

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.167 of 2008**

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Banaras Tiwari, son of Late Duryoddan Tiwary, Resident of village-
Dharphari, P.S. Deoria, District-Muzaffarpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Ms. Surya Nilambari, Amicus Curiae
For the Respondent/s : Mr. S. N. Prasad, APP

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**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

ORAL JUDGMENT

Date: 17-04-2025

Heard Ms. Surya Nilambari, learned Amicus Curiae for the appellant and Mr. S. N. Prasad, learned APP for the State.

2. The present appeal has been filed under Section 374(2) of Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C') challenging the judgment of conviction dated 19.12.2007 and order of sentence dated 20.12.2007 passed in Sessions Trial Case No. 154 of 2006 arising out of Deoriya P.S. Case No. 14 of 2005 dated 09.04.2005 passed by the learned Additional Sessions Judge (FTC)-IV, Muzaffarpur, whereby and where-under the appellant has been convicted for the offence punishable under Sections 304 of the Indian Penal Code (hereinafter referred as 'IPC') and



had been sentenced to undergo rigorous imprisonment for ten years under Section 304 of the IPC.

3. As per the prosecution story, the informant, recorded *fardbeyan* on 09.04.2005 before police that a scuffle took place in between the deceased and the accused on account of human refuse thrown through the hole of a wall causing annoyance to the inmates of the deceased home which led to an abusing altercation and eventually in course of that the accused started mounting pressure around the neck of the deceased as a result of which it is alleged that the informant's father fell on the ground and went in coma who was rescued taken to S.K.M.C.H, Muzaffarpur where he was declared dead and thereafter the informant and others returned back to their village home with the dead-body of the deceased and lodged the case before the P.S. concerned.

4. Further on the basis of *fardbeyan* of informant, police as usual took up the investigation and in course of that visited the place of occurrence, took down the statement of the witnesses, prepared inquest report, got the autopsy of the dead-body and after completing the formalities submitted the charge-sheet against the accused under Section 302 IPC which mandated the court of competent jurisdiction to take cognizance



of the offence vide order dated 04.02.2006 and thereafter the case was committed to the Court of Sessions on 17.02.2006.

5. On behalf of prosecution altogether 7 witnesses were examined to substantiate the charges levelled against the appellant, who are namely, PW-1 Mukesh Tiwari, PW-2 Sumangal Sharma, PW-3 Umesh Tiwari, PW-4 Kamlesh Tiwari, PW-5 Manoj Tiwari (informant), PW-6 Dr. and PW-7 Santosh Kumar Sinha (Investigating Officer). On behalf of defence one witness has been examined namely DW-1 Mahesh Tiwari.

6. PW-1 Mukesh Tiwari in his examination-in-chief stated that occurrence is of year 2005 around fourth month at about 6:30 am when he was going to take bath, he saw that there was a scuffle going between accused and deceased. He further stated that after hearing *hulla* he came and saw that Rameshwar Tiwari (deceased) was lying dead on the ground and *chachi* (wife of deceased) told him that accused killed the deceased by strangulation.

6.i. In his cross-examination, he stated that at the time of occurrence deceased was healthy and accused was scraggy person and he did not saw the occurrence himself. He further stated that he did not saw any human refuge near the



house of the deceased nor saw any mark at the place of occurrence. He further stated that deceased character was good and he was wearing *ganji*, *lungi* when he saw the deceased and deceased's wife and son was not there.

7. PW-2 Sumangal Sharma stated in his examination-in-chief that on 09.04.2005 the occurrence took place when he was going to his house from farm, there was talk in between two females about the death of the deceased and when he ran toward the place of occurrence, he saw the dead body of the deceased lying at his residence and PW-1 informed him about the occurrence. In his cross-examination, he stated that his statement was recorded after 10 days of the occurrence and police inspector read out the fardbeyan of the informant. At the time of occurrence he was at his house and his house is in between the village. Deceased and accused both were his neighbors.

8. PW-3 Umesh Tiwary who appears to be an eye-witness of the occurrence, stated in his examination-in-chief that occurrence is of last year at about 7:30 pm, there was a scuffle and hot exchange of words in between the deceased and the accused on the pretext of some nasty act of the accused and thereafter the accused mounted pressure catching the neck of the



deceased who died on account of that instantaneously. The deceased according to the witness was brought to S.K.M.C.H where he was declared death.

8.i. In his cross-examination he stated that the deceased and the accused are closely related to each other and there was no dispute in between them before this occurrence took place. He further stated about the situation of the houses of both of the parties and about the genesis of the occurrence that led to the dispute and he has seen that the accused has throwing human refuse which is the beginning of the end of the deceased. He further stated he did not give his deposition just because that the deceased is his uncle.

9. PW-4 Kamlesh Tiwari stated in his examination-in-chief that occurrence is of 2005 at around 7 am. He went at the place of occurrence after hearing *hulla* and saw Manoj Tiwari along with Umesh Tiwari there. Deceased was asking from the accused as to why he is creating nuisance by throwing human refuse in front of his house. Accused person eventually in course of that started mounting pressure around the neck of the deceased as a result of which he died.

9.i. In his cross-examination, he stated that deceased is his uncle and people from his village use to go near



his house for defecate. At the date of occurrence, he saw the accused person on the road and he could not clearly state about the distance between the road and his house where occurrence took place. In para 7 of his deposition PW-4 stated that he saw accused person mounting pressure on the neck of the deceased and he along with Manoj tried to part away the accused person from mounting pressure on the neck of the deceased.

10. PW-5 Manoj Tiwari (informant) the son of the deceased stated in his examination-in-chief that occurrence is of 09.04.2005 at about 7:30 am when his father was at home. He further stated that accused house is in front of his house and he admitted the fact that there was ongoing land dispute with the accused. He further stated that accused had created a whole in the wall of his house and was facilitating the fall of human refuge through that whole and when it was objected by the deceased then the accused came out-side and caught hold of the neck of the deceased which was depicted in action by him and this commission of the accused ended the life of his father who after five minutes felled on the ground and lost his sense. PW-5 went to bring doctor from the village and when doctor came then he didn't say anything and thereafter the person was brought to the S.K.M.C.H, Muzaffarpur where he was declared



dead. The witness has further stated that he returned back to his village along with the body of the deceased father, informed the police who came and recorded his statement which bears the signature of the witness marked as Ext. 2. The police prepared the inquest report which bears signature of the witnesses thereupon marked as Ext.3 and 3/1 and after completing these formalities as stated in para-5 the dead-body of the deceased was sent to the Medical college for postmortem and after conducting the postmortem the dead-body was restored back for its cremation, PW-5 has also filed a protest petition which bears his signature thereupon marked as Ext.4.

11. PW-6 Dr. Mumtaz Ahmad (Medical Officer) was posted at S.K.M.C.H, Muzaffarpur and she conducted postmortem over the dead-body of the deceased on 10.04.2005 at 11.00 am and found the following injuries:

- i. Abrasion were found on right forehead $\frac{3}{4}$ " about, right eye-brow $\frac{1}{2}$ " x $\frac{1}{4}$ " and on left of right shoulder $\frac{1}{2}$ " x $\frac{1}{2}$ ".*
- ii. No external injury was found on neck but on dissection sub-cutaneous tissues of neck were congested and lacerated tracheal rings were fractured with presence of blood clot.*

The doctor has opined that the death due to asphyxia as a result of strangulation in the injury no.2. Injury no.1 may be due to fall



on ground. Time elapsed in death within 24 to 36 hours. The report has been marked Ext.5.

12. PW-7 Santosh Kumar Sinha (Investigating Officer) after receiving the information rushed to place at Dharfari at 9.00 pm and took down the statement of Manoj Tiwary (PW-5). He further stated that he visited the place which is open place before the houses of the informant and the deceased through which a passage leads to the courtyard of the informant and just besides the place there is a cemented roof house of the accused having north face and adjacent to its south the house of the informant is situated. He prepared the inquest report which is in his writing and bears his signature marked as Ext.6 and the dead body was sent to the S.K.M.C.H. He took down the statement of the witnesses who have been examined as PW-2, PW-3 and PW-4 and after completing of the formalities he found the case true and accordingly submitted charge-sheet in the court where the accused voluntarily surrendered.

13. The learned *Amicus Curiae* submits that the impugned judgment of conviction and order of sentence are not sustainable in the eye of law or on facts. Learned trial Court has not applied its judicial mind and erroneously passed the judgment of conviction and order of sentence and from perusal



of the evidences adduced on behalf of the prosecution it is crystal clear that the prosecution's case is false and fabricated and the case is filed due to enmity between the appellants and the informant as they had land dispute attributed between the parties. She further submitted that medical evidence given by the doctor (PW-6) does not support the prosecution case of death by manual strangulation. PW-6 in para 5 of his oral evidence clearly stated that the present case was not one of manual strangulation. Some material might have been used for strangulating the deceased. She further contended that there is delay in lodging of the FIR. Though the occurrence took place at 7:30 AM, the *fardbeyan* was lodged at 9:00 PM. According to the witnesses, the deceased was taken to the hospital at Muzaffarpur but no documentary evidence has been adduced to prove that the deceased was taken to the hospital. In fact in para 35 of his deposition, PW-5 (Manoj Tiwari/informant) admits that they had returned to their house from the hospital by 12/1 pm.

13.i. Learned *Amicus Curiae* further submitted that place of occurrence has not been established as the IO (PW-7) did not indicate the date/time at which he inspected the place of occurrence. Considering that the *fardbeyan* was lodged at



night, at 9 PM, if indeed the IO had inspected the place of occurrence immediately thereafter, then the question arises as to the source of light in which the inspection of the place of occurrence was conducted. The testimony of the IO is silent on this point. Further, in para 11 of his testimony, the IO blows hot and cold in the same breath by stating, firstly, that he found waste on the ground, near the hole in the wall of the house of the Appellant; then states that he did not find any sign of waste near the hole in the wall. It is also important to note that no site map was prepared, and the IO admits in para 10 of his deposition that he did not record the distance between the house of the deceased and that of the Appellant.

13.ii. Alternately, it is submitted that there was no intention on the part of the Appellant to cause the death of the victim or such bodily injury, to him, that would be sufficient to cause death. The incident occurred suddenly, on a trivial issue. There was no premeditation on the part of the Appellant. The testimony of the eye witnesses do not indicate that the Appellant used any weapons or that he continued to assault the deceased even after he had collapsed. The Appellant did not take undue advantage of the victim when he is said to have collapsed. In fact, PW-5 (informant/son of the deceased) stated



in his evidence that, para 2, that the Appellant caught hold of the neck of the deceased. No reference is made to the severity with which the neck was pressed or throttled.

13.iii. Learned *Amicus Curiae* further submitted that learned trial Court in para 30 of its judgment admitted the fact that the accused had no intention to cause death of the deceased and there is no evidence that there is strangulation for causing death, but what has been proved that accused had exchange of hot words with deceased and vulnerable part of the neck of the deceased slipped/came under the severe grip of the cross fingers of the accused which resulted in death of the deceased. She further submitted that learned trial Court in para 33 of its judgment did not mentioned as to under which part of Section 304 the accused is convicted which creates doubt on regard to its conviction itself as if there was no intention then the accused should be sentenced to maximum imprisonment for a term that may extend to seven years, or with a fine not less than seventy-five thousand rupees, or with both but the trial Court sentenced the accused for rigorous imprisonment for ten years without any fine.

13.iv. Learned *Amicus Curiae* further submitted that this appeal is of the year 2008 and occurrence is of the year



2005, where, the appellant has suffered and undergone persistent agony on the account of the same and are struggling for the defence since last 19-20 years. So, the appellant should have been acquitted from the conviction as sentenced against them or period undergone.

14. However, learned APP for the State defends the impugned judgment of conviction and the order of sentence submitting that there is no illegality or infirmity in the impugned judgment and order of sentence, because prosecution has proved its case against the appellant beyond all reasonable doubts. In view of the aforesaid statements and the evidence on record, learned trial Court has rightly convicted the appellant and the present appeal should not be entertained.

15. At this stage, I would like to appreciate the relevant extract of entire evidence led by the prosecution before the Trial Court. I have thoroughly perused the materials on record and aforesaid judgments referred by the *Amicus Curiae* as well as given thoughtful consideration to the submissions advanced by both the parties.

16. On deeply studied and scrutinized all evidences, it is evident to note from the deposition of prosecution witnesses that PW-5 was present at the place of



occurrence and constantly through out the trial substantially supported his fardbeyan. Other prosecution witnesses have also supported the fardbeyan and statement made by the informant substantially in their depositions. Further, there was no intention on the part of the Appellant to cause the death of the victim or such bodily injury, to him, that would be sufficient to cause death. The incident occurred suddenly, on a trivial issue. There was no premeditation on the part of the Appellant. The testimony of the eye witnesses do not indicate that the Appellant used any weapons or that he continued to assault the deceased even after he had collapsed. The Appellant did not take undue advantage of the victim when he is said to have collapsed. In fact, PW-5 (informant/son of the deceased) stated in his deposition para 2, that the Appellant caught hold of the neck of the deceased. No reference is made to the severity with which the neck was pressed or throttled.

17. Further, Learned trial Court in para 30 of its judgment admitted the fact that the accused had no intention to cause death of the deceased and there is no evidence that there is manual strangulation for causing death, but what has been proved that accused had exchange of hot words with deceased and vulnerable part of the neck of the deceased slipped/came



under the severe grip of the cross fingers of the accused which resulted in death of the deceased. Learned trial Court in para 33 of its judgment did not mentioned as to under which part of Section 304 the accused is convicted which creates doubt on regard to its conviction itself as if there was no intention then the accused should be sentenced under Section 304 part II of the IPC to maximum imprisonment for a term that may extend to ten years, or with a fine not less than seventy-five thousand rupees, or with both but the trial Court sentenced the accused for rigorous imprisonment for ten years without any fine.

18. In *Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444* where Hon'ble Supreme Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused:

" Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters- plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating



in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following. among other circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any



prior enmity or whether the deceased was a stranger: (viii) whether there was any grave and sudden provocation. and if so. the cause for such provocation: (ix) whether it was in the heat of passion: (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner: (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

(emphasis supplied)

19. In *Ajit Singh v. State of Punjab* (2011) 9 SCC 462, the Court held that "in order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder. In other words, Section 300 states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five exceptions to Section 300. The



legislature in its wisdom, thus, covered the entire gamut of culpable homicide that 'amounting to murder' as well as that 'not amounting to murder' in a composite manner in Section 300 of the Code. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences.”

20. The Hon’ble Apex Court, in the case of *State of U.P. vs Tribhuwan, (2018) 1 SCC 90* has laid down that, time spent in custody by a convicted person, both as an under-trial and as a convicted person, may be considered as jail sentence awarded to him and he may get the advantage of set-off under Section 428 of Cr.P.C.

21. Hence, keeping in view all the materials available on record and the observation of the Hon’ble Apex Court, it is observed that in the instant case the prosecution has proved the allegation leveled against the appellant beyond all reasonable shadow of doubt. As the appellant has struggled for a long time during the trial procedure and the conviction of the appellant is upheld for the offence punishable under Section 304 Part II of the IPC but given the long pendency of the trial and the order suffered by the appellant and there are no adverse



report against the appellant about his conduct otherwise the same would have been brought to our notice by learned counsel for the State, so sentence of the appellant is justified to period undergone and the appellant stands discharged of the liabilities of his bail bonds, if any.

22. Before parting with this appeal, Secretary, Patna High Court Legal Services Committee is directed to pay Rs. 10,000/- (ten thousand) to the learned *Amicus Curiae*, namely, Ms. Surya Nilambari towards honorarium for assisting this Court in the present appeal.

23. Let a copy of first and last page of this judgment be handed over to the advocate Ms. Surya Nilambari, learned *Amicus Curiae* and Office is directed to proceed further in granting honorarium to him which is to be paid by Patna High Court Legal Services Committee.

24. Accordingly, this appeal is partly allowed.

(Ramesh Chand Malviya, J)

Brajesh Kumar/-

AFR/NAFR	AFR
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