

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

**Criminal Appeal (SJ) No.2502 of 2018**

Arising Out of PS.Case No. -51 Year- 2015 Thana –Amarpur, District- BANKA

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Nunbatiya Devi, wife of Late Puran Yadav, resident of Dhawabaran, P.S.-  
Fullidumar, District-Banka.

.... .... Appellant

Versus

The State of Bihar.

.... .... Respondent

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**Appearance :**

For the Appellant/s : Mr. Prahlad Kumar Bhagat, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

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**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**

**ORAL JUDGMENT**

**Date: 07-09-2018**

Heard learned counsel for the appellant and learned  
counsel for the State.

2. This appeal is directed against the judgment of  
conviction and order of sentence dated 28.05.2018 and 30.05.2018  
respectively passed by the learned Session Judge, Banka in Session  
Trial No. 74 of 2016 by which the appellant has been convicted  
under Section 307/34, 341/34, 324/34 and 504/34 of the Indian  
Penal Code (for short 'IPC') and sentenced her to undergo rigorous  
imprisonment for three years with fine of Rs. 2000/- under Section  
307/34, rigorous imprisonment for one month under Section 341/34,



rigorous imprisonment for one month under Section 324/34 and rigorous imprisonment for one year under Section 504/34. All the sentences have been ordered to run concurrently.

3. It is submitted by the learned counsel for the appellant that the trial court has failed to appreciate the evidence on record. There was no material on the basis of which the appellant could have been convicted for any of the charges under which he was charged. The witnesses examined during trial did not whisper a word, which would have attracted ingredients of the offences punishable under Sections 307, 341, 324 and 504 of the Indian Penal Code against her. According to him, the conviction of the appellant with aid of section 34 of the IPC for the aforesaid offences is totally misconceived.

4. *Per contra*, learned counsel appearing for the State submitted that the trial court has rightly convicted the appellant. It was she, who had quarreled first with the son of the informant, which gave rise to further quarrel in which her son is alleged to have assaulted the son of the informant with *lathi* and took away Rs.2,000/- from his pocket. He contended that under the circumstances, conviction of the appellant with aid of section 34 of the IPC is fully justified.

5. I have heard learned counsel for the parties and



carefully perused the record.

6. The First Information Report (for short 'FIR') was instituted in Amarpur Police Station on 16.02.2015 under Sections 341, 323, 324, 307, 379, 504 read with 34 of the IPC on the basis of a written report submitted by PW-3 Sattan Yadav, in which he has alleged that on 16.02.2015 at 9:00 a.m. when he was taking his cow for grazing, the appellant caught hold of him and started abusing. Thereafter, her sons Arbind Yadav and Upendra Yadav came there. Upendra Yadav assaulted him with Tangi on the head as a result of which, he sustained bleeding injury. He started crying. On *hulla*, he along with villagers rushed towards the place of occurrence. When he reached there, Upendra Yadav assaulted him with *lathi* and took away Rs. 2000/- from his pocket. He also threatened him of dire consequences. However, the villagers intervened and somehow got the matter pacified. The motive for the occurrence has been alleged as fight between the kids of the two families, which had taken place on 14.02.2015.

7. After institution of the FIR, on the basis of aforesaid written report, the police investigated the case and found the case true against the appellant and her son Arbind Yadav. However, the allegation made against Upendra Yadav was found to be false. Hence, he was not sent up for trial. However, the appellant



and Arbind Yadav were sent up for trial.

8. After taking cognizance of the offence, the case was committed to the Court of Sessions for trial.

9. It appears from the perusal of record that the accused Arbind Yadav was found juvenile and, hence, his case was referred to the Juvenile Justice Board. The appellant was charged for the offences punishable under Sections 307/34, 341/34, 324/34 and 504/34 of the IPC. Since she did not plead guilty, the trial commenced.

10. In course of trial, altogether five witnesses were examined. They are PW-1 Shankar Yadav, PW-2 Arbind Yadav, PW-3 Sattan Yadav, PW-4 Birendra Yadav and PW-5 Surendra Prasad Yadav.

11. P.W-1, Shankar Yadav, stated that when the occurrence of offence took place he was not present. When he came back to his house, he came to know the son of the appellant and the son of the informant had fought over some trivial issue. He further stated that his statement was not recorded by the police during investigation. At this stage, at the request of the prosecution, he was declared hostile. After declaring him hostile by the prosecution, he was cross-examined. However, nothing important could be taken out from him by the prosecution in cross-



examination.

12. PW-2, Arbind Yadav, is the injured. In his examination-in-chief, he stated that on 16.02.2015, when he was taking his cow for grazing the filed, the appellant started abusing him. At that time, his father was accompanying him. In the meantime, son of the appellant, namely, Arbind Yadav came and assaulted him with *kulhari* on his head as a result of which, he sustained bleeding injury. He was taken to Fullidumar hospital. He further stated that his father had instituted a case in the police station. He identified the appellant in the court. In cross-examination, he stated that at that time when the occurrence took place, nobody was present. He reiterated that at that time, he alone was present at the place of occurrence. The villagers assembled soon thereafter. He denied that nothing had occurred as stated by him in his examination-in-chief.

13. PW-3 Sattan Yadav is the informant of the case. In his examination-in-chief, he stated that the occurrence of the offence took place at 9:00 a.m. At that time, he was at his house. A fight had taken place between his son and the son of the appellant a day before the alleged occurrence. On the next day, his son was going to graze his cow in field and when he reached near the house of the appellant, she started abusing him. Thereafter, Arbind Yadav



assaulted him with *tangi* on the head as a result of which, he sustained bleeding injury. He was taken to hospital where he had submitted his written report. He identified his signature on his written statement, which was marked as exhibit -1. He also identified the appellant in the court. In cross-examination, he admitted that he reached at the place of occurrence fifteen minutes after occurrence had already taken place. He also denied defence suggestion to have instituted a false case against the appellant.

14. P.W-4 is the doctor, who was posted at Fullidumar Primary Health Centre at the relevant time and had examined the injured son of the informant on 16.02.2015. He stated that the victim had sustained the following injuries:-

(i) Cut wound on the right side of scalp 3" x 1/2" x 1/4" caused by cutting weapon. On x-ray hair-line fracture on the right side of scalp was noticed, which was grievous in nature.

(ii) Complaint of bodyache and caused by hard and blunt substances simple in nature.

15. On cross-examination, he admitted that x-ray was done by a technician and report was not made by any radiologist. He further admitted that x-ray plate was not referred to any radiologist. He also admitted that x-ray report was not present



before him. He then admitted that the prescription issued advising x-ray is also not available with the injury report. However, he denied the defence suggestion that neither he examined the injured nor got x-ray done and issued a fake injury report.

16. PW-5 is the investigating officer of the case. He has identified the writing and signature of one Dheeraj Kumar, Sub-Inspector of Police-cum-in-charge, Fullidumar out post, who had forwarded the written report to Amarpur Police Station, which has been marked as exhibit-3. He also identified the writing and signature of the officer-in-charge of Amarpur police station on the written report and the formal proforma of the FIR, which have been marked as exhibit- 4 and 5 respectively. He stated that he had recorded the statement of the witnesses in course of investigating, obtained the injury report and after obtaining supervision note, submitted charge-sheet in the court. He has further stated that he found the accused Upendra Yadav to be innocent. Thus, he was not sent up for trial. In cross-examination, he admitted that at the place of occurrence nothing material was recovered. He also admitted that he did not record the statement of any independent witness living near the place of occurrence. He further admitted that the entire occurrence had taken place as children of the two families had fought together. He denied that his investigation was defective.



17. When I look to the evidence recorded during trial, I find the findings of the trial court are erroneous. There is no allegation either in the FIR or in the evidence adduced on behalf of the prosecution that the appellant committed any act with intention or knowledge to cause death of the victim. She is not alleged to have voluntarily caused hurt by any dangerous weapon or means to the injured. Even though the allegation made in the FIR is specific that it was her son Arbind Yadav, who had assaulted the son of the informant with *tangi* on his head, she has been convicted with aid of Section 34 of the Indian Penal Code.

18. Since there is no overt act alleged against the appellant, it is to be seen as to whether she could have been convicted for the offences under Sections 307, 341 and 324 of the IPC with aid of Section 34 or not.

19. Section 34 of the IPC reads as under:-

**“34. Acts done by several persons in furtherance of common intention.** – When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone”.

20. The general principle of criminal liability is that it is the primary responsibility of the person, who actually commits



an offence and only that person, who has committed crime can be held guilty and punished. However, section 34 prescribes a principle of joint liability in doing of a criminal act. The essence of that liability is to be found in the existence of common intention.

21. True it is that to attract offence under Section 34 IPC, it is not necessary that an overt act must be done by a particular accused. However, in order to hold a person jointly liable for committing an offence under Section 34 IPC two pre-conditions are to be fulfilled:- (i) There must be common intention to commit a criminal act; and (ii) there must be participation by the other person in doing such act in furtherance of common intention.

22. Whether or not there was a common intention on the part of the appellant is a question of fact, which is to be decided on the materials collected during trial in the case in hand. The decision has to be taken keeping in mind that there is difference between intention and knowledge, common intention and abatement and common intention and criminal conspiracy. In order to hold a person liable with aid of Section 34 of the IPC, there must be something to show unity of criminal behaviour.

23. In the instant case, the story narrated by the prosecution in the FIR is not consistent that the evidences adduced in course of trial. In the FIR, it has been alleged that one accused



Upendra Yadav had assaulted with *lathi* to the informant and had taken away Rs.2,000/- from his pocket. The story was found false by the police during investigation. The witnesses examined in course of trial also did not support this part of the allegation. The witnesses have also not supported the allegation made in the FIR that either the informant or the injured was threatened by any accused persons. In the FIR, the informant claims himself to be eye-witness but, in course of trial, he clearly admitted that he was not present at the place of occurrence when the accused Arbind Yadav had assaulted his son with *tangi*. In his deposition, he admitted that he arrived at the place of occurrence after fifteen minutes of the occurrence. Furthermore, I find that the witnesses have contradicted each other on the point of weapon used in the alleged occurrence. The informant has alleged in the FIR and in his examination-in-chief that his son was assaulted with *tangi* whereas the injured himself deposed that he was assaulted with *kulhari*. Most importantly, in the FIR, it is alleged that the appellant while abusing the son of the informant had caught hold of him, but the said allegation has not been supported either by the informant or by anyone else during trial. Every one gave up the story that at any point of time the appellant had in any manner even touched the body of injured.



24. On the basis of these material contradictions, I fail to understand as to how the court below could have reached to a conclusion that the prosecution had proved its case beyond reasonable doubt. That apart, as far as the conviction of the appellant with aid of Section 34 of the IPC is concerned, there is nothing on the basis of which it can be stated that she had a common intention when her son had assaulted the injured. The only thing alleged against her is that she was using abusive language when the injured was passing through her house. The same in itself was not enough to hold that she had a joint intention with her son to commit the offence.

25. In that view of the matter, her conviction with aid of section 34 of the IPC under Sections 341, 324 and 307 is bad on facts and in law.

26. The only other offence for which she could have held liable is section 504 of the IPC.

27. Section 504 of the IPC prescribes punishment for the offence of intentional insult with intent to provoke breach of the peace. In order to prove a case of insult under section 504 of the IPC, the prosecution is required to prove that the accused insulted some person; she did so intentionally; she thereby gave provocation to that person; and, she intended, or knew that it was likely that such



provocation would cause that person to break the peace or to commit any other offences.

28. In the present case, save and except, the allegation that some abusive language was used, no witness has stated before the court, which word was used by the appellant. The term 'abusive language' is quite vague. Unless, the witness reproduces the exact words, the court cannot reach to a finding that the words used constituted insult. If it was not possible for one reason or another to reproduce the word, it was incumbent upon the prosecution to at least indicate the gist or purport of the word. A mere allegation that the appellant used abusive language or abused anyone would not be sufficient to uphold conviction for the offence punishable under section 504 of the IPC.

29. In view of the discussions made above, this Court is of the considered opinion that the trial court has failed to appreciate the facts and law involved in the case in correct perspective.

30. Accordingly, the impugned judgment of conviction dated 28.05.2018 and the order of sentence dated 30.05.2018 passed by the learned Session Judge, Banka in Session Trial No. 74 of 2016, are set aside. She is discharged from the liabilities of the bail bonds.



31. The appeal stands allowed.

**(Ashwani Kumar Singh, J.)**

Sanjeet/SkSuman.

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