

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.315 of 2015**

Arising Out of PS. Case No.-178 Year-2006 Thana- BHABHUA District- Kaimur (Bhabua)

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Pankaj Pandey, son of Ram Narayan Pandey, resident of Village- Dewarji,
P.S.- Bhabua, District- Kaimur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Ravi Shankar Sahay, Advocate
Mr. Chandra Mohan Jha, Advocate
Mr. Rakesh Kumar Mishra, Advocate

For the Respondent/s : Mr. S. N. Prasad, APP

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**CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)**

Date : 24 -06-2022

By this appeal, appellant/accused no. 1 is challenging the Judgment and order dated 21.02.2015 and 23.02.2015 passed by the learned Adhoc Additional Sessions Judge-III, Kaimur at Bhabhua in Sessions Case No. 191 of 2013 (33 of 2010), thereby convicting him of the offences punishable under Sections 304 and 201 r/w Section 34 of the Indian Penal Code and sentencing him to suffer life imprisonment for the



offence punishable under Section 304 of the Indian Penal Code apart from imposition of fine of Rs.10,000/- and default sentence of one year on failure to pay the fine. For the offence punishable under Section 201 r/w Section 34 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for two years apart from imposition of fine of Rs.5,000/- and in default to undergo imprisonment for three months. For the sake of convenience, the appellant shall be referred to in his original capacity as “an accused”.

2. Facts in brief leading to the prosecution of the accused can be summarized thus:-

a. It is case of the prosecution that the incident of commission of homicidal death of Anil Pandey, son of Ram Narayan Pandey took place at about 8.30 P.M. on 21.06.2006 in the front yard of his residential house at village Dewarji Kala, P.S. Bhabhua, District Kaimur. Accused Pankaj Pandey is real brother of Anil Pandey (since deceased). Anil Pandey (since deceased) married P.W.9 Kamlesh Kuwar six years prior to the date of the incident and thereafter she started cohabiting with said Anil Pandey at village Dewarji Kala. Ram Narayan Pandey (deceased accused) was father of Anil Pandey. Sunil Pandey, Mithesh Padney and Akhilesh Pandey being brothers of Anil



and Pankaj Pandey, were also staying at the house of their father Ram Narayan Pandey (deceased accused) along with Anil Pandey (since deceased) and his wife P.W. 9 Kamlesh Kuwar.

b. According to the prosecution case, in-laws of P.W. 9 Kamlesh Kuwar were insisting her husband Anil Pandey (since deceased) to desert P.W. 9 Kamlesh Kuwar and to marry another women for the reason that father of Kamlesh Kuwar had not given requisite dowry in the marriage.

c. At about 8.30 P.M. of 21.06.2006 when all members of family of deceased accused Ram Narayan Pandey came in the front yard of the house for having dinner, accused/appellant Pankaj Pandey started abusing his brother Anil Pandey (since deceased) and insisted him to send back his wife P.W. 9 Kamlesh Kuwar to her parental house. Accused/appellant Pankaj Pandey was insisting his brother Anil Pandey (since deceased) to marry another women. However, Anil Pandey (since deceased) flatly refused to oblige. Thereupon Ram Narayan Pandey (deceased accused) exhorted and ordered killing of Anil Pandey. Then accused/appellant Pankaj Pandey lifted the small stool (describe in vernacular as “PIDHA”) and gave blow thereof on the head of Anil Pandey. When P.W. 9 Kamlesh Kuwar tried to intervene, she was



slapped and confined in a room.

d. According to the prosecution case, because of blow of small stool on his head, Anil Pandey sustained wound and was given first aid by Dr. Lalan Prasad. For further treatment, he was taken to Banaras but he on the way succumbed to the injuries sustained by him. The accused persons then performed funeral on the dead body of Anil Pandey without disclosing the fact of his death either to police or to other relatives.

e. On 23.06.2006, P.W. 9 Kamlesh Kuwar was released from confinement by her mother-in-law and she was directed to go back to her parental house. That is how on 23.06.2006, P.W. 9 Kamlesh Kuwar returned back to her parental house at village Amao and disclosed the incident of death of her husband to her mother P.W. 4 Fulmati Devi, her sister P.W. 5 Chandani Kumari and her father P.W. 6 Basant Tiwari. Accompanied by her father Basant Tiwri, P.W. 9 Kamlesh Kuwar then went to the police station Bhabhua on 24.06.2006 itself and lodged report which has resulted in registration of Crime No. 178 of 2006 against the accused persons.

f. Routine investigation followed and on



completion of investigation, appellant/accused no. 1 Pankaj Pandey and his father Ram Narayan Pandey came to be charge sheeted for the offences punishable under Sections 304 and 201 r/w Section 34 of the Indian Penal Code.

g. The learned trial court had framed the charge for the offences punishable under Sections 302 and 201 r/w Section 34 of the Indian Penal Code and explained the same to accused persons. They pleaded not guilty and claimed trial.

3. In order to bring home the guilt to the accused, the prosecution has examined as many as ten witnesses. Ram Prakash Prasad a co-villager is examined as P.W.1, another co-villager Brajesh Pandey is examined as P.W. 2. Awadhesh Pathak, brother-in-law of first informant is examined as P.W.3. Fulmati Devi, mother of first informant is examined as P.W.4. Chandani Kumari, sister of first informant is examined as P.W. 5. Basant Tiwari father of first informant is examined as P.W. 6. Prem Chand Pandey and Houshla Nand Pandey are examined as P.W. 7 and P.W. 8 respectively. First informant Kamlesh Kuwar @ Kamlesha is examined as P.W. 9 and the Investigating Officer Manju Singh is examined as P.W. 10.

4. Defence of the accused was that of total denial. As seen from the line of cross-examination of the prosecution



witnesses, according to the defence version, deceased Anil Pandey suffered an accidental fall while climbing on the ladder. The defence has examined Pratap Singh and Kameshwar Pandey as D.W. 1 and D.W. 2 respectively.

5. After hearing the parties, the learned trial court was pleased to convict appellant/accused no. 1 Pankaj Pandey as well as co-accused Ram Narayan Pandey as indicated in the opening paragraph of this Judgment and they came to be sentenced accordingly.

6. We heard the learned counsel appearing for the appellant/accused no. 1 Pankaj Pandey at sufficient length of time. Therefore, argued that evidence of sole eye witness Kamlesh Kuwar is unreliable and untrustworthy. She was not staying at her matrimonial house and therefore, she was not an eye witness to the incident. It is further argued that the evidence on record suggests accidental death of Anil Pandey. It is further argued by the learned counsel for the appellant/accused no. 1 Pankaj Pandey that there is delay of three days in lodging the FIR. The deceased used to work at Gujrat and therefore, the defence has probabalized the fact that P.W. 9 Kamlesh Kuwar is not an eye witness to the incident. It is further argued that the appellant has already undergone sentence of more than eight



years.

7. Per contra the learned Additional Public Prosecutor supported the impugned Judgment and order.

8. We have considered the submissions so advanced and we have also perused the record and proceedings including the oral as well as documentary evidence adduced by the prosecution.

9. In order to bring home the guilt to the accused, it is incumbent for the prosecution to prove homicidal death of Anil Pandey. However in the case in hand, as per version of the prosecution, after death of Anil Pandey, his dead body was surreptitiously disposed of by the accused persons for destroying the evidence of commission of the offence. Evidence of the Investigating Officer P.W.10 Manju Singh shows that the dead body was not found when the wheels of the investigation were set in motion after lodgment of the FIR by P.W. 9 Kamlesh Kuwar on 24.06.2006. Therefore, we are not having advantage of having evidence of the autopsy surgeon or report of postmortem examination of dead body of Anil Pandey. Let us therefore advert to the other evidence on recorded in order to ascertain whether it is proved that Anil Pandey died homicidal death at the instance of the accused persons.



10. P.W. 2 Brajesh Pandey, P.W. 7 Prem Chand Pandey and P.W. 8 Houshla Nand Pandey are the prosecution witnesses who have turned hostile to the prosecution and as such their evidence is of no use to the prosecution to infer guilt of the accused in the crime in question. P.W. 1 Ram Prakash Prasad is a co-villager residing at village Dewarji Kala. He claims to have heard from the deceased that the deceased sustained injury while climbing the ladder because of the accidental fall. P.W. 1 Ram Prakash Prasad has deposed that Anil Pandey was suffering from physical disability. He has not witnessed the incident. Though, he claimed to have heard the oral dying declaration of Anil Pandey regarding cause of his death, other witnesses in whose presence such statement was allegedly made are not supporting P.W. 1 Ram Prakash Prasad on this aspect. Therefore, his evidence cannot cast a shadow of doubt on the case of the prosecution.

11. P.W. 9 Kamlesh Kuwar is the star witness for the prosecution. The prosecution case is regarding homicidal death of her husband Anil Pandey at her matrimonial house. Therefore, fate of the prosecution case to a large extent hinges on her testimony. It is in her evidence that the incident took place in the year 2006. On that day at about 8 to 9 P.M., her in-



laws were to have dinner at their house. As per statement of Kamlesh Kuwar, Ram Narayan Pandey (deceased accused) had exhorted and order his sons to kill their brother Anil Pandey and thereupon appellant/accused Pankaj Pandey gave a blow of the small stool on the head of her husband Anil Pandey. As per version of Kamlesh Kuwar when she tried to intervene, she was assaulted and was confined in a room. She further stated that she was released on 23rd day of the month and was asked to go to her parental house. This witness duly proved the FIR lodged by her on 24.06.2006. As per her version, her in-laws used to insist her husband to desert her and to marry another women for getting dowry and this was the cause of the incident.

12. P.W. 9 Kamlesh Kuwar was subjected to the searching cross-examination by the defence. It was attempted to elicit from her that she was not staying at her matrimonial house because her husband was serving at the Gujrat State. However P.W. 9 Kamlesh Kuwar reiterated in the cross-examination that she was present at her matrimonial house at the time of the incident and after the incident she returned to her parental house. In cross-examination she testified that her husband was assaulted only once by the small stool and her husband had suffered wound on his head. Thereafter further blows were not



dealt on her husband. Even in cross-examination, this witness has reiterated that three days after the incident she returned to her parental house from her matrimonial house, all alone.

13. It is thus seen from the overall scrutiny of evidence of P.W. 9 Kamlesh Kuwar that her testimony is not at all shaken in the cross-examination and the incident of assault on her husband by accused Pankaj Pandey was witnessed by her. It was a single blow on the forehead by using a small stool available on the spot itself as weapon.

14. P.W. 4 Filmati Devi, P.W. 5 Chandani Kumari and P.W. 6 Basant Tiwari, who are parents and sister of P.W. 9 Kamlesh Kuwar, are not direct witnesses to the incident of assault on Anil Pandey by his brother accused Pankaj Pandey. All these three witnesses have narrated what they heard from P.W. 9 Kamlesh Kuwar and so far as the incident in question is concerned, evidence of these witnesses is certainly a hearsay evidence. These three witnesses are cross-examined by the defence in order to show that P.W. 9 Kamlesh Kuwar was not staying at the house of the accused persons but she was staying at her parental house. However nothing favourable could be elicited from their cross-examination by the defence. These three relatives of the first informant have candidly stated in the



cross-examination that after marriage with Anil Pandey, P.W. 9 Kamlesh Kuwar was staying with him and she used to visit her parental house for a brief period.

15. The prosecution witnesses including P.W. 3 Awadhesh Pathak were cross-examined by the defence to show that Anil Pandey who was suffering from the physical disability had suffered an accidental fall while climbing on the ladder. However when the spot of the incident was inspected by P.W. 10 Manju Singh the Investigating Officer, no such ladder was found thereat.

16. D.W. 1 Pratap Singh is Mukhiya of the Gram Panchayat. He has stated that Anil Pandey died while he was being taken to Banaras for medical treatment. Though he had stated that Anil Pandey suffered an accidental fall, he accepted that he had not witnessed that incident. Another defence witness is Kamleshwar Pandey. He is relative of the prosecuting party. He deposed that Anil Pandey died because of the accidental fall. However he is also not an eye witness to such accident.

17. It is thus clear from the evidence of P.W. 9 Kamlesh Kuwar that her husband Anil Pandey died because of assault by means of small stool by his brother accused/appellant, Pankaj Pandey. The defence has not disputed death of Anil



Pandey. However their defence to that effect that the death of Anil Pandey was because of accidental fall, is not at all probablies. On the contrary trustworthy evidence of P.W. 9 Kamlesh Kuwar is making it clear that Anil Pandey died homicidal death because of assault by means of small stool by his brother accused/appellant Pankaj Pandey. The blow was on head of Anil Pandey. Thus, it needs to be concluded that Anil Pandey died homicidal death at the hands of appellant/accused no. 1 Pankaj Pandey.

18. The learned trial court concluded that the prosecution has failed to prove the offence punishable under Section 302 of the Indian Penal Code and has held that the offence punishable under Section 304 of the Indian Penal Code is established against the accused apart from the one punishable under Section 201 of the Indian Penal Code. Unfortunately, the learned trial court has failed to dwell further on this aspect in order to ascertain whether the offence proved is falling under Part I or Part II of Section 304 of the Indian Penal Code. This section reads thus :-

“304. Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amounting to murder shall be punished with (imprisonment for life), or



imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death”.

19. The death was because of a single blow of the small stool on head of Anil Pandey. The small stool used for commission of offence was available on the spot of the incident. Version of P.W. 9 Kamlesh Kuwar shows that a single blow was delivered on head of Anil Pandey by accused/appellant Pankaj Pandey. In such situation Part II of Section 304 of the Indian Penal Code gets attracted as the act of assault was done without intention to cause death or to cause such bodily injuries as is likely to cause death. However the accused was certainly having knowledge that by assaulting his brother on head by means of small stool he may cause death of his brother. Thus what is proved by evidence of the prosecution is commission of offence punishable under Part II of Section 304 of the Indian Penal



Code by the appellant/accused.

20. After commission of the offence of culpable homicide not amounting to murder of his brother Anil Pandey, dead body of Anil Pandey was disposed of by the accused even without reporting the fact of death either to the police or to in-laws of deceased Anil Pandey. Thus evidence of commission of offence of culpable homicide not amounting to murder was caused to be disappeared by the accused with the intention of screening himself from the legal punishment. Therefore, the offence punishable under Section 201 of the Indian Penal Code is also proved against the appellant/accused.

21. Now let us examine whether the consequent sentence of life imprisonment imposed on appellant/accused Pankaj Pandey for the offence punishable under Section 304 of the Indian Penal Code is proper or not. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing court are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with the gravity and nature of



the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

22. As pointed out above, the incident took place because of quarrel between two brothers and their father in which one brother namely Anil Pandey died. Perusal of the sentencing trend in past for the offence punishable under Section 304(II) of the Indian Penal Code shows that sentence of life imprisonment is too harsh considering the facts and circumstances of the case. It is required to be modified. In the matter of **Shivappa Buddappa Kolkar alias Buddappagol vs. State of Karnataka**, reported in **AIR 2004 Supreme Court 5047**, modifying the conviction of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Honourable Supreme Court had imposed sentence of imprisonment for a period of five years apart from fine of Rs.7,000/- on the appellant/accused. In the matter of **Padmakar s/o. Dadarao Thorat vs. The State of Maharashtra** reported in **2015 ALL MR (Cri) 2628** Division Bench of the Bombay High Court by modifying the conviction



of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the offence punishable under Section 304(II) of the Indian Penal Code, had sentenced the appellant/accused therein for rigorous imprisonment for 5 years apart from payment of fine of Rs.500/-. Similarly, in the matter of **Manke Ram vs. State of Haryana** reported in **2003 CRI.J. 2328** by altering the conviction of the appellant/accused therein from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Hon'ble Supreme Court was pleased to award sentence of 5 years of rigorous imprisonment apart from fine of Rs.2,000/- on the appellant/accused therein. In the result, we find that the accused is not properly sentenced by the learned trial court and his sentence is required to be scaled down.

23. In the case in hand, It is reported that the appellant/accused has already undergone sentence of more than eight years and much more including the remission earned. Therefore, the order:-

- a. The appeal is partly allowed.
- b. Conviction of the appellant/accused for the offence punishable under Section 304 of the Indian Penal Code is



confirmed by holding that it is proved that the appellant/accused has committed the offence punishable under Part II of Section 304 of the Indian Penal Code.

c. Conviction of appellant/accused for the offence punishable under Section 201 r/w Section 34 of the Indian Penal Code is also maintained.

d. Sentence awarded to the appellant/accused on both count is modified by sentencing the appellant/accused to imprisonment for the period already undergone.

24. The appeal is, accordingly, disposed of.

(A. M. Badar, J)

(Rajesh Kumar Verma, J)

Bhardwaj/-

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