

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.666 of 2002

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

- =====
1. Mina Sah @ Mina Sao son of Ramdhari Sao
 2. Satuli @ Sarswati Devi W/O Mina Sao
- Both resident of village Urain P.S.Kajra District Munger.

.... Appellants

Versus

State of Bihar

.... Respondent

=====

Appearance :

For the Appellants : Ms. Rina Sinha, Adv/Amicus Curiae

For the Respondent : Mrs. Abha Singh, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 21-08-2018

On repeated calls, no body appears on behalf of the appellants, as such Mrs. Rina Sinha, Advocate is appointed as the Amicus Curiae to assist this Court.

2. This appeal is directed against the judgment 20.11.2002 and order dated 21.11.2002 passed by Sri Paras Nath Sinha, Presiding Officer, Addl. Court (Fast Track Court), Munger by which the appellants were convicted under Section 304 (Part II) of the Indian Pena Code and sentenced R.I. for three years and fine of Rs.2,000/- in default clause.

3. The prosecution case as per the fardbeyan of Tetri Devi (P.W.5) who is wife of the deceased Bisundeo Sah in short is that she



along with her husband had gone to the house of accused Ramdhari Sah to purchase *Mahua* on 19.4.1993 at about 7.00 P.M., however, the accused Mina Sah did not agree to sale *Mahua* as his previous amount was due with him and it is also alleged that Mina Sah threaten to murder the husband of the informant and also assaulted by iron rod on his back, waist and hand and seeing that the accused Ramdhari Sah (since died) and wife of Mina Sah also arrived there and assaulted at the husband of the informant by weight and fists and foot. Consequently, the informant's husband fell down and accused persons went back to their house and on hearing *hulla*, Ramchandra Sah (P.W.2), Doman Sah (P.W.1), Mahendra Sah and several other persons arrived there.

4. On the basis of the aforesaid fardbeyan, Surajgarha (Kajra) P.S.Case no.106 of 1993 was registered, after investigation, charge-sheet was submitted, the cognizance of the case was taken and the case was committed to the court of Sessions, which ultimately came to the file of Sri Paras Nath Sinha, Presiding Officer, Addl. Court (Fast Track Court), Munger, for trial and disposal in Sessions Trial No.145 of 1996.

5. The charges were framed against these appellants under Section 304(II) of the IPC and in order to prove the charges the



prosecution has examined altogether nine witnesses, they are : -
P.W.1. Doman Sah, P.W.2 Ramchandra Sah - declared hostile, PW.3
Bhola Choudhary- declared hostile, P.W.4 Musahru Chaudhary-
declared hostile, P.W.5 Tetri Devi- informant, P.W.6 Dr. Sudhir
Kumar, P.W.7 Rampiyari Devi, P.W.8 Sitaram Pandit and P.W.9
Muni Devi. Apart from the above ocular evidence, following
documents have been brought on record as exhibits. Ext.1 and 1/1
signature on inquest report and Ext.2 postmortem report.

6. The defence of the accused persons is of false
implication and of innocence, as per the cross examination and the
statement under Section 313 of the Cr.P.C.

7. The learned trial court on conclusion of the trial has
convicted the appellants under Section 304 (part II) of the IPC and
sentenced them as stated above.

8. It appears that one of the co-accused Ramdhari Sah
died during the pendency of the trial and the proceeding against his
was dropped, vide order dated 16.11.2002.

9. The learned Amicus Curiae has assailed the judgment
on the ground that in this case though the informant and other
witnesses have stated that he was brutally assaulted by weight and the
iron rod but the P.W.6 who is Doctor has not found any injury except



one abrasion on the right scapular region in the postmortem report and the cause of death could not be ascertained and it is not mentioned whether the injury was ante mortem or post mortem as such there is no evidence available on the record to show that due to assault the death of the deceased occurred. Further submission of the learned Amicus Curiae is that in this case P.Ws. 2 to 4 have been declared hostile by the prosecution and so far P.W.1 is concerned, he appears to be a chance witnesses though he has supported the allegation of assault by the appellants to the deceased. The learned Amicus Curiae has further submitted that in spite of ocular evidence and medical evidence, cause of death could not be ascertained but the learned Trial court has convicted the appellants under Section 304 (Part II) of the IPC.

10. However, the learned counsel for the State has supported the judgment of guilt and submitted that evidences are consistent on assault by the appellants by the iron rod, weight and fits and foot, though the medical evidence does not support the ocular evidence but whenever there is contradiction between the medical evidence and the ocular evidence, it is ocular evidence which prevails, as such convictions is just and proper and it does not require any interference by this Court.



11. In the background of the rival contention and on perusal of the evidence, it appears that P.W.5 is the informant itself and her evidence discloses that her husband was assaulted by Mina Sah by iron rod on the whole body except head, Ramdhari Sah assaulted by weight on the whole body except head, Satuli Devi also assaulted by fists and foot but her attention has been drawn towards the previous statement made before the police and she has stated that she had disclosed before the police that Ramdhari Sah assaulted by weight and Mina Sah assaulted by iron rod on whole body. P.W.7 is the daughter of the informant who has also supported the allegation of assault and stated that on *hulla* she went to the shop of Ramdhani Sah and saw that her father was assaulted by accused persons by weight and fists and foot. P.W.8 appears to be a chance witness and his evidence shows that he saw Bisundeo Sah fallen in unconscious condition. P.W.9 is the mother of the deceased and she has also supported the assault by the weight and her attention has also been drawn towards the previous statement made before the police, in which she had stated that the accused persons assaulted his son by weight.

12. In this case the I.O. has not been examined. From the above evidence it appears that there is consistent evidence of P.Ws. 5,



7 and 9 of assault by the accused person by weight on the deceased and P.W.8 though had seen the deceased fallen on the ground but he does not appear to be eye witness of the occurrence.

13. P.W.6 is the doctor who has conducted the postmortem and his evidence also discloses that no internal or external injury except abrasion over the right scapular region $\frac{1}{2}$ " X $\frac{1}{2}$ " was found and his evidence further discloses that it is not mentioned whether it was ante mortem or postmortem and the cause of death could not be ascertained and viscera report was preserved. Hence, it appears that there is contradiction between the ocular evidence and the medical evidence and his evidence discloses that the deceased was brutally assaulted but the Doctor has found only one injury that is abrasion on the right scapular region and that also could not be said to be ante mortem.

14. I am aware of the settled principal of law that when there is contradiction between the ocular evidence and the medical evidence, it is the ocular evidence that will be prevailed and in such a situation, there are consistent evidence of assault by the appellants to the deceased but the medical evidence does not suggest that the deceased died due to injuries caused in the occurrence. In such a situation, convicting the appellants under Section 304 (Part II) does



not inspire confidence and at best they can be held guilty under Section 323 of the IPC.

15. In such views of the matter, conviction of the appellants is modified from Section 304 (Part II) of the IPC to Section 323 of the IPC and so far sentences of R.I. for three years and fine of Rs.2,000/- is concerned, it appears that appellants no.1 has remained in custody for about five months during the trial and appellant no.2 (Satuli @ Sarswati Devi) is a lady and the lower court record shows that she was pregnant at that time.

16. Submission of the learned Amicus Curiae is that sentences of the appellants may be reduced to the period already undergone under Section 323 of the IPC as the occurrence is 25 years old and the appellant no.2 being a lady may be released on due admonition under Section 360 of the Cr.P.C.

17. I find force in the argument as such considering the case being 25 years old and the appellant has suffered pain and agony of the trial and the appeal for 25 years, as such the sentences of the appellant no.1 (Mina Sah @ Mina Sao) is reduced to the period already undergone in custody under Section 323 of the IPC and instead of confirming the sentence of appellant no.2 she is directed to be released on due admonition under Section 360 of Cr.P.C.



18. With the aforesaid modification in conviction and sentences this appeal is dismissed.

19. I must thank the assistance provided by the Amicus Curiae and she shall be entitled for fee as per entitlement from Patna High Court Legal Services Committee.

(Vinod Kumar Sinha, J)

chn/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	28.08.2018
Transmission Date	28.08.2018

