

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.247 of 2018**

Arising Out of PS.Case No. -6 Year- 2016 Thana -BELCHHI District- PATNA

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1. Birmani Yadav, Son of Late Nand Kishore Yadav, Resident of village-Dariyapur, P.S.- Belchi, Distt.- Patna.

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Raj Kishore Pd. Adv.
Mr. Binit Kumar, Adv.

For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**ORAL JUDGMENT****Date: 21-06-2018**

At an earlier occasion, while prayer for bail on behalf of the appellant was moved, during course thereof, judgment impugned has been gone through and perceiving the same to be susceptible relating to finding, this appeal has been directed to be listed under the heading 'for hearing' out of turn so that, appellant should not remain in custody on one pretext or another. Accordingly, this appeal has been listed.

2. Heard learned counsel for the appellant as well as learned A.P.P.

3. Appellant Birmani Yadav has been found guilty for an offence punishable under Section 326 of the IPC and sentenced to



undergo RI 5 years as well as to pay fine of Rs.60,000/- in default thereof, to undergo RI for 9 months, additionally passed by the Additional Sessions Judge-II, Barh, vide judgment of conviction dated 09.11.2017 and order of sentence dated 13.11.2017 passed in connection with Sessions Trial No.734/2016.

4. PW-2, Rajesh Kumar Singh gave his fardbeyan on 02.02.2016 at about 12.30 p.m. at PMCH where his wife Rupa Devi (deceased) was admitted in precarious condition for treatment, divulging the fact that on 31.01.2016 at about 11.30 a.m., while she was at his *khalihan* lying by the side of her house wherein brinjal had been planted. His Gotiya, wife of Nand Kishore Yadav, Birmani Yadav (appellant) and Sishupal Yadav were plucking plums from the tree having by the side of *Khaliha*. During course thereof, his wife has instructed them to take precaution otherwise, the brinjal plants will be damaged whereupon, wife of Nand Kishore Yadav ordered Sishupal and Birmani to kill, Birmani gave iron rod over her head as a result of which, she became severely injured. Sishupal assaulted with *lathi*, indiscriminately, as a result of which, his wife became unconscious. Accordingly, he with the help of co-villagers lifted his wife to Belchi and then to Barh and then to P.M.C.H., after informing the administration. She was admitted at the P.M.C.H. on 31.01.2016 and during course of treatment, today she died.



5. The aforesaid *fardbeyan* was transmitted from P.M.C.H., whereupon Belchi P.S. Case No.6/16 has been registered under Section 302/34 of the IPC. Sue to submission of charge-sheet trial commenced meeting with the ultimate result, subject matter of the instant appeal.

6. 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. It has also been pleaded that no such kind of occurrence had ever taken place rather the deceased while was getting down from her roof through bamboo stair fell down, as a result of which, sustained injury leading to her death. And due to village politics appellant has been implicated. In order to substantiate the same, ocular evidence has also been adduced.

7. In order to substantiate its case, prosecution has examined altogether 9 PWs, who are PW-1,Vijendra Prasad, PW-2 Rajesh Kumar Singh, PW-3 Khusboo Kumari, PW-4 Jai Murti Devi, PW-5 Lallan Yadav, PW-6 Sagen Topno, PW-7 Vinay Kumar, PW-8 Rakesh Kumar Singh and PW-9 Dr. Anil Sandilya. The prosecution has also exhibited, Exhibit-1 Fardbeyan, Ex-2 Signature of informant over fardbeyan, Exhibit-2/1 signature of Vijendra Prasad on the fardbeyan, Exhibit-2/2 signature of Rajesh Kumar Singh over fardbeyan, Exhibit-2/3 endorsement of the S.H.O., Exhibit-4 is the



formal F.I.R., Exhibit-4/1 is the signature of the S.H.O., Belchi, Exhibit-5 is the inquest report, Exhibit-6, postmortem report and Exhibit-7 is the death certificate issued by the P.M.C.H. (It is pertinent to note that serial number of Exhibit-3 appears to be incorrect as Exhibit-3 is not found duly identified). Defence has also examined Uma Devi as DW-1.

8. Manifold arguments have been made on behalf of learned counsel for the appellant while assailing the judgment of conviction and sentence. The first and foremost argument happens to be that none of the independent witnesses have supported the case of the prosecution, whoever supported, are the own family members whose status being interested one, presence thereof also appear to be doubtful. It has also been submitted that from the evidences of the PWs, it is apparent that both the parties are in strained relationship since before and that happens to be reason behind that after manipulating the whole event, got the *fardbeyan* recorded after three days of the alleged occurrence without having any kind of explanation as no chit of paper has been produced by the prosecution to suggest that deceased was taken to P.H.C., Belchi and then to Sub-Divisional Hospital, Barh. Had there been, then in that circumstances, the Investigating Officer-PW-6 could have visited those places in order to collect the injury report as well as, the prescription or the



indoor/outdoor register showing examining of the deceased, Rupa Devi and further, nature of the injuries having sustained by her. It has also been submitted that aforesaid fact had purposely been introduced to ward off a situation which might have been perceived by the Court on account of delay in lodging of the FIR coupled with possibility of false implication.

9. In its continuity, it has also been submitted that from the *fardbeyan*, it is apparent that informant had disclosed that firstly the administration was informed and then victim was lifted from the place of occurrence for treatment. The offence, as alleged happens to be cognizable whereupon, it was bounded duty of the police more particularly, in light of direction having been given by the Constitution Bench in the case of *Lalita Kumari v. State of U.P.* reported in *2014 CrLJ 470*. The aforesaid version has not been brought up on record. So, it has got severe adverse impact upon the prosecution case. The first one, concealment of earlier version and the second one the present F.I.R. appears to be hit by Section 162 of the Cr.P.C. When the cumulative effect is taken together with the evidences of the PWs wherein, apart from inconsistency prevailing amongst themselves over the manner as well as genesis of occurrence, presence of material contradiction is a circumstance which make the evidences unreliable and in likewise manner the status of the



witnesses to be uncreditworthy. So, submitted that the judgment of conviction and sentence recorded by the learned lower Court is not at all sustainable. Consequent, thereupon, is fit to be set aside.

10. On the other hand, learned A.P.P. endorsed the view of the learned counsel for the appellant that the judgment impugned would not survive in the background of deficiency, illegality so persisting as well as suffering from conjecture and surmises. To substantiate such plea, it has been submitted that there happens to be consistent prosecution version that deceased was assaulted with iron rod as well as *lathi* and so, none of the ingredients so prescribed under Section 326 of the IPC is found satisfied. Moreover, when the evidence on record is gone through, it is apparent that they are consistent over the genesis as well as manner of occurrence. In worst, learned lower Court would have taken a view that assault was on 31.01.2016 while deceased died on 02.02.2016, while she was under treatment at P.M.C.H. and so, would have properly identified it a case falling under Section 304-I of the IPC or under Section 304-II of the IPC. Instead thereof, the learned lower Court concluded adverse to the materials available on the record and further, during course thereof became blank in appreciating the evidence which of Part-I or Part II of Section 304 is found duly substantiated. The findings of the learned lower Court so recorded under Paragraphs-22 and 23 of the judgment



speak a lot, at least, non application of judicial mind by the learned lower Court while appreciating the facts of the case.

11. In order to properly appreciate the rival submissions as well as deficiency persisting on the record more particularly relating to the judgment impugned, first of all **Section 326 of the IPC** is to be taken note of and for that, the same is quoted hereinbelow :-

“326. Voluntarily causing grievous hurt by dangerous weapons or means—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.



12. Now, coming to the evidence on record, it is evident that defence has not challenged the injuries having over the person of the deceased by way of to examining PW-2. The only circumstance happens to be as coming out from suggestion is that deceased had fallen down from the stair during course of getting down from the roof. Whether aforesaid theme was possible or not in the background of nature of injury is found duly explained by the doctor PW-9 who had conducted post-mortem over the dead-body of Rupa Devi on 02.02.2016 at PMCH and found the following:-

External and Internal:- (1) Stitched wound 4.3 cm, length 7 cm, from mid line and 8 cm from left eyebrow. Left frontoparietal aspect. (2) Abrasion radish brown in colour posterior aspect right elbow 3cm x 1cm. irregular shape. (3) Head sub scalp extravasation of blood all over except astragal with dark radish blood on incision with fracture, left, frontoparietal temporal 10 cm. adjacent frontoparietal suthers with loosing of suthers with blood clots correspondingly and fracture, right perito temporal 5 cm. from mid line 11 cm. length corresponding consisting of brain matter with subdual hemorrhage right fronto temporal area constusional hemorrhage left side correspondingly. Opinion:-Cause of death was craniocerebral damage resulting from head injury caused by blunt force impact. Time since death:- Consistent with hospital timing of death.



13. During cross-examination at Para 5 he was specifically questioned whether the nature of ante-mortem injury having over the deceased Rupa Devi could be caused by way of falling from the roof and he answered that. In this case it is unlikely to be caused such kind of injury after falling from the height. Even, injury no. 1 is not possible to be caused by fall from the height. So, it is clear from the evidence of doctor that the deceased had sustained ante-mortem injury by means of had and blunt substance.

14. PW-1 is the father-in-law and from Para 3 of his examination-in-chief, it is apparent that the deceased was assaulted by rod on her head by Birmani Yadav and by *lathi* by Shishupal. During course of cross-examination, he was not at all cross-examined over the manner of assault though at Para 34 he was tested only with regard to Shisupal wherein he had stated that he had seen Shisupal assaulting over leg but he is unable to say the numbers of blows as he had not seen the occurrence since its beginning. PW-2 in likewise manner at Para 5, had stated and on that very score, again there happens to be failure at the end of the defense to cross-examine him at least how and by which she was assaulted though at Para-33 had stated that his wife was not assaulted with rod as well as *lathi* after falling over the ground. He had further stated that he is unable to say as to how many *lathi* blows were given over her body. He is unable to say from which



side, she was assaulted. PW-3 at Para 5, had disclosed that the blows were hurled over the person of the deceased by the rod as well as *lathi*. In Para 16, she had stated that Shisupal and Birmani had caught hold hair of deceased and then assaulted with rod. In Para-17, he had stated that she is unable to say how many *lathi* blows were given by the Shisupal but only one rod blow was given.

15. PW-4 at Para 2 had reiterated the same and so far assault by the rod is concerned, she was also not cross-examined though, under Para 13, she had stated that how many *lathi* blows were given by Shisupal, she is unable to say. PW-5 also reiterated the same under Para 6 which, during course of cross-examination had not been tested. PW-7, in likewise manner, had stated under Para 4 but again not been cross-examined on that very score. PW-8 is a witness of inquest. PW-6 is the I.O. and so his evidence on that very score, is not at all relevant.

16. From the evidence available on the record, as discussed hereinabove, along with the medical evidence, it is apparent that on account of assault over the head of the deceased, there was fracture of triennial cavity, which ultimately cost her life and that being so, the finding could have been, whether it was a case of culpable homicide amounting to murder or culpable homicide not amounting to murder. Whether it was a case wherein there would have



been an applicability of Section 326 of the IPC is not at all found supported with the material available on the record as neither rod nor *lathi* happens to be the weapons, so identified under Section 326 of the IPC. Moreover, from Para 22, 23 of the judgment impugned, it is apparent that learned Lower Court was very much confused, which ought not to be but its presence made the judgment impugned a nullity.

17. In *Issac @ Kishor vs. Ronald Cheriyan and others reported in 2018 (2) P.L.J.R. 57 (SC)*, it has been held by the Apex Court:-

“9. Section 386 Cr.P.C. defines the powers of the Appellate Court in dealing with the appeals. The powers enumerated thereon are vested in all courts, whether the High Court or subordinate courts, except that Clause (a) of the section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that court, while Clause (b) of the section is not so restricted and embraces all courts. The power to direct the accused to be retried has been conferred on the High Court not only when it deals with an appeal against acquittal but also when it deals with an appeal against conviction. Section 386 Cr.P.C. reads as under:- "Section 386:- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in



case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may :- (a) In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law; (b) In an appeal from a conviction:- (i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of Competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) Alter the finding, maintaining the sentence, or (iii) With or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;"

10. Under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass



sentence on him according to law.

11. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

12. In K. Chinnaswamy Ready v. State of Andhra Pradesh and Another, AIR 1962 SC 1788, the accused had been convicted by the trial court. The Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the de facto complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:- "7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have



thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been



overlooked either by the trial court or by the appeal court, or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....." (underlining added) The same principle was again reiterated in Mahendra Pratap Singh v. Sarju Singh and Another AIR 1968 SC 707.

13. In Matukdhari Singh and others v. Janardan Prasad, AIR 1966 SC 356, accused was tried for offences under Sections 420, 466, 406 and 465/471 IPC and acquitted. The trial court did not frame charge under Section 467 IPC regarding which there were prima facie materials available, that is an offence triable exclusively by the Sessions Court. The High Court, in appeal, set aside the acquittal and ordered retrial. The Supreme Court dismissed the appeal preferred before it. The court referred to earlier decisions in Abinash Chandra Bose v. Bimal Krishna Sen and Another AIR 1963 SC 316 and Rajeshwar Prasad Misra v. State of West Bengal and Another AIR 1965 SC 1887 with reference to the facts of those cases and emphasized that wide discretion available with the Appellate Court in ordering retrial.



18. After proper evaluating the evidences, circumstances visualizing from the lower Court record, it is apparent that by way of recording of the present finding, a miscarriage of justice is found at the end of the learned Lower Court and that being so, the judgment impugned is set aside.

19. Appeal is allowed. Matter is remitted back to the learned Lower Court with a direction to proceed afresh from the stage of argument after hearing both the parties will pass judgment afresh in accordance with law. Appellant is under custody, who will be produced before the learned Lower Court during the intervening period. The learned Lower Court will conclude the hearing and will deliver the judgment within three months from the date of receipt of the instant judgment as well as lower court record. Simultaneously, office is also directed to transmit the record at an earliest.

Amjad/Ravi

(Aditya Kumar Trivedi, J)

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