neither P.O. nor the material development, exaggeration visualizing from the evidence of the witnesses, so examined, during course of trial been able to be properly placed on the record in order to suggest the evidence untrustworthy. Furthermore, non examination of impendent witness happens to be another circumstance, which the defence failed to surface on account of non-examination of I.O. coupled with partial way of investigation. Accordingly, the cumulative effects nullify the finding having been recorded by the learned lower court.

8. Now coming to the facts of the case, it has been submitted that neither there was an intention nor knowledge while assaulting the deceased Mahavir Prasad by fist and slap when he irked over fun and began to abuse the appellant and others. It happens to be instantaneous reaction without any intention or



knowledge and so, in worst case, appellant would be responsible for an offence punishable under section 323 of the IPC which, in the facts of the case being the occurrence of the order 1985 would warrant application of Probation of Offenders Act.

9. The learned APP while controverting the submission having been at the end of the learned counsel for the appellant had submitted that five persons encircling the deceased had brutally assaulted whereupon, it saw ultimately costing life of the deceased. Because of the fact that appellant had not restricted their activity, even being annoyed with the abusive language having been used by the deceased and for that, accused including appellant were themselves responsible as they knowingly, intentionally invited by calling deceased as Mama and so, the learned lower court had rightly convicted and sentenced for an offence punishable under Section 304 Part-II of the IPC.

10. PW.1 had stated that on the alleged date and time of occurrence he was at the tea shop informant Nand Lal Prasad and was sipping tea along with Rajendra Prasad and Ram Lal Arya. At that very time Uttam Prasad, Pappu Prasad, Subhash Jaishawal, Nehal Ansari and one another came and asked for tea. Subhash called Mama to Mahabir Prasad, brother of Nand Lal who was assisting. Uttam Prasad had said Mama kindly provide a glass of water whereupon Mahabir Prasad objected. In spite of the same, the accused continued with calling Mama as a result of which Mahabir began to abuse. Subhash had disclosed that as he is abusing being a person of



lower strata, on account thereof, he be killed. All the five dragged Mahabir outside the shop and began to assault over stomach as well as chest with fist and slap. Mahabir Prasad fell down and died. All the accused fled therefrom. Then thereafter, they took Mahabir to hospital where doctor declared dead. Then they have gone to police station where Nand Lal gave his fardbeyan. Nand Lal had put his signature as well as he had also put his signature. His statement was recorded by the police. Inquest report was prepared in his presence in carbon process whereupon he along with Nand Lal put his signature (exhibited). Identified the accused. During cross-examination he has deposed that Nand Lal happens to be his cousin brother. He had further stated that there happens to be stair for coming from the shop. At para-9, he had stated that Mahabir irked as calling Mama. He had stated that just after sitting inside the shop, first of all Subhash called mama and then Uttam Prasad had demanded a glass of water calling Mama whereupon Mahabir protested. As accused persons continued, thereupon Mahabir began to abuse Mahabir was cleaning cup and plate. Accused persons had not assaulted Mahabir at that very place rather they dragged to road outside shop where he was assaulted by fist and slap. In para-11 he had stated that they have tried to intervene till then, accused persons ran away. They raised alarm. But, they have not raised alarm during course of assault. After falling of Mahabir Prasad, people of the surrounding assembled. In para-12, he had stated that accused persons were assaulting Mahabir from front. They all jointly assaulted. He had denied the suggestion that on account of heart failure, deceased had died.



11. PW.2 is Rajendra Prasad Keshri who had deposed that on the alleged date and time occurrence he along with Lal Babu, Ram Lal Arya was sipping tea at the shop of Nand Lal where Uttam Jaiswal, Subhash Jaiswal, Nehal Ansari and one another came. Uttam Jaiswal called Mahabir Jaiswal Mama please give a glass of water whereupon Mahabir protested but, accused persons did not pay heed to it and continued calling Mama whereupon Mahavir began to abuse. Subhash had said he is abusing like anything and so, he be assaulted whereupon all the accused persons dragged Mahabir to road where assaulted with fist and slap over his chest, stomach. Mahabir fell down. Accused persons fled therefrom. They lifted Mahabir to hospital where doctor declared him dead. Identified the accused. In cross-examination, he had said that people used to huff the Mahabir as Mama whereupon, he used to abuse. In para-4 he had stated that accused persons assaulted for about a minute. They all assaulted from front side. They tried to intervene but till then, accused persons escaped. He denied the suggestion that no such kind of occurrence had taken place.

12. PW.3 is Ram Lal Arya who during course of his evidence has stated that on the alleged date and time of occurrence, he was taken tea at the shop of Nand Lal. Rajendra along with others were also taking tea. Nehal, Subhash, Pappu, Uttam along with one another came at thatvery time. Uttam demanded water from Mahabir saying Mama give me a glass of water whereupon Mahabir protested. All the accused persons began to call him Mama-Mama whereupon Mahabir began to abuse as a result of which, all the accused persons



caught hold Mahabir, dragged him outside shop and then began to assault with fist and slap over his chest, stomach as a result of which Mahabir fell down. All the accused persons flee therefrom. They have taken Mahabir to hospital where doctor declared him dead. During cross-examination at para-7 he had stated that who dragged Mahabir he is unable to disclose. He is unable to say whether accused persons dragged him by catching his cloth. But, he stated that Mahabir was dragged up to 2-3 yards to road where he was assaulted. He had further stated that he had not gone to P.S. along with informant. He denied the suggestion.

13. PW.4 is informant who had stated that he as well as his brother Mahabir are separate. He runs tea stall wherein Mahabir gave his services. On the alleged date and time of occurrence 2-3 persons were taking tea since before. Uttam, Pappu, Nehal, Subhash along with one another has came. At that very time Mahabir was cleaning cup and plates. Uttam asked for a glass of water from Mahabir saying Mama give me a glass of water whereupon Mahabir protested whereupon all the accused persons began to call him Mama-Mama. Mahabir began to abuse. Subhash directed assault as he dared to abuse them whereupon, all the accused persons caught hold Mahabir, dragged him up to road and then assaulted with fist and slap over his chest and stomach whereupon Mahabir fell down. All the accused fled away. Then thereafter, they taken away Mahabir to hospital where he was declared dead. Then they have gone to police station and recorded his fardbeyan in presence of Lal Babu (exhibited since before). His further statement was recorded. Police had prepared



inquest in his presence as well as in presence of Lal Babu (since exhibited), identified the accused. During cross-examination at para-6 he had stated accused persons dragged his brother outside shop. Mahabir had fallen 1-2 hands away from stair of the shop. Mahabir was assaulted from front side. He was assaulted by fist and slap. None had pushed him. As a result of which he fell down. In para-8 he had stated that he rushed in rescue but was pushed by the accused persons. Then had stated that Ram Nath who happens to be father of Maldhani Sah having shop south to his shop. In para-9, he has stated that accused persons used to visit his shop and when they came, they used to huff his brother by calling Mama. They have not quarreled with the accused persons. He had shown P.O. to the I.O.

14. From the ocular evidence as referred above it is clearly evident that all the witnesses are consistent over manner of assault by means of fist and slap. They are also consistent with regard to the fact that the accused persons were not at all carrying intention or knowledge while assaulting Mahabir with fist and slap nor they came at the shop with premeditation rather, the whole occurrence visualized in a spur of moment on huffing the deceased.

15. Apart from this, non-examination of doctor at least in the facts and circumstances of the case had a bearing in the background of the fact that on account of non-examination, activity of the accused relating to the occurrence so alleged with ultimate result is found completely missing. That means to say whether the assault even by means of fist and slap was responsible for causing death is to



be connected in order to justify the culpability of the accused persons, is found absent.

16. Now coming to applicability of Section 304 IPC is concerned, the prosecution has to substantiate that the action of the accused should be with an intention to cause death or cause such bodily injury without ultimate result in death then in that event there should be an application of Section 304 of the IPC but, if the bodily injury if any, is being caused in absence of intention or knowledge that such bodily injury will ultimately results in death of the victim then in that circumstance, Section 304 would not apply.

17. In **Afrahim Sheikh and others v. State of W.B** reported in **AIR 1964 Supreme Court 1263**, it has been held:

“Section 304 reads as follows :-

"Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death ".

Section 304 does not define culpable homicide not amounting to murder. That definition is to be found in S. 299, which provides :

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by



such act to cause death, commits the offence of culpable homicide."

Culpable homicide is the causing of the death of a person in three ways : 1. With the intention of causing death, 2. With the intention of causing such bodily injury as is likely to cause death, and 3. With the knowledge that the offence is likely by such act to cause death. The offence of culpable homicide becomes murder when four circumstances exist. They are mentioned in S.300. A number of exceptions are however included, and those exceptions show extenuating circumstances on strict proof of which the offence is again brought down to culpable homicide not amounting to murder. The causing of the death of a person by doing an act accompanied by intention in the two ways described in S.299 or with the knowledge that the act is likely to cause death also described there is thus distinguished from cases of deaths resulting from accident or rash and negligent act and those cases where death may result but the offence is of causing hurt either simple or grievous. Once it was established, as was established in this case, that the act was a deliberate act and was not the result of accident or rashness or negligence, it is obvious that the offence which was committed was one under S. 304. In the present case however death was not the result of the act of a single individual but was the result of the act of several persons, and they shared the common intention, namely the commission of the act or acts by which death was occasioned."

18. In **Molu and others v. State of Haryana** reported in **AIR 1976 Supreme Court 2499**, it has been held:

"12. The next point that falls for consideration is what is the nature of the offences that the accused have committed on the evidence led before the Trial Court. To begin with, as pointed out above, multiple injuries were received by the deceased persons which were caused by blunt weapons like lathis and are of minor character. Furthermore the injuries are not on any vital parts of the body and even those which are on the scalp portion appear to be very superficial. There is nothing to show that the accused intended to cause the deliberate murder of the two deceased persons. There is no evidence to show that any of the accused ordered the killing of the deceased persons or incited or in



any way expressed a desire to kill the deceased persons at the spot. In these circumstances we are satisfied that there is no legal evidence in this case that the accused intended to cause the murder of the deceased. The fact, however, remains that the accused have caused multiple injuries on both the deceased persons on various parts of their bodies and, therefore, they undoubtedly had the knowledge that the cumulative effect of the injuries would result in the death of the deceased. As all the accused appear to have acted together and under a pre-conceived plan which developed at the spot and which is clear from the fact that they suddenly pounced on the deceased and went away together they must be deemed to have possessed a common intention to assault the deceased with the knowledge that the injuries caused by them were likely to cause the death of the deceased. In these circumstances, the accused have committed an offence under Section 304, Part II of the Indian Penal Code and not one under Section 302, I.P.C. We would, therefore, allow this appeal only to this extent that the conviction of the appellants is altered from that under Section 302 to that under Section 304, Part II, I.P.C. and their sentences reduced from life imprisonment to seven years rigorous imprisonment while maintaining the fine. The conviction and concurrent sentence passed by the High Court under Sections 325/34, I.P.C. is maintained.”

19. In the background of principle so laid down by the Apex Court, it is found and held the appellant guilty for an offence punishable under Section 323 IPC, whereupon is sentenced to undergo R.I. for a year as well as fined of Rs.1000/- and in default thereof, to undergo R.I. for a month. In terms thereof, the finding of learned lower court is altered. Appellant is on bail, his bail bond is cancelled directing him to surrender before the learned lower court to serve out the remaining part of sentence within four weeks failing which the learned lower court will proceed against the appellant in accordance with law. Period already undergone during course of trial will be set



off in terms of Section 428 Cr.P.C. Thus, appeal is partly allowed.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
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