

Criminal (Jail) Appeal (DB) No. 756 of 2007

Ashwini Kumar Bhui son of Bhola Nath Bhui, resident of Village- Masra,
PS- Barsole, District- East Singhbhum Appellant

The State of Jharkhand Respondent

For the State: Mr. Sanjay Kumar Pandey-II, APP

**HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RATNAKER BHENGRA**

Per D.N. Patel, ACJ:

1. The present appeal has been preferred against the judgment and order of conviction and sentence dated 28th May, 2007 and 31st May, 2007 respectively, passed by learned Additional Sessions Judge, Ghatshila, East Singhbhum, in Sessions Trial No. 49 of 2005, arising out Baharagora (Barsole) P.S. Case No. 84 of 2004, whereby, the appellant, namely, Ashwini Kumar Bhui, has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life with a fine of Rs.5,000/- and in default of payment of fine, to further undergo simple imprisonment for three months.
2. The case of the prosecution and the summary of evidence and documentary evidence are as under:

“Date of incident - 12.12.2004 at 7.30 PM
Fardbeyan on - 12.12.2004 at 21.00 hrs (i.e. 9 PM)
FIR lodged on - 13.12.2004 at 9 AM being Baharagora (Barsole) PS
Case No. 84 of 2004
Deceased - Savitri Bhui

The sole appellant has been convicted for the offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and fine of Rs.5000/- and in default of payment of fine, to further undergo simple imprisonment for three months.

The case of the prosecution is that on 12.12.2004 at 21.00 hours (i.e. 9

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PM) the informant Parmeshwar Mahto (PW 1) who was posted as a Chowkidar in Chowki No. 04/4 gave fardbeyan to police that on 12.12.2004 in the evening he was standing at the Chowk of Oriya School. He heard the Hulla coming out from the village that Ashwini Kumar Bhui (accused) is beating his wife Savitri Bhui (deceased) after shutting the door of his house. When the informant reached near the house of Ashwini Kumar Bhui he heard the Hulla of Bachao-Bachao. The villagers (i) Deepak Nayak (PW 2), (ii) Bindu Dehuri (PW 7), (iii) Khokhan Dehuri (PW 6) and (iv) Gauri Pado Dehuri (PW 5) also gathered there. The informant tried his best to open the door by pushing it, but, the door did not open and then the informant entered into the house by breaking the window of the house and saw Ashwini Kumar Bhui standing with Lathi in his hand and the dead body of his wife was lying on the floor, whose tongue has come out and blood was oozing out from the nose. Thereafter, the informant the door from inside and the villagers came inside the house. The informant further alleged that Ashwini Kumar Bhui told the villagers that he had an altercation with his wife for not cooking the food, due to which he closed the door of his house and killed his wife by throttling her neck.

Prosecution witnesses:

PW 1	Parmeshwar Mahto	He is the informant of this case and has supported the case of prosecution. He has <u>proved the Fard Beyan in the writing the B.B.Verma, marked as Ext. 1.</u>
PW 2	Deepak Kumar	He has deposed that Ashwini was standing inside his house with Lathi in his hand and the dead body of his wife Savitri Bhui was lying there.
PW 3	Dr. Lalan Choudhary	He is the doctor who has conducted the post-mortem of the dead body of Savitri Bhui and has <u>proved the post-mortem report, marked as Ext. 3.</u>
PW 4	Balak Das Mohanty	He is hearsay witness . He has <u>proved his signature on the carbon copy of inquest report, marked as Ext. 2/1.</u>
PW 5	Gauri Pado Dehuri	He has deposed that Ashwini Bhui was standing inside his house and the dead body of his wife Savitri Bhui was lying there covered with cloth.
PW 6	Khokhan Dehuri	He has deposed that Ashwini Bhui was standing inside his house with Lathi in his hand and the dead body of his wife Savitri Bhui was lying there.
PW 7	Bindu Dehuri	He has deposed that Ashwini was standing inside his house with Lathi in his hand and the dead body of his wife Savitri Bhui was lying there.
PW 8	B.B. Verma (I.O.)	He is the Investigating Officer of this case. He has <u>proved the signature of A.S.I. Sri Vijay Kumar Singh in formal FIR, which is marked as Ext. 4</u> and has also <u>proved the formal FIR in the writing of Munshi Sri Dhrub Rai, which is marked as Ext. 4/1.</u> He has also <u>proved the seizure list of broken bangles of deceased Savitri Bhui, marked as Ext. 5</u> and has also <u>proved the inquest report, marked as Ext. 2/2.</u>

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Exhibits:

Ext. 1 - Fard Beyan
Ext. 2/1 - Signature of Balak Das Mohanty on inquest report.
Ext. 2/2 - Inquest Report
Ext. 3 - Post-Morem Report

Ante-mortem Injuries:

(A) Abrasions:

- (i) 2 cm X 2 cm over left forehead;
- (ii) 2 cm X 4 cm over right clavicular region;
- (iii) 1 cm X 2.5 cm over right mandibular region;
- (iv) 3 cm X 6 cm over left side sterno clavicular area;
- (v) 4 cm X 4 cm over left mandibular region;
- (vi) 2 cm X 4 cm over back of right shoulder;
- (vii) 3 cm X 6 cm over back of neck lower part;
- (viii) 1 cm X 3 cm over left side of lower lip.

On dissection:

(A) Skull:

Left temporal scalp contused. 6 cm x 3 cm vertex contused. 1 cm x 1cm left side occipital scalp contused. 6 cm x 4 cm whole brain contused.

(B) Neck:

Whole neck and upper chest valve contused. Posterior aspects of larynx and trachea massively contused. Both cornea fractured. Larynx and tracheal mucosa contused and contains copious whitish froth. 2nd cervical vertebra dislocated. Spinal cord torn and lacerated.

(C) Chest and Abdomen:

Lungs congested. Viscera congested. Stomach contains undigested rice and Sag 200 gms.

Opinion:

Cause of death- throttling. However, the head injury is also sufficient to cause death in ordinary course.

All above injuries are caused by hard and blunt object.

Time since death - 18 hours to 24 hours approximately.
The aforesaid injury on head may be caused by Lathi.

Ext. 4 - Signature of A.S.I. Sri Vijay Kumar Singh on formal FIR
Ext. 4/1 - Formal FIR in writing of Munshi Sri Dhruv Rai
Ext. 5 - Seizure list"

3. Arguments on behalf of the appellant:

- Learned counsel for the appellant submitted that the prosecution has failed to prove its case, beyond reasonable doubts, as there are major omissions and contradictions in the depositions of the witnesses. These aspects of the matter have not been properly appreciated by the learned trial court and hence, the impugned judgment and order of conviction and sentence, passed by the learned trial court, deserve to be quashed and set aside. It is also

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submitted by the learned counsel for the appellant that as per the prosecution witnesses, the Fard-beyan was given at the place of occurrence and on the other hand, it has been stated that the same was also taken at the police station and, thus, the true First Information Report has not been brought on record.

- It is also submitted by the learned counsel for the appellant that neither there is any seizure of the weapon nor there is any seizure of the rod of window, which is said to have been broken up by the Chowkidar. It is also submitted by the learned counsel for the appellant that looking to the cordial relationship between the deceased-wife and the accused-husband and the fact that there was no animosity in the relationship between the couple, it appears that the action of this appellant was neither premeditated nor preplanned nor well designed rather the offence has been committed at the spur of moment and hence, it is not an offence, punishable under Section 302 of the Indian Penal Code. It is, thus, submitted that, at best, the action of the appellant comes within the exception of Section 300 of the Indian Penal Code and, as such, the offence is punishable under Section 304 Part I of the Indian Penal Code. It is also submitted that there is no eye witness to the occurrence. These aspects of the matter have not been properly appreciated by the learned trial court and hence also, the impugned judgment and order of conviction and sentence deserve to be quashed and set aside.
- Learned counsel for the appellant has relied upon a decision, rendered by Hon'ble Patna High Court in the case of ***Ishwar Murmu Vs. State of Bihar***, as reported in ***2001(1) Eastern Criminal Cases 218 (Patna)***. On the basis of the aforesaid decision, it is submitted that the offence, committed by this appellant is not a premeditated action and hence, the offence is not punishable under Section 302 of the Indian Penal Code rather it is punishable under Section 304 Part I of the Indian Penal Code.
- It is further submitted that the appellant is in judicial custody since 12th December, 2004 and hence, he has already undergone the maximum period of sentence under Section 304 Part I of the Indian Penal Code.

4. **Arguments on behalf of the respondent-State:**

- Learned counsel for the respondent- State submitted that the prosecution has proved the offence of murder, committed by this appellant, beyond reasonable doubts. It is submitted that the informant, who is PW 1, rushed at the place of occurrence, upon hearing the cry of the deceased, who is wife of this appellant, and thereafter, several persons, including PW 2, PW 5, PW 6 and PW 7, rushed at the place of occurrence and found the house of this appellant bolted from inside. Ultimately the window was broken and PW 1 entered into the room through the said broken window and there he saw the deceased and the appellant. Thereafter, he opened the door through which several persons, including the prosecution witnesses, entered into the room and the appellant was found present there with the dead body of his wife.
- It is also submitted by the learned counsel for the respondent-State that looking to the cross-examination of PW 1 and other prosecution witnesses, it appears that this aspect of the matter has remained intact, as it is. The house was bolted from inside and this witness (PW 1) entered into the house after breaking the window and saw this appellant standing there and the dead body of this wife was lying in the house of this appellant. It is also submitted by the learned counsel for the respondent- State that the prosecution witnesses have stated before the court that when they asked the accused about the occurrence, it was his oral confession that he has committed murder of his wife, because she had not given him the food.
- It is further submitted by the learned counsel for the respondent-State that the medical evidence of PW 3 (Dr. Lalan Choudhary), who has conducted post-mortem of the deceased, is corroborative to the depositions of the prosecution witnesses. These aspects of the matter have been properly appreciated by the learned trial court, while passing the impugned judgment and order of conviction and sentence against this appellant. It is also submitted that looking to the nature of injuries, the *mens rea* is evident on the part of this appellant. There was none in the house, except the dead body of the deceased and this appellant. The house was bolted from inside and, therefore, the window was to be broken. This reveals the

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fact that this appellant has committed murder of his wife and hence, the impugned judgment and order of conviction and sentence, awarded to this appellant by the learned trial court, may not be altered by this Court.

5. Reasons:

(I) Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, it appears that the date of occurrence is 12th December, 2004 at about 19.30 hours. Statement of the informant was recorded on 12th December, 2004 at about 21.00 hours. PW 1 is the informant, who has stated that he was posted as a Chowkidar in Chowki No. 04/4 and upon hearing the cry of a lady, he rushed in the direction from which sound was coming and reached at the house of this appellant and several persons, including Deepak Nayak (PW 2), Bindu Dehuri (PW 7), Khokhan Dehuri (PW 6) and Gauri Pado Dehuri (PW 5), rushed near the house of this appellant and saw that the house was bolted from inside. Thereafter, they called this appellant, but, the door of the house was not opened and ultimately the window of the house was broken and PW 1 entered into the house through the broken window and opened the door of the house whereupon several persons entered through the door.

(II) It is also narrated by PW 1 that in the room he saw the dead body of Savitri Bhui, who is wife of this appellant. This PW 1 has also stated that there was non else in the room, except this appellant with a Lathi in his hand and the deceased. Thereafter, First Information Report was drawn up, investigation was carried out, charge sheet was submitted and the case was committed to the court of sessions, being Sessions Trial No. 49 of 2005. The learned trial court on the basis of evidences of the prosecution witnesses, including medical evidence, convicted this appellant for committing murder of the deceased, who is wife of this appellant.

(III) Looking to the deposition of PW 1, it appears that this witness has clearly narrated the factum of hearing the cry of the deceased, whereupon he rushed to the house of this appellant. This witness has further deposed that the house of this appellant was bolted from inside and when the house was not opened by this appellant, PW 1

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after breaking the window of the house, entered into the house and saw the dead body of the deceased lying there and the appellant was standing there with a Lathi in his hand. This fact remained intact, as it is, even during his cross-examination.

We have carefully gone through the deposition of this witness and his cross-examination, but, nothing has come out in favour of this appellant. Though PW 1 is a rustic witness and has given deposition after several months, he has clearly narrated the facts, stated by him earlier, without any exaggeration or without any improvement.

(IV) Similar is the deposition of PW 2, PW 5, PW 6 and PW 7. They all have stated that they rushed at the house of this appellant and PW 1 entered into the house of this appellant, after breaking the window of the house and this appellant, having a Lathi in his hand, was found present in the house with the dead body of his wife. Witnesses have also stated that this appellant had narrated before them that he has committed the murder of his wife, because she had not given food to him. Apart from this reason and the confession, made by this appellant before the villagers, the fact remains that the house was bolted from inside and for entering into the house, the window was broken and within one room, there was the dead body of the wife of this appellant and the appellant was found present, with a Lathi in his hand.

(V) PW 3, Dr. Lalan Choudhary, who has conducted post-mortem, has found the following ante-mortem injuries on the person of the deceased:

- (i) 2 cm X 2 cm over left forehead;
- (ii) 2 cm X 4 cm over right clavicular region;
- (iii) 1 cm X 2.5 cm over right mandibular region;
- (iv) 3 cm X 6 cm over left side sterno clavicular area;
- (v) 4 cm X 4 cm over left mandibular region;
- (vi) 2 cm X 4 cm over back of right shoulder;
- (vii) 3 cm X 6 cm over back of neck lower part;
- (viii) 1 cm X 3 cm over left side of lower lip.

These injuries were capable of being caused by hard and blunt substance.

In view of the aforesaid evidence, given by PW 3, it appears that there is enough corroboration to the depositions, given by the prosecution witnesses.

(VI) Looking to the deposition, given by PW 8, who is Investigating Officer of this case, it appears that he has also narrated that there were broken glasses of bangles of the deceased. He has also narrated the place of occurrence, which is corroborative to the depositions of several prosecution witnesses. Investigating Officer has also stated about the broken window, from where the prosecution witness had entered into the house.

(VII) Much has been argued out by the learned counsel for the appellant that the Lathi was not recovered by the police and hence, the whole prosecution story is concocted.

We are not accepting this argument, because recovery of weapon depends upon efficiency of an accused and inefficiency of Investigating Officer to recover the weapon, but, the fact remains that inefficiency of police is not a ground to prove innocence of the accused. Police is not a witness to the occurrence, at all.

(VIII) Looking to overall depositions of PW 1, PW 2, PW 5, PW 6 and PW 7, it appears that they all have clearly narrated that on hearing cry of the deceased, they rushed at the house of this appellant. The house was bolted from inside. Ultimately PW 1 had to break open the window and entered into the house from the said broken window and opened the door from inside. Thereafter, several persons, including the prosecution witnesses, entered into the house from the door and saw the dead body of the deceased and this appellant was standing in the room, with a Lathi in his hand. This fact, even during cross-examination, has remained intact, as it is, and hence, no error has been committed by the learned trial court in convicting and sentencing this appellant, for causing murder of the deceased.

(IX) Relying upon the decision, rendered by Hon'ble Patna High Court in the case of *Ishwar Murmu Vs. State of Bihar*, reported in **2001(1) Eastern Criminal Cases 218 (Patna)**, learned counsel for the appellant submitted that in this case also, no *mens rea* is there on the part of appellant, in view of the fact that there was a cordial relationship in between the couple and their married life was of approximately 15 years and thus, there being no occasion for the appellant to commit offence, benefit under exception of Section 300 of the Indian Penal Code should have been given to the appellant.

We are not in agreement with the aforesaid submission of the learned counsel for the appellant, mainly for the reason that nothing has been brought on record to prove the fact that the occurrence took place due to sudden provocation. Whenever the accused is claiming the benefit of exception of Section 300 of the Indian Penal Code, the onus lies upon the accused and not upon the prosecution. Nothing has been proved by this appellant for getting benefit of the exception under Section 300 of the Indian Penal Code and just for the sake of argument, it is submitted that there is no *mens rea* on the part of this appellant.

(X) *Mens rea* in this case is reflected, looking to the injuries, sustained by the deceased and also looking to the post-mortem report of the deceased, which is Ext. 3. Looking to the number of injuries and nature of injuries, it appears that the *mens rea* was very much present on the part of this appellant, as it is not a case of single injury, at all. There are more than eight abrasions and other injuries. Meaning thereby, there is bound to be resistance by the deceased and despite resistance, the offence has been committed. The dead body was present in the room and except this appellant, there was non else in the said room. Thus, the prosecution has proved the offence of murder, beyond reasonable doubts. Nothing is coming in the cross-examination of the prosecution witnesses, in favour of this appellant and hence, we see no reason to take any other view than what is taken by the learned trial court.

6. Thus, the judgment and order of conviction and sentence, passed by trial court, is absolutely in accordance with the evidence on record and, thus, the prosecution has proved the offence of murder, committed by this appellant, beyond reasonable doubts.
7. Hence, there being no substance, this Criminal Appeal is hereby dismissed.

(D. N. Patel, A.C.J.)

(Ratnaker Bhengra, J.)