

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1488 of 2017

Arising Out of PS. Case No.-196 Year-1995 Thana- BARAULI District- Gopalganj

1. Sheoji Tiwari, S/o Late Ram Swarup Tiwari,
2. Munna Tiwari, S/o Shroji Tiwari, Both R/o Village- Bharkuiya, P.S.- Barauli, District- Gopalganj.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. D.K. Tandon, Advocate.
Mr. Pratik Tandon, Advocate.
For the Respondent/s : Mr. Ajay Mishra, APP.

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE NANI TAGIA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 16-01-2024

We have heard Mr. D.K. Tandon, the learned Advocate for the Appellants and Mr. Ajay Mishra, the learned APP for the State.

2. The appellant no.1, who is the father of appellant no.2, has been convicted under Section 302 with the aid of Section 109 of the Indian Penal Code; whereas appellant no.2 has been convicted under Section 302 of the



IPC, simplicitor *vide* judgment dated 18.11.2017 passed by the learned Additional Sessions Judge, Fast Track Court-I, Gopalganj in Sessions Trial No. 126 of 1997/ Tr. No. 249 of 2017/ C.I.S. No. 1294 of 2013, arising out of Barauli P.S. Case No. 196 of 1995. By order dated 23.11.2017, appellant no.1 has been sentenced undergo imprisonment for life, to pay a fine of Rs. 8,000/- and in default of payment of fine, to further suffer S.I. for five months for the offence under Section 302/109 of IPC. The appellant no. 2 has been sentenced to undergo imprisonment for life, to pay a fine of Rs.10,000/- and in default of payment of fine, to further suffer S.I. for six months. for the offence under Section 302 of IPC.

3. On the exhortation of appellant no.1, the appellant no. 2 is said to have given a *Bhala* blow on the deceased as a result of which he died instantaneously.

4. The attack on the deceased caused an incised penetrating wound of $1\frac{1}{2}$ " x $\frac{1}{2}$ ", which went in to the thoracic cavity. The impact of it was fracture of the fifth rib at the junction of the sternum and the coastal region.



This had resulted in a large hematoma underneath the sternum. The left ventricle was punctured through and through and the injury crossed through the left lung. The whole thoracic cavity was found to be full of blood clots.

5. Obviously, the death was because of the aforementioned injury, accelerated by shock and hemorrhage.

6. The post-mortem on the deceased was conducted on 31.08.1995 i.e. on the day of the occurrence and the time of death was fixed at 6 to 12 hours, to be counted from the time of the post-mortem examination. Such injuries were confirmed by Dr. Tirthanand Singh, (P.W. 9) who had conducted the post-mortem examination. In his opinion, such injury could well have been caused by a spear.

7. The reason for the assault arose out of appellant no. 1 holding some grudge against the deceased for his taking sides with his *bete-noire*, but for a petty dispute. The deceased along with his son/the informant (P.W. 6) was present at the place of occurrence at the time when appellant no.1 was fighting with one Nand Bihari



Tiwary over the issue of drainage of a hand-pump. The water collected from the hand-pump was hitherto being drained out in a *gair-majarua* land. However, on the day of the occurrence, appellant no.1 had occluded the drain, which perhaps was the bone of contention between Nand Bihari Tiwary and appellant no. 1. While they were having heated discussions and many persons of the village including the deceased and his son were watching it, the deceased moved forward in order to intercede with appellant no. 1 and Nand Bihari Tiwary. This enraged Sheoji Tiwary (appellant no.1), who asked his son (appellant no.2) to bring a *Bhala* from his home and kill the deceased. Perhaps, as noted above, the appellant no.1 was of the opinion that the deceased always sided with Nand Bihari Tiwary.

8. It would be relevant to state here that according to the evidence garnered during the Trial, Nand Bihari Tiwary, Sheoji Tiwary (appellant no. 1) and the deceased are all related to each other.

9. Obeying his father, appellant no. 2 went to his



house, brought a *Bhala* and hit the deceased by that *Bhala*. He is said to have then taken out the spear from the body of the deceased and having retreated to his home to keep the weapon. Thereafter, both father and son dyad (appellant nos. 1 and 2) scarpered.

10. The police had arrived in the village; had prepared the inquest report and had also recovered the weapon of assault *viz. Bhala*, which had blood smeared on it, from the house of the appellants. Though the police noted the presence of blood, but it appears that because most of it was wiped off as the weapon was kept on haystack, the blood drops were not collected for any forensic examination. But then, there is no dispute about the fact that over a trifle, appellant no.2 had assaulted the deceased with the spear. The post-mortem report completely confirmed that the death was because of the injury by the spear.

11. Both the appellants were charge-sheeted and put on Trial.

12. The Trial Court, after having examined ten



witnesses on behalf of the prosecution, convicted and sentenced the appellants as aforesaid.

13. Though Dayanand Tiwary, Lallan Tiwary, Deota Tiwary, Raj Kishore Singh and Dina Nath Singh, who have been examined as P.Ws. 1 to 5 were present at the P.O when the assault had taken place, but, if their deposition is examined in some more detail, it would appear that some of them may not have actually seen the real part of the assault. However, in their presence, according to them, the deceased was hit by a spear which led to his instantaneous death.

14. The entire occurrence of murder took place in such a short time that even the afore-noted witnesses, who were around the P.O could not come to the rescue of the deceased. Even P.W. 6, who is the son of the deceased, could not stop the appellant no. 2 from hitting his father by the spear.

15. The only reason, as it appears to us, is that none of these witnesses including P.W. 6 had believed that only because the deceased had tried to intercede between



appellant no.1 and Nand Bihari Tiwari over drainage of hand-pump water, the deceased would be killed. That appellant no.1 gave a hortatory call to appellant no.2 to bring a weapon and kill the deceased was only a bluster. The deceased also perhaps had not anticipated that appellant no.1 was serious when he had commanded his son (appellant no. 2) to bring a weapon and kill him.

16. There is no dispute about the fact that the deceased, the appellants and Nand Bihari Tiwari are all resident of the same village and are related to each other. That the deceased showed more affinity with Nand Bihari Tiwari was perhaps the reason for appellant no.1 to get enraged and get apoplectic when the deceased moved forward to pacify the warring brothers. Any exclamation or words spoken in anger at that time would not have been taken seriously. There was no real issue between the deceased and appellant no.1 and perhaps appellant no. 2 as well. The drainage of water in the *gair majarua* land had continued for quite some time. The opposition to it was only raised on the day of the occurrence. Appellant no.1



had blocked the drainage and Nand Bihari Tiwary, who perhaps had been using the hand-pump was not happy about it. This was hardly a dispute which would have occasioned the murder of another relative of both of them who had gone to intercede.

17. The learned advocate for the appellants has taken great strains to demonstrate that even if the accusation is accepted to be true, appellant no.2 would never have intended to cause the death of the deceased.

18. However, that may not be sufficient for giving a clean chit to the appellants so far as the offence of murder is concerned.

19. The law mandates that if the nature of injury which was intended to be caused, was, in the ordinary course of nature, so imminently dangerous that it could have caused the death, the offence of murder would be complete.

20. The whole effort of the appellants, therefore, has been demonstrate that under the afore-noted



circumstances, there could not be any intention to kill the deceased or cause such an injury, which in ordinary course of nature, would occasion the death of the deceased.

21. But how is the intention to be gathered and calibrated ?

22. The appellant no. 2 had used a weapon which was dangerous in itself and the injuries caused on the deceased was very grievous.

23. Can the intent deficit be determined only on the account of one blow by appellant no. 2 and no premeditation or preparedness for committing the murder ?

24. It requires to be discussed.

25. We have given our anxious consideration over the surrounding facts and circumstances of the case with respect to the moot question whether the appellants could be held guilty of the offence of murder, punishable under Section 302 of the IPC or whether they would be criminally liable under the less severe section of 304 IPC.

26. This question has been engaging the attention



of Courts regularly.

27. In ***Virsa Singh vs. State of Punjab: 1958 SCR 1495***, the Supreme Court has declared that for the offence of murder, the prosecution must prove that the death has been caused by a bodily injury and that the injury was such as would have surely caused the death.

28. These are but purely objective investigations. The prosecution would be under an obligation to prove that there was an intention to inflict that particular injury, i.e. to say that it was not accidental or unintentional or that some other kind of injury was intended.

29. Once these elements are proved to be present, the Court would proceed with an inquiry further and would look for evidence which would prove that the injury of the type suffered by the deceased was sufficient in the ordinary course of nature to cause death.

30. This inquiry also is purely objective and inferential and has got nothing to do with the intention of



the offender.

31. The Courts in all such matters have to proceed to decide the pivotal question of intention, with utmost care and caution as that would decide whether the case would fall under Section 302 or 304 Part -I or 304 Part -II of the IPC.

32. Many petty or insignificant issues could lead to an altercation culminating in death. They could be with the usual motives of revenge, greed, jealousy or suspicion or such impelling factors may not be present. How to gather intention under the latter circumstance viz. no usual impelling factor? In such cases, there may not even be any criminality.

33. It is for the Courts to be rather careful in ensuring that the cases of murder are not converted into offences punishable under Section 304 Part -I/II of the IPC or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302 of the IPC. The intention, therefore, to cause death has to be determined and gathered generally, which is dependent on



a combination of many circumstances. Some of such circumstances would be:

- (i) The nature of weapon used;
- (ii) whether the weapon was carried by the accused or brought from home;
- (iii) whether the blow was aimed at a vital part of the body;
- (iv) what was the amount of force employed in causing such injury;
- (v) whether the act was in course of sudden quarrel or sudden fight or free fight for all;
- (vi) whether the incident occurred by chance or whether there was any premeditation;
- (vii) whether there was any prior enmity or the deceased was a stranger;
- (viii) whether there was any grave and sudden provocation, and if so, what was the cause of such provocation;
- (ix) whether the act committed was in a heat of passion;
- (x) whether any undue advantage was taken by the offender over the person who was attacked;
- (xi) whether any cruel and unusual method was adopted for killing the deceased; or
- (xii) whether the deceased was dealt with a



single blow or several blows etc. etc.

34. The list could go on and could never be exhaustive. [Refer to ***Pulichera Nagaraju vs. State of A.P (2006) 11 SCC 444; Santosh vs. State of Maharashtra (2015) 7 SCC 641 and Prasad Pradhan & Anr. vs. State of Chhatisgarh 2023 SCC OnLine Sc 81***].

35. Before we test the circumstances of this case to form any specific opinion whether offence of Section 302 or 304 of the IPC is made out, it would be necessary for us to state in brief as to what is the actual import of the word 'intention'.

36. Etymologically, the word 'intent' has some connection with archery and aim. This, therefore, refers to not a casual or merely possible result which could be foreseen. It connotes a definite object coupled with a dominant motive, without which the action would not have been taken. There is a world of difference between motive, intention and knowledge. Motive prompts a man to form an intention, whereas knowledge is an awareness of the



consequences of the act. In many cases, intention and knowledge would merge into each other and mean the same thing. The intention could be presumed from the knowledge. The demarcating line between knowledge and intention is very thin. However, it would be required to be perceived no matter how much of perspicaciousness would be needed, as it connotes different things. [Refer to ***Anbazhagan vs. State Represented by the Inspector of Police 2023 SCC OnLine SC 857***].

37. The deceased was given one *Bhala* blow. The fight was not between the deceased and appellant no.1. There was no prior dispute of the appellant with the deceased. The deceased, the appellants and Nand Bihari Tiwary with whom appellant no.1 had been fighting are all related to each other. There was no preparedness for any assault of any kind as nobody is alleged to be prepared with any weapon; not even a *lathi*. There was only a verbal duel between appellant no.1 and Nand Bihari Tiwary. Rest all, including the deceased and P.W. 6 and other witnesses were fence-sitters. Precaratory words were being used; but



there was no physical assault. The moment appellant 1 and Nand Bihari Tiwary entered into fisticuffs, the deceased got up from his seat somewhere around under a banayan tree and tried to pacify the matter. This was the exact moment when the appellant no.1 became livid. In such moment of indiscretion, he asked his son (appellant no.2) to bring a weapon from the house and kill the deceased. The rage had got the better of the appellant no.1, also for the reason that his perception was that the deceased always sided with Nand Bihari Tiwary.

38. In such a situation, the exhortations of appellant no.1 would only have meant to prevent the deceased from interfering in the fight between the appellant no.1 and Nand Bihari Tiwary and nothing more. The minatory words were, perhaps, not taken seriously by any one except appellant no.2 or else the villagers who had assembled there and had been watching the fight, would have immediately rushed to the rescue of the weaker party.

39. None of the witnesses *viz.* P.Ws.1 to 5 moved from their seats. It was only the deceased who had



come to pacify the warring brothers. However, it appears that appellant no.2 took the orders of his father rather seriously; went back to his home and brought a spear and attacked the deceased with that.

40. We have noted that there was no second blow.

41. We have also noted from the surrounding circumstances that there was no real effort on the part of P.Ws. 1 to 6 to put appellant no.2 in any arm-lock, thereby preventing him from attacking the deceased again. Appellant no.2 had taken the weapon back to his home. There was no great urgency for them to scoot away. This reflects that the appellants did not intend to cause the death of the deceased or cause such injury which would surely have cause his death.

42. But then, can appellant no.2 or for that matter, appellant no. 1 be said to be oblivious of the knowledge that such assault will lead to an injury which might result in death, thereby invoking the mischief of section 300 fourthly.



43. It is at this stage that a distinction has to be drawn between the intention and the knowledge.

44. We have gathered from the circumstances and have formed an opinion that there was no intention to cause even such injury which would, in ordinary course of nature, have caused the death of the deceased. Even with the risk of repetition, we say so for the reason that there was only one blow given and there was no preparedness. The deceased was not at loggerheads with the appellants. There had been a peaceful co-existence.

45. This act was in a heat of passion, without understanding the nature and quality of the act.

46. Would such heat of passion come within the parameters of "sudden and grave" provocation, which provides for a defence to the offenders?

47. Perhaps not.

48. The appellant had sufficient time to re-think and cool down in running to his house and coming back with a weapon. Appellant no.1 also, as a senior citizen



and as father to appellant no.2, had time to re-think whether the intercession of the deceased in the fight with Nand Bihari Tiwary needed to be recriminated like this.

49. The appellants, therefore, cannot claim to have been over taken by any sudden and grave provocation for them to take the shelter of the exception to Section 300 of the IPC.

50. But we find that there is a deficit of intention to cause such bodily injury which would have caused death. However the appellant can be presumed to have the knowledge that such an exhortation and resultant assault might result in culpable homicide not amounting to murder.

51. We, therefore, consider it appropriate to convert the conviction of the appellants from one under Section 302/109 of the IPC and Section 302 of the IPC, simplicitor to one under Section 304 Part-II/109 of the IPC and 304 Part-II of the IPC against the appellants respectively.



52. We order accordingly.

53. The sentence of the appellants are also required to be altered.

54. Taking into account that the occurrence is of the year 1995, we have thought it fit to convert the respective sentences of the appellants.

55. The appellant no.1 was assessed to be of 65 years by the Trial Court in the year 2017. The occurrence is of the year 1995. He had been on bail during the investigation and Trial. After his conviction, his sentence was suspended. Taking a lenient view, we are of the opinion that a sentence of five years to appellant no.1 would the meet the ends of justice. As far as appellant no. 2 is concerned, we deem it appropriate to saddle him with ten years of rigorous imprisonment. We say nothing regarding their entitlements to remissions.

56. We order accordingly.

57. The amount of fine saddled by the Trial Court is not interfered with and is maintained.



58. In the event of non-payment of fine, both the appellants would further suffer additional simple imprisonment for three months each.

59. Since appellant no.1 is on bail, he is directed to be taken in custody to serve out the sentence.

60. The appeal stands partially allowed.

61. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

62. The records of this case be returned to the Trial Court forthwith.

63. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

manoj/sunil-

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