

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.275 of 2015

Arising Out of PS. Case No.-9 Year-1995 Thana- HAYAGHAT District- Darbhanga

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Rajeshwar Das, son of Shiv Das, resident of village-Ghosramma, P.S.- Hayaghat, District-Darbhangha.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Amish Kumar, Amicus Curie
		Mr. Manish Kumar No.13, Advocate
		Mr. Rohit Kumar, Advocate
		Mrs. Kanchan Jha, Advocate
		Mrs. Nitu Kumari No.7, Advocate
For the Respondent/s	:	Mr. Ashwani Kumar Sinha, A.P.P

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
and

HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE S.KUMAR)

Date : 16-09-2017

The appellant has filed this jail appeal assailing the judgment of conviction dated 19.09.2014 and order of sentence dated 20.09.2014 passed by 2nd Additional Sessions Judge, Darbhanga in Sessions Trial No.85 of 1997 arising out of Hayaghat P.S. Case No.9/1995 by which the appellant Rajeshwar Das has been



convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to undergo imprisonment for life and fine of Rs.2000/- and in default of payment of fine, he would have to undergo rigorous imprisonment for six months.

The prosecution case, in brief, is that the informant along with his father, mother, wife and other persons had gone to uproot 'Khesari, in the field of Jagdish Jha on 16.03.1995 at about 6-6.30 hours in the morning and at about 8.30 to 9.00 hours, Ram Shekhar Singh and Mukesh Pandey @ Mahesh Pandey came shouting and they thought that house has caught fire and when they came running then they told that neck of his brother was partially severed and when they asked who had done this they did not tell anything, when they came near the orchard of Ram Swarth Singh then Garbhu Das told that accused Rajeshwar Das had partially severed the neck of Pawan Das with spade, as a result of which, he died. When they came to the house, he saw his brother Pawan Kumar Das lying near pumping set in front of his house and his dead body had been kept on the thigh of Bindeshwar Das and wife of the deceased Poonam Devi was in a state of shock. Thereafter, Pawan Kumar Das was brought to Hayaghat Hospital with the help of Garbhu Das, Batahu Das, Ganaur Das and



Bindeshwar Das. In the way, he met with Dr. Ram Naresh Singh, who saw his brother Pawan Kumar Das and he declared him dead. When he returned back to his house then Urwashi Kumari, daughter of Kaplu Das, aged about 10 years and Anita Kumari, daughter, aged about 7 years, daughter of Raj Kumar Das told that Rajeshwar uncle killed Pawan 'Chacha' by spade. When he asked further then both told that Pawan uncle was washing his hands at the pumping set and, in the meantime, Rajeshwar uncle severed his neck by spade and fled away taking the spade away. Cause of occurrence is not known. Both were at the house and they had not gone to uproot 'Khesari' and in the meantime what happened he could not say and about 2 ½ years ago, Pawan had engaged him for doing work in Bombay but from there also, he left the work and went to Punjab and about six months he has been living at his house and Pawan had also come home last month on 17.02.1995 from Bombay and both were living very happily but today, what and how happened, he could not know on account of employment, there had been hot talks between both and there had been seen strained relation between them but he could not visualise that Rajeshwar would kill him and it is his claim that accused Rajeshwar Das killed his brother, Pawan Kumar Das by cutting his neck with spade.



On the basis of aforesaid fardbeyan, the police registered Hayaghat P.S. Case No. 9/1995 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 showing him absconder for the offence punishable under Section 302 of the Indian Penal Code vide C.S. No. 19/1995 dated 15.06.1995. Thereafter, the Chief Judicial Magistrate, Darbhanga had taken cognizance of the offence against the appellant under Section 302 of the Indian Penal Code vide order dated 10.11.1995. The case was committed to the court of sessions vide order dated 20.06.1997, where charges were framed vide order dated 6.12.2012, to which, the accused person pleaded not guilty. Thereafter, trial started.

During trial, the prosecution has examined altogether seven witnesses in support of its case. P.W.1 is Bindeshwar Das, P.W.2 is Garbhu Das, P.W.3 is Punam Das, P.W.4 is Urwashi Devi, P.W.5 is Raj Kumar Das, who is the informant of the case and own brother of the deceased, P.W.6 is Anita Devi and P.W. 7 is Sada Nand Yadav, who is the formal witness.

The defence has not produced either oral or documentary evidence on his 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

On reappraisal of the prosecution evidence in order to conclude if the prosecution has been able to substantiate its case beyond shadow of all reasonable doubts or not?

P.W.1 has stated in his examination-in-chief that he knows the deceased Pawan Kumar Das. When on 'hulla', he went on road and saw that deceased was in wriggle (chhatpatahat) stage and blood was oozing out from his neck. He knew that accused Rajeshwar had cut the neck of Pawan with spade and people were taking Pawan for his treatment to the Hospital and, in the way, he died. During cross-examination, he in para 5 has stated that he has not seen any occurrence.

P.W.2 has stated in his examination-in-chief that he knew the deceased and the occurrence took place 18 years ago at 8.30 hours in the morning and at that time he was at his Darwaja. He saw that the deceased was washing his hands and face at the tube-well then Rajeshwar Das came with spade and assaulted on the neck of the deceased, as a result of which, half portion of head of deceased was severed and the deceased fell down and when he repeated



second blow of spade then nerve 'Nali' of the neck was cut. On hulla, he came running there and the appellant fled away after throwing the spade. During his cross-examination, he has stated that after 2-4 minutes of the occurrence, he reached at the place of occurrence. In para 7, he has stated that he saw directly killing the deceased by accused Rajeshwar Das. This witness has fully supported his previous statements given before the police.

P.W.3 has stated the same story as P.W.2 stated in his examination-in-chief and in para 2, this witness has stated that the deceased had gone to attend the call of nature and after returning from the same, he was washing his hands and feet on tube-well. The appellant with intention to kill Pawan Das gave spade blow upon him and thereafter, he fled away. The deceased died.

P.W.4 has stated in her examination-in-chief that the deceased was her uncle and the occurrence was of 18 years ago. When she was playing at that time at her house, Rajeshwar Das cut the neck of Pawan Das with spade and, thereafter, she raised alarm and people came and Pawan Das was brought to doctor and, in the way, Pawan Das died. This witness was not cross-examined as none turned up on repeated calls for her cross-examination and witness discharged.



P.W. 5 is the informant of the case and brother of the deceased. He, in his examination-in-chief, has stated that he lodged this case. The deceased was his full brother. In para 2, he has stated that the occurrence took place 18 years ago at about 8.00-8.30 in the morning when Pawan Das was washing his hands at the pumping set and, in the meantime, appellant Rajeshwar Das came there with spade and gave spade blow on his neck, as a result of which, the deceased fell down and the appellant repeated the blow after turning back the same at Pawan Das, which hit at the neck of Pawan Das by which neck of Pawan Das was cut but the head could not be separated from the neck. In para 3, he has stated that his niece Urwashi and daughter Anita Kumar shouted then the wife of Pawan, Bindeshwar Das, Batahu Das, Darbhu Das came there. The deceased was taken to the hospital and, in the way, the deceased died. He is not the eye witness to the occurrence but he has supported the prosecution case.

P.W.6 has stated in her examination-in-chief that she knew Pawan Kumar Das. The occurrence took place 18 years ago when she was eight years old. At that time, she was playing with her sister. Pawan Das was washing his mouth at the pump-set at that time and he was gargling then Rajeshwar Das came and cut the head of deceased with spade. By first blow, the deceased fell down



and by second blow of spade, the neck of Pawan Das was partially severed. Thereafter, the deceased was taken to the hospital and, in the way, the deceased died. During her cross-examination, she has stated in para 7 that she and her sister were playing at the time of the occurrence at the distance of one 'Lagga' and the occurrence had occurred in presence of her and seeing the occurrence, she raised alarm and she became puzzled but they did not flee away but saw the whole occurrence.

P.W.7 is an Advocate Clerk and he is a formal witness.

After scrutinizing the evidence of prosecution witnesses, it appears that P.Ws. 1 to 6 are the material witnesses, who have supported the prosecution case and P.Ws. 4 to 6 are the eye witnesses, who have seen the occurrence. The intention of the appellant is clear that he gave two blows by spade on the neck of the deceased, as a result of which, he died. However, the Investigating Officer has not been examined in this case, although it is always desirable for the prosecution to examine the Investigating Officer, however, non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses. The postmortem report has been proved as Exhibit-6 and there is no denial by the defence



with regard to the postmortem report. As such, if the doctor has not been examined but cause of death has been attributed to said two blows which has been corroborated by ocular evidence, as such, the postmortem report even if it is exhibited by formal witness cannot be discarded and certainly itself it becomes part of evidence without losing its reliability.

On re-appreciation of entire evidence and having considered the submissions of learned counsel for the parties, we agree with the view taken by the trial court that it is clearly established from the evidence on record that the appellant caused homicidal death of his cousin.

As to whether the act on the part of the appellant constitutes the offence punishable under Section 302 of the Indian Penal Code or Section 304 Part 1 of the Indian Penal Code, we are of the view that it was not a planned or premeditated act. Both were living in same room happily but for last some days relations became strained but what was reasons for such strained relation has not been spelt out by any of witnesses and in such a strained state of mind the appellant committed this crime in a fit of anger when he lost total self control. It has been stated in the FIR that there were not exchanges between the two for some time before the incident.



In *State of Andhra Pradesh v. Rauavarapu Punnayya & another [1976 (4) SCC 382]*, this Court, explaining the scheme of Penal Code relating to culpable homicide, has laid down the law as under:-

“In the scheme of the Penal Code, “culpable homicide” is genus and “murder” its specie. Every “murder” is “culpable homicide” but not vice-versa. Speaking generally, “culpable homicide” sans “special characteristics of murder”, is “culpable homicide not amounting to murder”. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, “culpable homicide of the first degree”. This is the greatest form of culpable homicide, which is defined in Section 300 as “murder”. The second may be termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.”

In the same case, i.e. *State of Andhra Pradesh v. Rauavarapu Punnayya & another* (supra), this Court has further observed at page 608 as under: -

“.....whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first



stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

In view of above discussion/facts and law, we modify the conviction of the appellant under Section 304 Part I of the Indian Penal Code and sentence to undergo rigorous imprisonment for 10 years.

This appeal is dismissed subject to above modification.

This Criminal Appeal in form of Jail Appeal was admitted on 13.04.2015 and Sri Amish Kumar, Advocate, was appointed to appear on behalf of appellant as Amicus Curiae.



The Legal Services Authority shall make payment to him as
per schedule.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
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