

A MURARI THAKUR AND ANR.

v.

STATE OF BIHAR

DECEMBER 14, 2006

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

*Penal Code, 1860:*

C *s.302/34—Common intention—Three accused participating in murder of a boy—One holding legs of victim, the other sitting on his back and holding his hands, the third pressing his neck and cutting his throat—Complicity of the first two—Held, accused had committed murder after overpowering the victim—s.34 is clearly applicable—Plea for benefit of Juvenile Justice Act having not been raised in courts below, cannot be allowed to be taken up at such a late stage in Supreme Court—There was no fatal delay in lodging FIR—Juvenile Justice (Care and Protection of Children) Act, 2000.*

E The two appellants along with another were prosecuted for an offence punishable u/s 302/34 IPC. The prosecution case was that appellant no. 1 caught hold of the legs of the victim, the son of the first informant, while appellant no. 2 held his hands and sat on his back and the third accused after pressing his neck cut his throat. The incident was witnessed by PW 4, the uncle of the deceased and on his alarm PW-6, PW-2, PW-3, PW-7 and a number of other persons reached the place of occurrence and they saw that the victim had died at the spot. The trial court convicted the appellants under F s. 302/34 IPC; and the High Court upheld the conviction.

In the appeal filed by the appellants it was contended that they were entitled to the benefit of the Juvenile Justice (Care and Protection of Children) Act, 2000; and that there was delay in filing the appeal.

G Dismissing the appeal, the Court

HELD: 1. The plea regarding benefit of Juvenile Justice (Care and Protection of Children) Act, 2000, having not been taken before the Courts below, cannot be raised before the Supreme Court. Even otherwise also, the

question of age of the accused appellants is a question of fact on which evidence, cross-examination, etc. is required and, therefore, it cannot be allowed to be taken up at this late stage. [990-H; 991-A-B] A

2. As regards the contention that there was delay in filing the FIR, the occurrence took place on 26.8.1998 at 4 p.m. The first informant, the father of the deceased (PW8) was out. He returned home at 8 p.m. and then went to lodge the FIR. The Investigating Officer (PW11) has stated in his evidence that it was rainy season; there was flood in the area; he reached the place of the occurrence on the night of 26.8.1998/27.8.1998 at about 1.30 a.m. and recorded the Fard-e-bayan of the informant. In these circumstances, there was no such fatal delay in lodging the FIR. [991-C-D] B C

3. The High Court and the Trial Court rightly held that the accused had committed murder of the deceased after overpowering him in furtherance of their common intention. No doubt it was another accused, who is not before the Court, who cut the neck of the deceased, but the appellants also participated in the murder. One of them had caught the legs of the deceased and the other sat on his back at the time of commission of the murder. Hence Section 34 IPC is clearly applicable in this case. [994-E-F] D

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.985 of 2005. E

From the final Judgment and Order dated 12.1.2005 of the High Court of Patna, Bihar in Criminal Appeal No. 266 of 2001.

S.C. Maheshwari, Sandhya Goswami, Jabar Singh, M.P.S. Tomar and Vipul Maheshwari for the Appellants. F

Gopal Singh and Nishakant Pandey for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. This appeal has been filed against the judgment and order dated 12.1.2005 of the Patna High Court in Criminal Appeal No. 266 of 2001. By that judgment the conviction of the appellants by the trial court under Section 302/34 IPC was upheld. G

Heard learned counsel for the parties and perused the record.

The case of the prosecution, in short, is that on 26.8.1998 at about 3 H

- A p.m., Dhaneshwar Mishra (PW4), elder brother of the first informant Bhuneshwar Mishra was going for grazing his buffalo when he saw his deceased nephew Bal Krishna Mishra with the appellants going across the river in Parti land. When Dhaneshwar Mishra enquired from them where they were going, they all replied that they were on a stroll and they went towards east of the river. Dhaneshwar Mishra also went across the river with his
- B buffalo. After sometime at about 4 p.m., he heard the sound of gasping from the other side of a field of sugarcane and leaving his buffalo, he went towards the sugarcane field he found that on a ridge under the tree of Jamun (rose apple), appellant Murari Thakur had caught hold of the legs of deceased, appellant Sudhir Thakur was sitting on the back of the deceased holding both
- C his hands, and the third accused Sunil Kumar (who is not before us) after pressing the neck of the deceased was cutting it with a sharp edged weapon. Dhaneshwar Mishra saw this incident from a distance of ten laggis, and he ran raising hulla and the appellants and Sunil Kumar fled away towards west of the sugarcane field. When Dhaneshwar Mishra reached the place, he found
- D that all the three appellants had already committed the murder of the deceased by cutting his neck. On hulla of Dhaneshwar Mishra, Devendra Singh (PW6), Kishore Jha (PW2), Baleswar Mishra (PW3), Paras Nath Mishra (PW7) and a number of other persons came there and they saw the dead body of the deceased. About motive of the occurrence, the case of the prosecution is that twelve days before the occurrence, some altercation had taken place with
- E appellant Sunil Kumar. On the date of the occurrence at about 8 p.m. when the informant Bhuneshwar Mishra (PW8), father of the deceased came to his house from Sitamarhi, he came to know that his son had been killed and Dhaneshwar Mishra told him about the entire incident. On the night between 26.8.1998 and 27.8.1998 about 1.30 hours, Fard-e-bayan of the first informant
- F was recorded at the place of the occurrence and a case under Section 302/34 of Indian Penal Code was registered against all the three appellants. The police, after investigation, submitted chargesheet against them under the same heading. Cognizance of the case was taken and the case was committed to the Court of Session where after trial, appellants were held guilty and were convicted and sentenced, as stated above.
- G Against the judgment of the Trial Court, the appellant filed an appeal in the High Court, which was dismissed and hence this appeal.

Learned counsel for the appellant firstly submitted that the appellants are entitled to the benefit of the Juvenile Justice (Care and Protection of Children) Act 2000 as amended by the amendment of 2006. We are of the

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opinion that this point cannot be raised at this stage because neither was it taken before the Trial Court nor before the High Court. Even otherwise we do not find any merit in the said contention. The question of age of the accused appellants is a question of fact on which evidence, cross-examination, etc. is required and, therefore, it cannot be allowed to be taken up at this late stage. Hence, we reject this submission of the learned counsel for the appellant.

Learned counsel for the appellant then submitted that there was delay in filing the FIR. We are of the opinion that there is no such delay which can be said to be fatal to the prosecution case. The occurrence took place on 26.8.1998 at 4 p. m. The first informant, the father of the deceased, Bhuneshwar Mishra (PW8), was at Sitamarhi and returned home on 8 p. m., when he came to know from his brother Dhaneshwar Mishra that his minor son Bal Krishna Mishra aged about 14 years had been murdered. After Bhuneshwar Mishra learnt about this from his brother Dhaneshwar Mishra (PW4), then he went and lodged the FIR R.K. Tiwari (PW11), the Investigating Officer, has stated in his evidence that it was rainy season and there was flood in the area and he reached the place of the occurrence on the night of 26.8.1998/27.8.1998 at about 1.30 a.m. and recorded the Fard-e-bayan of the informant. In these circumstances, we are of the opinion that there was no such fatal delay in lodging the FIR.

We agree with the view taken by the High Court and the Trial Court that the accused had committed murder of deceased Bal Krishna Mishra after overpowering him in furtherance of their common intention on 26.8.1998 at 4 p.m. No doubt it was Sunil Thakur, who is not before us, who cut the neck of the deceased but the appellants before us (Murali Thakur and Sudhir Thakur) also participated in the murder. Murali Thakur had caught the legs of the deceased and Sudhir Thakur sat on the back of the deceased at the time of commission of this murder. Hence Section 34 IPC is clearly applicable in this case.

In these circumstances, we find no merit in this appeal and hence it is dismissed.

R.P.

Appeal dismissed.