

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 225 of 1993

Against the judgment of conviction, dated 21.04.1993, and order of sentenced dated 22.04.1993 passed by Sri Jaleshwar Ram, Additional Sessions Judge, I, East Champaran at Motihari, in Sessions Trial No. 9 of 1981/23 of 1984 arising out of Pipra P.S. Case No. 6 of 1978

- =====
1. Dina Nath Sah
 2. Jagarnath Sah, both are sons of Late Thakur Sah
 3. Asharfi Mahto
 4. Etbar Mahto, both are sons of Dunmun Mahto
 5. Dukha Mahto, Son of Sarup Mahto
 6. Baiju Mahto, Son of Gagan Mahto
 7. Mathura Sah, Son of Munal Sah
 8. Ramdeo Parit, Son of Sheoratan Parit
 9. Darbhangi Hazra, Son of Kodai Hazra

All residents of village Sirsiya, Police Station – Pipra,
Distt. – East Champaran

.... Appellants

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, APP

Mrs. Fauzia Shakeel, Advocate as Amicus Curiae

=====

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 02-04-2015

Under the judgment, dated 21.04.1993, passed, in Sessions Trial No. 9 of 1981/23 of 1984, by learned Additional Sessions Judge, I, East Champaran, at Motihari, the appellants, namely, Etbar Mahto, Dukha Mahto, Baiju Mahto, Maithur Mahto, Ramdeo Parit and Darbhangi Hazra, stand convicted under Section 147 of the Indian Penal Code and have been granted benefit under

Section 4 of the Probation of Offenders Act, 1958, read with Section 360 of the Criminal Procedure Code. The remaining three appellants, namely, Jagannath Sah, Asharfi Mahto and Dinanath Sah, have been convicted under Section 302 read with Section 149 of the Indian Penal Code and sentenced to undergo imprisonment for life and accused Dinanath Sah has been further convicted under Section 148 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and accused, Jagannath Sah and Asharfi Mahto, have been further convicted under Section 147 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year each.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) In the afternoon of 25.03.1978, Nawal Kishore Singh, accompanied by accused, Jagannath Sah, Dinanath Sah, Asharfi Mahto, Dukhan Mahto, Etbar Mahto, Ramdeo Parit, Bachchan Parit, Mathura Sah, Baiju Mahto, Darbhangi Hazra and Manohar Sah, drank *toddy* (a kind of intoxicating sweat juice) at the toddy shop of Jaddu Hajra.

(ii) Having consumed *toddy* as indicated hereinbefore, when Nawal Kishore Singh, accompanied by the remaining accused aforementioned, were returning, some of them started using abusive language against Jaddu Hajra, owner of the said toddy shop, by saying that the quality of toddy, sold to them by Jaddu Hajra, was of inferior quality and Jaddu Hajra, therefore,

needed to be taught a lesson.

(iii) On hearing the accused using highly degrading and abusive words against Jaddu Hajra, Nawal Kishore Singh (since deceased) reacted by asking the accused persons aforementioned not to use such kind of abusive language.

(iv) On being so admonished, accused Dinanath Sah threatened Nawal Kishore Singh by saying that he would be stabbed by dagger if he did not keep mum. To the threat so given by accused Dinanath Sah, Nawal Kishore Singh replied by saying that if he (accused Dinanath Sah) happened to stab, he would have to face the consequences.

(v) Hearing the response of Nawal Kishore Singh, accused Jagannath Sah exhorted accused Dinanath Sah to stab Nawal Kishore Singh.

(vi) Realizing danger to his life, Nawal Kishore Singh started running towards his house; but all the accused aforementioned chased and surrounded Nawal Kishore Singh, when Nawal Kishore Singh had almost reached the door of his house. At that time, while accused Dinanath Sah was holding a dagger in his hand, the other accused persons were armed with *lathis*. When Nawal Kishore Singh reached the door of his house and stood surrounded by the accused persons aforementioned, accused Asharfi Mahto held Nawal Kishore Singh by his waist and accused Dinanath Sah stabbed Nawal Kishore Singh on the left side of his chest. On being so stabbed by dagger, Nawal Kishore Singh

slumped to the ground and instantly died.

(vii) Thereafter, the dead body of Nawal Kishore Singh was carried to Pipra Police Station, where Nawal Kishore Singh's elder brother, Rambahadur Singh (P.W. 7), orally reported the entire occurrence. The information, with regard to the occurrence, so given by Rambahadur Singh, was reduced into writing in the form of his *fardbeyan* and treating the same as the First Information Report, Pipra P.S. Case No. 6 of 1978 was registered, under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code, against the accused persons, namely, Jagannath Sah, Dinanath Sah, Asharfi Mahto, Dukhan Mahto, Etbar Mahto, Ramdeo Parit, Bachchan Parit, Mathura Sah, Baiju Mahto, Darbhangi Hazra and Manohar Sah.

(viii) During investigation, police visited the place, where the said dead body was found, and held *inquest* over Nawal Kishore Singh's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid, under Sections 302 and 148 of the Indian Penal Code, against accused Dinanath Sah and, under Section 302 read with Section 149 of the Indian Penal Code, against accused, Jagannath Sah, Dinanath Sah, Asharfi Sah, Dukhan Mahto, Etbar Mahto, Ramdeo Pandit, Bachchan Pandit, Mathura Sah, Baiju Mahto, Darbhangi Hazra and Manohar Sah, and under Section 147 of the Indian Penal Code, against accused Jagannath Sah, Asharfi Mahto, Dukha Mahto, Etbar Mahto, Ramdeo Parit, Bachchan Parit,

Mathura Sah, Baiju Mahto, Darbhangi Hazra and Manohar Sah.

3. At the trial, when *charges*, under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code, were framed against the accused, the accused pleaded not guilty thereto.

4. In support of their case, prosecution examined as many as 8 (eight) witnesses. The accused were, then, examined under Section 313 (1) (b) of the Criminal Procedure Code and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial.

5. Having, however, arrived at the finding that accused-appellants, namely, Etbar Mahto, Dukha Mahto, Baiju Mahto, Maithur Mahto, Ramdeo Parit and Darbhangi Hazra, have been proved guilty of the charge under Section 147 of the Indian Penal Code, the learned trial Court has convicted the accused aforementioned accordingly, but has granted them the benefit of Section 4 of the Probation of Offenders Act, 1958, read with Section 360 of the Criminal Procedure Code. The remaining three accused-appellants, namely, Jagannath Sah, Asharfi Mahto and Dinanath Sah, having been found to have been proved guilty of the charge under Section 302 read with Section 149 of the Indian Penal Code and, accused Dinanath Sah having further been proved guilty of the charge under Section 148 of the Indian Penal Code

and, accused, Jagannath Sah and Asharfi Mahto, having further been found to have been proved guilty of the charge under Section 147 of the Indian Penal Code, the learned trial Court convicted them as indicated above. Following their conviction, sentences have been passed against the convicts aforementioned.

6. Aggrieved by their conviction and the sentences passed against them, the convicts aforementioned have preferred this appeal.

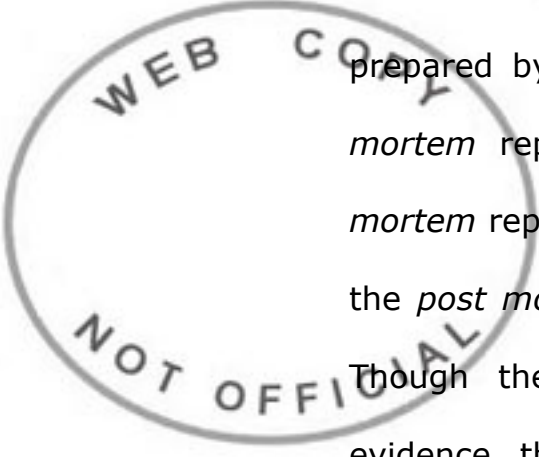
7. We have heard Mrs. Fauzia Shakeel, learned Counsel, appearing as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecution, appearing for the State.

8. While considering the merit of the present appeal, what attracts our attention, most prominently, is that the prosecution's case stands divided into three parts and, accordingly, covers three different stages. The inception of the occurrence is the consumption of *toddy* at the shop of Jaddu Hajra. This was followed by the second stage, wherein the accused had allegedly been using utterly abusive language against Jaddu Hajra by saying that Jaddu Hajra had sold to them toddy of inferior quality and needed to be, therefore, taught a lesson and objection being taken by the said deceased at the kind of abusive language, which the accused had been using against Jaddu Hajra, and, then, on being admonished by the said deceased that they should not use such foul language against Jaddu Hajra, accused Dinanath Sah allegedly threatened to stab the said deceased if he did not remain silent and reacting

thereto, the said deceased replied by saying that Dinanath Sah would have to face consequences of stabbing and, on this retort, accused Jagannath Sah exhorted accused Dinanath Sah to stab the said deceased and, realizing the danger to his life, the said deceased ran towards his house. The third stage commences, when chasing the said deceased, all the accused had allegedly surrounded the said deceased near the door of the of the house of the said deceased and while accused Asharfi Mahto held the deceased by his waist, accused Dinanath Sah allegedly stabbed the said deceased on the left side of his chest and, on being so stabbed by the dagger, the said deceased slumped to the ground and died.

9. Bearing in mind the three distinct stages in which stood divided the prosecution's case, let us, now, proceed with the evidence on record in order to determine if the prosecution have succeeded in proving its case beyond reasonable doubt.

10. Before we deal with the ocular evidence on record, we may point out that Dr. B.D. Pandey, who had performed *post mortem* examination on the dead body of Nawal Kishore Singh, on 25.03.1978, at Sadar Hospital, East Champaran, at Motihari, was not examined at the trial. However, *post mortem* report, said to have been prepared by Dr. B.D. Pandey, was proved by P.W. 8, an Advocate's Clerk, whose evidence is that he recognizes handwriting and signature of Dr. B.D. Pandey, who had prepared *post mortem* report in respect of the death of Nawal Kishore Singh on 26.03.1978.



11. What is, however, necessary to point out is that it in the evidence of P.W. 8 that the *post mortem* report was prepared by carbon process meaning thereby that the said *post mortem* report was prepared by using carbon paper and *post mortem* report, which has been proved as Exhibit 4, was, thus, not the *post mortem* report, in original, but the carbon copy thereof. Though the said carbon copy has been treated as primary evidence, the fact remains that the said carbon copy could have been proved and admitted into evidence as primary evidence provided that P.W. 8 had witnessed the process of preparation of the *post mortem* report by Dr. B.D. Pandey. Far from this, the evidence of P.W. 8 is crystal clear that he was not present at the time, when said *post mortem* report was prepared by Dr. B.D. Pandey.

12. Logically, therefore, P.W. 8 could not have proved the said *post mortem* report as the primary evidence inasmuch as there is nothing in the evidence on record to show that Exhibit 4 was simultaneously prepared by using carbon paper, while preparing the *post mortem* report, so that the carbon copy of the *post mortem* report could have been used and treated as the primary piece of evidence.

13. Strictly speaking, therefore, the *post mortem* report has not been proved. Consequently, no medical opinion, with regard to the cause of death stands proved on record.

14. We must, however, hasten to add and clarify that

merely because a *post mortem* report is not proved and the medical opinion, with regard to the cause of death, is not available, prosecution's case of *homicidal death* would not necessarily and invariably fail. The outcome of a case will depend on the nature of the case and would, therefore, rest on the facts of a given case.

15. For instance, if there is a case, where an accused is proved to have hacked a person to death by chopping off his head from the neck, homicidal death would stand proved even if there is no *post mortem* examination of the dead body. When, however, a person is stabbed to death, it is required to be determined if the nature of the injury was such, which would have, in the ordinary course of nature, resulted into the death of the victim, for, the cause of death, in a case of stabbing, may be for reasons other than the injury sustained. The death, in a case of stabbing, may or may not, therefore, be *homicidal*.

16. In fact, while defining *murder* by Section 300 of the Indian Penal Code, Illustration (b) is furnished, in this regard, which reads,

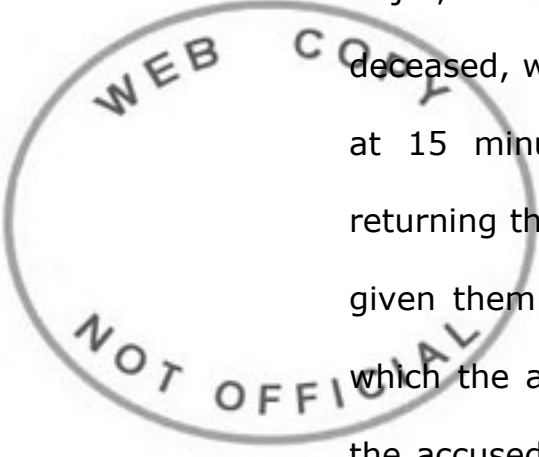
"(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a

person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death."

17. From the above illustration, what can be easily gathered is that knowing that Z is labouring under such a disease that a blow is likely to cause his death, when A strikes Z with the intention of causing bodily injury and Z dies in consequence of the blow, A would be guilty of *murder*, although the blow might not have been sufficient, in the ordinary course of nature, to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not, in the ordinary course of nature, kill a person in a sound state of health, A would not be held liable for *murder*, although he might have intended to cause bodily injury.

18. Thus, in a given case, it is legally permissible to convict an accused of the offence of *murder* even without a *post mortem* report. No wonder, therefore, that absence of *corpus delicti* need not necessarily, in every case, make it impermissible in law to take a case of *murder* as having been proved.

19. Bearing in mind what we have indicated above, let us, now, turn to the ocular evidence on record and deal with the evidence of P.W. 7 (Rambahadur Singh), elder brother of the deceased, whose evidence is that on the day of the occurrence, accused Jagannath Sah, Dinanath Sah, Asharfi Mahto, Dukha



Mahto, Etbar Mahto, Baiju Mahto, Ramdeo Pandit, Darbhangi Hajra, Mathura Sah and Manohar Sah, along with the said deceased, were drinking *toddy* at the toddy parlour of Jaddu Hajra, at 15 minutes past four o'clock in the afternoon and, while returning therefrom, they were aggrieved that Jaddu Hajra had not given them good quality of *toddy*, but reacting to the manner in which the accused were reacting Nawal Kishore Singh forbade all the accused not to do so, but accused Dinanath Sah asked Nawal Kishore Singh to keep mum or else, he would stab him (Nawal Kishore Singh). It is also in the evidence of P.W. 7 that on being so threatened by accused Dinanath Sah, Nawal Kishore Singh told accused Dinanath Sah that they had not tasted the pleasure of stabbing and that they would suffer the consequences if anyone stabbed, whereupon accused Jagannath Sah exhorted accused Dinanath Sah to catch hold of Nawal Kishore Singh and stab him. It is the further evidence of P.W. 7 that hearing accused Jagannath Sah exhorting accused Dinanath Sah to catch hold of him (Nawal Kishore Singh) and stab him, Nawal Kishore Singh began running towards his house, but accused Dinanath Sah chased him and stabbed him on the left side of his chest at the doorstep of Nawal Kishore Singh, who fell down at the very place, where he was stabbed and died, whereupon he (P.W. 7) wrapped Nawal Kishore Singh's wound by means of a *gamchha*, i.e., country towel, and carried him to hospital. P.W. 7 has further added, in his evidence, that the occurrence had been seen by Ramjee Singh, Shiv Bachhan

Singh, Ganesh Singh, Hargen Singh and Ramayan Singh and that he (PW 7) took the dead body of Nawal Kishore Singh to the Police Station and reported the occurrence to them.

20. Notwithstanding the fact that P.W. 1 gave his evidence describing the occurrence from the beginning to the end covering all the three stages, which we have, while describing the prosecution's case, pointed out above, it is extremely important to note that P.W. 7 has deposed, in his evidence, that he did not go to drink *toddy* and that he was at home.

21. The question, therefore, of PW 7 having seen the occurrence from the inception to the end, did not arise at all. What is, however, most important to note, in the evidence of P.W. 7, is that according to what he has deposed, in his cross-examination, he came out on hearing *hulla*, which had been raised from the direction of Jaddu Hajra's house, which was on the north-east of the house of P.W. 7.

22. In the cross-examination, P.W. 7 has deposed that when he, first, saw his brother, accused Dinanath Sah was stabbing his brother, i.e., Nawal Kishore Singh, by means of a dagger and, on the account of the blow by dagger so given, his brother fell down and, then, he (P.W. 7) raised *hulla* and, on the *hulla*, so raised by him (P.W. 7), Sheo Bachan Singh (P.W. 1), Ramjee Singh (P.W. 2), Ganesh Singh (P.W. 4), Hargen Singh (P.W. 6) came there and so came Rambaran Singh, who has not been examined. It is also in the evidence of P.W. 7, given in his

cross-examination, that accused Dinanath Sah ran away after killing Nawal Kishore Singh and he (P.W. 7) made no attempt to chase accused Dinanath Sah inasmuch as he was busy in lifting his brother.

23. What, thus, becomes transparent is that though P.W. 7 has given evidence, at the trial, describing the alleged occurrence from the beginning to the end, his cross-examination clearly shows that what he had witnessed was accused Dinanath Sah allegedly stabbing Nawal Kishore Singh.

24. Interestingly enough, P.W. 7 does not name any other accused persons, though the prosecution's case, as we have indicated above, is that it was accused Jagannath Sah, who had exhorted accused Dinanath Sah to stab Nawal Kishore Singh and accused Asharfi Mahto had held the said deceased by his waist in order to help accused Dinanath Sah stab Nawal Kishore Singh.

25. Coupled with the above, what can also not be ignored, while considering the evidence of P.W. 7, is that it is his specific evidence, in the cross-examination, that after his brother fell down, he raised *hulla* and it was on the *hulla* so raised by him that the witnesses aforementioned came; whereas the remaining witnesses, namely, P.Ws. 1, 2 and 4 have given evidence describing the occurrence and in their descriptions so given, as regards the occurrence, they have attributed role to accused Jagannath Sah and also accused Asharfi Mahto.

26. What becomes clear in the light of evidence of

P.W. 7, given in his cross-examination, that though P.Ws. 1, 2 and 4 have claimed themselves to be eye witnesses, they could not have seen the occurrence inasmuch as they came to the place of occurrence only upon *hulla* being raised by P.W. 7 and it the clear evidence of P.W. 7 that having stabbed the said deceased, accused Dinanath Sah fled away.

27. What must also be borne in mind is that though P.W. 7, as already indicated above, gave evidence to the effect that the accused had consumed *toddy* at the shop of Jaddu Hajra along with the said deceased and, then, with regard to the quality of *toddy* sold to them, the accused used abusive language, Nawal Kishore Singh forbade the accused from using such language and accused Dinanath Sah, then, threatened the said deceased to keep mum or else, he would be stabbed and that the said deceased retorted by telling accused Dinanath Sah that he and Dinanath Sah had not tasted the pleasure of stabbing and, then, accused Jagannath Sah exhorted accused Dinanath Sah to catch hold of Nawal Kishore Singh and stab him.

28. We have already pointed out above that in the light of the evidence of P.W. 7, P.Ws. 1, 2 and 4 could not have seen the occurrence and their evidence, describing the appellants, can not, therefore, be safely relied on. At the same time, as far as P.W. 7 is concerned, we find that though he described the occurrence in the examination-in-chief in the manner as indicated above, his cross-examination clearly reveals that he was not

present along with his brother from the beginning, rather, he only saw his brother, Nawal Kishore Singh, being stabbed to death at his door.

29. Thus, the genesis of the occurrence and the material parts of the occurrence, as presented by the prosecution, have not been proved.

30. Further-more, P.W. 7 ascribes no role to accused Asharfi Mahto, who had, according to the remaining witnesses, held the deceased, while the deceased was stabbed to death. It becomes, therefore, clear that apart from abandoning its case and failing to prove the genesis of its case, prosecution has presented before the Court two different versions of the occurrence and, in such circumstances, it could not have been held, and cannot be held, that the prosecution has proved its case beyond all reasonable doubt. Witnesses, who can falsely attribute role to a person, — in a case as serious as murder and in the manner as P.W. 7 and others have done — cannot be safely relied upon. This apart, even if we do not reject the evidence of PW 7 as wholly unreliable, his evidence, will in the light of what we have discussed above, fall, at best, in the category of a witness, who is neither wholly reliable nor unreliable.

31. It is trite that the witnesses, ordinarily, fall into three distinct categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. If the witness is wholly reliable, his evidence can be implicitly relied

upon and such a witness's testimony can be made basis for conviction of an accused. Similarly, when a witness is found to be wholly unreliable, no reliance can at all be placed on his evidence and his evidence has to be rejected outright. When, however, a witness is found to be neither wholly reliable, nor wholly unreliable, his evidence cannot be accepted as true unless his evidence is found to have been corroborated by some credible independent evidence, direct or circumstantial.

32. The evidence of P.W. 7, on whose evidence the prosecution's case rests, cannot be safely relied upon unless the same is found to have been corroborated by some credible independent evidence, direct or circumstantial.

33. In the light of the evidence, which has surfaced, it clearly follows that the evidence of P.W. 7, coupled with the remaining evidence on record, could not have been held to have proved the accused-appellants guilty of the charges brought against them. At any rate, accused-appellants deserve to be given, at least, benefit of doubt.

34. Situated, thus, we are of the considered view that in the light of the evidence on record, adduced by the prosecution, the accused-appellants ought to have been given, at least, benefit of doubt.

35. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment

and order, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offence, which they stand convicted of, and they are hereby acquitted of the same under benefit of doubt.

36. Since the accused-appellants are on bail, their bail bonds are hereby cancelled and their sureties shall stand discharged from their respective bail bonds.

37. Let the Amicus Curiae be paid a fee of Rs. 5,000/-.

38. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court, along with the Lower Court Records.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

N.A.F.R.
S.A./Kundan

U	✓	T	✓
---	---	---	---