

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.344 of 2003**

Arising Out of PS.Case No. -null Year- null Thana -null District- BANKA

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Tepu Sah son of Late Panwi Sah aged about 60 years, resident of village Amarpur  
(Chutiya) P.S. Banka District Banka.

.... .... Appellant

Versus

State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellant : Mr. Brij Nandan Prasad, Adv.

For the Respondent : Mr. Bipin Kumar, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**

**ORAL JUDGMENT**

**Date: 29-06-2018**

The sole appellant has been convicted under Section 304 (Part II) of the Indian Penal Code and sentenced to undergo R.I. for five years by Sri Pradip Sah, Ist Addl. Sessions Judge, Banka in Sessions Trial No.698 of 1999/ Trial No.206 of 2003.

2. The prosecution case as per the fardbeyan of the informant Sital Sah (P.W.8) is that he had dug up the foundation for construction of the western wall of his house, which had fallen down, accused Tepu Sah opposed and asked to get the land measured. It is also alleged that on the date of occurrence the informant was filling up the foundation with the earth but the accused asked why he was filling up the foundation and said that water is going towards his lands. The informant stated that that as the accused was not allowing him to construct his wall, he was filling up the ditch and also he was



feeling difficulty on account of flowing water. On this the accused Tepu Sah started assaulting him. It is also stated that his mother Rameshwari came to save him but Tepu Sah caught hold her by neck and pushed her aside due to which she fell down and urine came out of her body and on that she became senseless and he carried out her to the Hospital and she died.

3. On the basis of aforesaid fardbeyan, Banka P.S. Case no.197 of 1999 was registered, post investigation, charge-sheet has been submitted and the case was committed to the court of sessions, which ultimately travelled to the file of Sri Pradip Sah, Ist Addl. Sessions Judge, Banka for trial and disposal.

4. During the trial, charge was framed under Section 302 of the IPC against the appellant.

5. In support of his contention, the prosecution has examined altogether nine witnesses, they are : P.W.1 Sajani Devi, P.W.2 Bhago Sah, P.W.3 Bharat @ Bharat Sah, P.W.4 Tribeni Sah, P.W.5 Naresh, P.W.6 Dr. Sunil Kumar Sinha, who has conducted postmortem examination P.W.7 Dev Kishor Prasad, Inspector of Police, who has investigated the case and P.W.8 Sital Sah (informant) who has been declared hostile by the prosecution and P.W.9 Bhawesh Mahto. Some documents have also been adduced on behalf of prosecution.



6. Defence of the accused person is simply denial of the occurrence and false implication in the case.

7. Learned trial court on conclusion of the trial has convicted the appellant under Section 304 (Part II) of the IPC and sentenced to undergo for five years.

8. The learned trial court has assailed the judgment on the ground that even if the prosecution witnesses is found believable at best the allegation against the appellant is that during the scuffle with respect to construction of the wall he caught hold the deceased and pushed her on the ground due to which her urine came out and she died, as such it can not be said that he was carrying no any intention to kill her or having knowledge that due to such action, she may die so conviction of the appellant under Section 304 (Part II) is sustainable in the eye of law.

9. Further submission is that in this case P.W.8 is the informant and he has been declared hostile and P.W.9 has also stated that he heard that Rameshwari died by diarrhea and so far P.W.2 is concerned, the learned court below has found that he is not an eye witness of the occurrence as he stated before the I.O. that he reached after Rameshwari had fell down and all these facts create doubt about the prosecution case, hence, conviction of the appellant is not sustainable in the eye of law.



10. On the other hand learned counsel for the state has submitted that the evidence of P.Ws. 1, 3, 4, 5 and 6 clearly discloses that after the scuffle the appellant caught her by neck and pushed her on the ground, due to which she died and the Doctor has also found the death due to asphyxia i.e. due to her strangulation, as such prosecution has been able to established this case under Section 304 (Part II) of the IPC.

11. On perusal of the evidence, it appears that though the informant has not supported the prosecution case and stated that there was quarrel between her and the appellant and in which she fell down thereafter she was brought to the hospital for treatment where she died.

12. Whereas evidence of P.W.9 discloses that he heard that Rameshwari died due to diarrhoea, however, so far other witnesses are concerned, it appears that evidence of P.W.2 discloses that the appellant caught hold her by neck and pushed her on the ground due to which she died but from his cross examination, it appears that he stated before the police that when he reached near the place of occurrence he found that Rameshwari fell down as such it appears that he is not eye witness of the occurrence.

13. However, P.W.1 has supported the prosecution case and she has stated in her evidence that she saw that Sital Sah



(informant) is filling up the earth and Tepu Sah appellant came and started abusing Sital Sah and further stated that Tepu Sah assaulted throwing Sital Sah and when her mother came to save him, Tepu Sah caught hold her by pressing her neck and pushed her on the ground due to which she became unconscious and her urine came out at the place of occurrence and later on she died. There is nothing in her cross examination to doubt about her evidence.

14. P.W.3 has also supported the prosecution case and corroborated the evidence of P.W.1. P.Ws.4 & 5 are the witness on inquest.

15. P.W.6 is the Doctor and he has stated in his evidence that he found following injuries on the person of the deceased :

***i. A bruise of size 1: X ½” with swelling in the right side of her neck caused by hard and blunt object.***

***He has further stated cause of death was Asphyxia.***

16. The learned counsel for the appellant has also submitted that the postmortem report was not prepared in the postmortem house rather he has prepared the postmortem in the hospital as such that is not of much relevance.

17. P.W.7 Dev Kishor Prasad has identified the writing and signature on the fardbeyan.

18. P.W.7 is the I.O. in this case proved the fardbeyan and



also that after investigation he had submitted charge-sheet.

19. Considering the evidence as discussed above, it appears that P.W.1 has supported the prosecution case and so far evidence of P.W.2 is concerned, it appears that though she is not eye witness of the occurrence but she had seen the deadbody of Rameshwari and the place of occurrence and also taken the name of the appellant.

20. P.W.3 has also corroborated the evidence of P.W.1 and P.Ws. 4 & 5 are the inquest witness and there is nothing in their evidence to create doubt. It appears that Rameshwari died due to injury received in the occurrence.

21. Submission of the learned counsel for the appellant is concerned no offence under Section 304 (Part II) of the IPC is made out and it appears that in this case even according to the prosecution case, the occurrence started with respect to construction of the wall and in course of that the scuffle took place and the appellant pressing her neck pushed Rameshwari on the ground due to which she died, however, the FIR shows that he only caught hold her neck and pushed her.

22. In such view of the matter, it does not appear that the appellant caught hold her by neck and pushed her on the ground with an intention to cause her death or she is likely to die. It also can not be



said that the appellant acts with the knowledge that it is likely to cause death rather the evidence shows that during altercation, he merely pushes the deceased. In such view of the matter, conviction of the appellant under Section 304 (part II) does not appear to be sustainable in the eye of law, however, in the facts and circumstances of the case at best the appellant can be convicted under Section 325 of the IPC.

23. In such view of the matter, conviction of the appellant under Section 304 (Part II) of the IPC is modified to conviction under Section 325 of the IPC.

24. Submission of the learned counsel for the appellant is that he has remained in custody for ten months and the occurrence is of the year, 1990 and the appellant is aged about 80 years, hence, the sentence may be modified to the period already undergone in custody.

25. Accordingly, this appeal is disposed of with a modification in conviction from Section 304 (Part II) to under Section 325 of the IPC and sentenced under Section 325 of the IPC to the period already undergone in custody.

**(Vinod Kumar Sinha, J)**

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