

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal No.352 of 1993

AGAINST THE JUDGMENT OF CONVICTION AND THE ORDER OF SENTENCE, DATED 20th May, 1993, PASSED BY SRI B. N. SINGH, LEARNED SESSIONS JUDGE, KHAGARIA, IN SESSIONS CASE NO. 70 of 1991, ARISING OUT OF KHAGARIA POLICE STATION CASE NO. 126 OF 1990.

1. KHALTU CHOUDHARY, SON OF LATE DURGA CHOUDHARY
2. SOGARATH CHOUDHARY, SON OF LATE DURGA CHOUDHARY
BOTH RESIDENT OF VILLAGE DHUSMURI, P.S. BISHUNPUR,
DISTRICT- KHAGARIA.

... APPELLANTS

VERSUS

THE STATE OF BIHAR RESPONDENT

Appearance :

For the Appellant : Mr. Amish Kumar Jha, Advocate

For the Respondent : Mr. Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

**HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

CAV JUDGMENT

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

Date: 16-02-2015

Under the judgment, dated 20.05.1993, passed, in Sessions Case No. 70 of 1991, by learned Sessions Judge, Khagaria, the appellants, Khaltu Choudhary and Sogarath Choudhary, stand convicted under Sections 436 and 302 of the Indian Penal Code. Following their conviction, the accused-appellants have been sentenced to undergo life imprisonment.

2. The case of the prosecution may, in brief, described as follows:

(i) When accused Khaltu Choudhary had been suffering from tuberculosis, Chano Devi (PW 3) gave some of her ornaments to him on the promise made by accused Khaltu Choudhary that as soon as he became alright, he would get the ornaments released from the person to whom he would pledge the same. Khaltu Choudhary pledged those ornaments for Rs.2,000/- at Khagaria. However, as Khaltu Choudhary did not return the ornaments even after he became alright and Chano Devi demanded the return of her ornaments and insisted that her ornaments be returned, accused Khaltu Choudhary threatened her that if she insisted her demand for return of the ornaments, her children would be done to death and she would be childless. Not satisfied with the threats, which he had given to Chano Devi (PW 3), accused Khaltu Choudhary, Sogarath Choudhary, Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi, on 14.09.1990, at about 2.30 PM, set on fire the house of Chano Devi. When Chano Devi reached her house, she found her three sons, namely, Jai Kishore Chaudhary, Krishna Chaudhary and Bablu Chaudhary along with Batasiya Devi and Ram Udit Pandit burnt alive. While the accused persons were running away, they were seen by Chano Devi (PW 3), Mano Devi (PW 1), sister of PW 3, and Shanti Devi (PW 2), mother of PW 3.

(ii) On receiving the information about the



occurrence, police arrived at the place of occurrence, where they recorded the statement of Chano Devi (PW 3) as the *First Information Report* and, accordingly, Khagaria Police Station Case No.126 of 1990, under Sections 302/436/34 of the Indian Penal Code, was registered against accused Khaltu Choudhary, Sogarath Choudhary, Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi.

3. During investigation, inquest was held on the dead bodies of Batasiya Devi, Ram Udit Pandit, Jai Kishore Chaudhary, Krishna Chaudhary and Bablu Chaudhary; *inquest reports* were accordingly prepared and, on completion of investigation, police laid *charge sheet*, under Sections 302/436/34 of the Indian Penal Code, against accused Khaltu Choudhary and Sogarath Choudhary, Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi, showing Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi as *absconders*.

4. At the trial, when charges, under Sections 302 and 436 read with Section 34 of the Indian Penal Code, were framed against accused Khaltu Choudhary and Sogarath Choudhary, both of them pleaded not guilty thereto.

5. In support of their case, prosecution examined altogether six witnesses, the relevant witnesses, out of them, being PW 1 (Mano Devi), PW 2 (Shanti Devi), PW 3 (Chano

Devi), PW 4 (Sriram Pandit), PW 5 (Dr. Md. Amirul Hoda) and PW 6 (Manager Ram). The accused persons have, in their defence, also adduced evidence by examining two witnesses, namely, DW 1 (Jagdambi Choudhary) and DW 2 (Basudeo Choudhary), the case of the defence being that of denial and that accused Khaltu Choudhary never suffered from tuberculosis.

6. Having, however, arrived at the finding that the two accused, namely, Khaltu Choudhary and Sogarath Choudhary, had been proved guilty of the charges under Section 302 and 436 read with Section 34 of the Indian Penal Code, the learned trial Court convicted them accordingly. Following their conviction, sentences have been passed against them as mentioned above.

7. Aggrieved by their conviction and the sentences passed against them, the convicted persons aforementioned have preferred the present appeal.

8. We have heard Mr. Amish Kumar Jha, learned Counsel, for the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. Before entering into the discussion of the ocular evidence on record, let us, first, take into consideration the medical evidence on record.

10. According to the evidence of the doctor (PW 5),

who had, admittedly, performed *post mortem* examination on the dead body of Batasiya Devi, he had found as follows:

"Externally, the body was completely charred and mutilated beyond recognition. There was 100 per cent burnt of 4th degree.

Internal examination: - all organs were heavily congested and lungs were charred."

11. Similarly, PW 5 had found, on examination of dead body of Ram Udai Pandit, as follows:

"External: - the body was completely charred and mutilated. The burn was 100 per cent of 4th degree. Internally all the organs are extremely congestion and dehydration."

12. PW 5, likewise, had found, on examination of dead body of Jai Kishore Chaudhary, as follows:

"Externally the body was completely charred and mutilated beyond recognition. The burn was 100 per cent of 4th degree. Internally all organs extremely congested and dehydrated leading to C. R. failure."

13. PW 5 had also, on examination of dead body of Krishna Choudhary, found as follows:

"The body was completely charred and mutilated. The burn was of 100 per cent of 4th degree. Internally all organs completely congested and dehydrated."

14. PW 5 had found, on examination of dead body of Bablu Chaudhary, as follows:

"Externally the body was completely charred and burnt. The skull had exploded and opened. The burnt brain matter was visible. Internal examination all organs were deeply congested and dehydrated. The burn was 100 per cent and of 4th degree."

15. The finding of the doctor and his opinion with regard to the causes of death have not been disputed. This apart, we do not find anything inherently, incorrect or improbable in the evidence of the doctor.

16. It can, therefore, be safely concluded that the said five persons died as a result of burn injuries of varied degrees sustained by them. It is also not in dispute that the house, in question, burnt down and it was inside the said house

that the said five persons were found lying dead, because of the burn injuries suffered by them.

17. The question, however, remains as to whether the present appellants were the ones, who had set the house of Chano Devi (PW 3) on fire. In this regard, it must be noted that though Chano Devi (PW 3) has deposed that the villagers were saying to her that the fire was lit by Khaltu Choudhary and Sogarath Choudhary, whereas no neighbour or co-villager of Chano Devi (PW 3) has claimed to have seen any of the accused-appellants and/or their alleged associates setting the house, in question, on fire. As a corollary thereto, no neighbour or co-villager of Chano Devi (PW 3) has deposed that he/she had reported to Chano Devi (PW 3) that Khaltu Choudhary and Sogarath Choudhary had been seen setting Chano Devi's house ablaze.

18. The evidence of PW 1, Mano Devi, is that on the day of occurrence, when she was returning after reaping the (lentil) crops, along with her mother (PW 2) and her sister (PW 3), she saw their house burning and Khaltu Choudhary, Sogarath Choudhary, Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi fleeing after setting ablaze the house. The cause of occurrence, according to PW 1, is that Khaltu Choudhary had taken jewellery of her elder sister, i.e., Chano Devi (PW 3), because Khaltu Choudhary had been

suffering from tuberculosis and when her sister, Chano Devi (PW 3), went to Khaltu Choudhary and demanded return of her jewellery, he talked in filthy language and said that he would ruin her whole family. She has also deposed that she recognized Khaltu Choudhary and Sogarath Choudhary, while they were running away from the place of occurrence.

19. PW 1 (Mano Devi) has further deposed that since her sister, Gayatri Devi, had performed her marriage with Khaltu Choudhary against the will of her family, including Chano Devi (PW 3) and their mother, Shanti Devi (PW 2), following Gayatri Devi's marriage with accused Khaltu Choudhary, there was complete break-down of the relationship between Gayatri Devi, on the one hand, and PW 1 (Mano Devi), PW 2 (Shanti Devi), and PW 3 (Chano Devi), on the other.

20. There is nothing in the evidence of PW 1 to show that she had seen her sister giving her ornaments; nor is there anything in her evidence to show that it was in her presence that her sister (PW 3) had demanded the return of her ornaments and accused Khaltu Choudhary threatening to ruin her family.

21. Situated thus, it becomes abundantly clear that the evidence of PW 1 (Mano Devi), as to what has transpired between her sister, Chano Devi (PW 3), on the one hand, and the accused Khaltu Choudhary, on the other, is nothing, but



hearsay inasmuch as PW 3 has, nowhere, deposed, as we would show, that when accused Khaltu Choudhary had requested her to give ornaments for his treatment of tuberculosis, her sister, (Mano Devi, PW 1), was present there and/or that when she (PW 3) had demanded from accused Khaltu Choudhary return of her ornaments and/or when accused Khaltu Choudhary had given threats, her sister, Mano Devi, was present there.

22. Thus, the only admissible piece of evidence, which remains, if the evidence of PW 1 is believed, is that she had seen her house burning and, at that point of time, the accused persons were seen by her fleeing away.

23. Though PW 1 (Mano Devi) has claimed in her evidence that before the police, she had stated that Khaltu, Sogarath, Madan, Panchu, Shankar Choudhary and Manti Devi were seen by her running away after setting the house on fire, it has, however, come on record that this witness (PW 1) had not stated, in her previous statement made before the police, that Khaltu, Sogarath, Madan, Panchu, Shankar Choudhary and Manti Devi were seen by her running away after setting the house on fire nor has she stated before police that the house was burning with fire.

24. Thus, the evidence of PW 1 suffers from serious contradictions, which cannot be ignored inasmuch as she had

not stated, when the occurrence was fresh in mind, that Khaltu, Sogarath, Madan, Panchu, Shankar Choudhary and Manti Devi were seen by her running away after setting the house on fire.

25. The evidence of PW 2 (Shanti Devi), is that on the day of occurrence, at about 10-11 AM, she (PW 2) and her daughters (PW 1 and PW 3) were returning after reaping the *arhar* (lentil) crop, she saw Khaltu Choudhary, Sogarath Choudhary, Madan Choudhary, Panchu Choudhary, Shankar Choudhary and Manti Devi fleeing away from the village and when they reached their house, she saw Jay Kishore, Krishna, Bablu, Batasiya Devi and Ram Uday Pandit lying dead, they having succumbed to burn injuries.

26. It is also in the evidence of PW 2 that her neighbour, Sriram (PW 4), informed them that Sogarath and Khaltu had set ablaze their house and then, fled away. However, Sriram (PW 4) has, nowhere, deposed that he had seen Sogarath and Khaltu setting the house of Shanti Devi ablaze and/or having reported to her that accused Sogarath and Khaltu had set her house on fire. Logically extended, the evidence of PW 2 (Shanti Devi) that her neighbour, Sriram (PW 4), had informed them that Sogarath and Khaltu had set ablaze her house and then fled away, can, at best, be regarded as hearsay and the same ought to be kept excluded from the

purview of our consideration.

27. It is also worth noticing that PW 2 has deposed that Khaltu had taken jewellery of Chano Devi (PW 3) for treatment of tuberculosis and after Khaltu's treatment, when Chano Devi (PW 3) demanded return of her jewellery, then, Khaltu Choudhary said that he would not give jewellery and would kill all after burning and, on the following morning, the occurrence had taken place.

28. Considering the fact that there is nothing in the evidence on record to show that Chano Devi (PW 3) had given, in the presence of PW 2 (Shanti Devi) her jewellery to accused Khaltu Choudhary for treatment of tuberculosis nor is there any evidence on record to show that PW 2 (Shanti Devi) was present, when Chano Devi (PW 3) was demanding her jewellery and/or Khaltu Choudhary, as claimed by PW 2, not only refused to return the jewellery, but even burn them all, we have to treat, and we do treat, as the evidence of PW 2 given, in this regard, nothing, but hearsay and cannot be taken into account for the purpose of determining the guilt or otherwise of the appellants.

29. It may be noted that at one stage of her evidence, PW 2 admitted to have recognized Khaltu Choudhary, but again reiterated that she had recognized Khaltu Choudhary.

30. What needs to be pointed out is that though PW



2 has claimed, in her evidence, that she had stated before the police that when she had come running, she had found Jai Kishore, Krishna, Babloo, Ram Uday, Batasiya lying dead; whereas the Investigating Officer's evidence shows that this witness (PW 2) had not stated that Khaltu Choudhary and Sogarath Choudhary had burnt her house and ran away.

31. The evidence of PW 2, as depicted above, if considered dispassionately, make it very clear that even before she had reached her house, her neighbours had been extinguishing fire meaning thereby that before she saw her house ablaze, the accused persons had already set the house on fire. The evidence, therefore, of PW 2 that she had seen the accused persons running away after setting fire to the house cannot at all be believed in or relied upon.

32. Broadly in tune with PW 1 and PW 2, PW 3 (Chano Devi), in her evidence, has deposed that on the day of occurrence, she was cutting *arhar* (i.e., lentil crop) and she came to her village on seeing flames and saw that Khaltu Choudhary, Sogarath Choudhary, Madan Choudhary and Shankar Choudhary were fleeing away towards west. It is in her evidence that she found her maternal grandmother, Batasiya, Jai Kishore, Krishna, Babloo and Ram Uday Pandit lying dead on receiving burn injuries and villagers were extinguishing fire and saying that Khaltu and Sogarath had put

the house on fire.

33. From a bare reading of the above evidence of PW 3, it becomes clear that what she had seen were flames erupting from the direction of her house meaning thereby that her house had already been set ablaze before the fact of burning of her house drew her attention.

34. Since PW 1, PW 2 and PW 3 were together, it is reasonable to infer that when PW 3 has clearly conceded, in her evidence, that she had seen her house ablaze, while PW 1, PW 2 and PW 3 were together at their agricultural field, it logically means that none of the three witnesses, namely, PW 1, PW 2 and PW 3 had seen, or could have seen, any of the accused persons aforementioned setting the house, in question, on fire. This apart, though this witness (PW 3) has claimed that her neighbours had reported that Khaltu Choudhary and Sogarath Choudhary had set her house on fire, it has come on record that in her previous statement made before the police, this witness (PW 3) had not stated that the villagers were saying that the fire was lit by Khaltu and Sogarath and she had also not stated before the police that she had given her ornaments to Khaltu and/or that she had demanded her ornaments from Khaltu after Khaltu had recovered from his illness.

35. What remains in the evidence of PW 3 is that she had seen, if her evidence is believed, her house burning

and the accused persons fleeing away and the interference drawn by her from the alleged act of fleeing away of the accused aforementioned was that the accused were the ones, who had set her house on fire.

36. Coupled with the above, what can also not be ignored, and must not be ignored, is the fact that though Sriram Pandit (PW 4) was examined as a witness, he has not supported the assertions of PW 1, PW2 and PW3 that he (PW 4) had reported to anyone of them that he had seen any of the accused-appellants setting fire to the house of PW 1, PW 2 and PW 3. Further-more, though PW 3 has deposed that Jagdish Saw, Chhotelal Sharma, Arjun Pandit, Sukho Sharma were extinguishing fire, none of these independent and material witnesses has been examined.

37. Though PW 3 has claimed that she had stated before police that her co-villagers had been saying that Khaltu Choudhary and Sogarath Choudhary had set the house on fire, it stands proved on record, as we had already recorded above, that she had not stated before the police that her co-villagers were saying that the fire was lit by Khaltu and Sogarath. She had also not stated before the police that she had given her ornaments to Khaltu and/or that she demanded her ornaments after Khaltu had recovered from his illness.

38. What surfaces from a minute, careful and



cautious analysis of the evidence adduced by the prosecution is that the present one is not a case — if the prosecution's case is true — where there was no independent witness available to the alleged occurrence of setting the house of PW 1, PW 2 and PW 3 on fire by the accused appellants and their alleged associates; rather, there is abundance of evidence, as given by none other than PW 3, that a number of the neighbours and co-villagers were present and had, in fact, seen the occurrence of setting the house on fire by the accused aforementioned; but apart from Sriram (PW 4), who has belied such assertions of PW 1, PW 2 and PW 3, none of the neighbours or co-villagers of PW 1, PW 2 and PW 3 was examined or has deposed that he/she had seen any of the accused-appellants aforementioned setting the house on fire. Neither any explanation has been offered by the prosecution as to why none of the co-villagers, other than Sriram (PW 4), who were claimed to be present at the place of occurrence, when PW 1, PW 2 and PW 3 arrived there, was examined as a witness nor is there any explanation, plausible and convincing, discernible, in this regard, from the evidence on record.

39. Clearly thus, prosecution has withheld material witnesses from the Court without having offered any explanation in this regard nor is there any explanation available, in this regard, from the evidence on record. There

can be no escape from the conclusion, therefore, that had the witnesses aforementioned been examined, they would not have, same as PW 4, supported the version of the occurrence, which PW 1, PW 2 and PW 3 had given before the learned trial Court.

40. Because of what have been discussed and pointed out above, PW 1, PW 2 and PW 3 cannot be treated as witnesses, who were *wholly reliable* and even if their evidence is not rejected outright as evidence of *wholly unreliable witnesses*, their evidence would fall, at best, in the category of those witnesses, who are *neither wholly reliable nor wholly unreliable*.

41. 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.

42. The evidence of PW 1, PW 2 and PW 3, 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.

43. It is also an undisputed proposition of law that one infirm witness cannot be treated to have corroborated the evidence of another infirm witness meaning thereby that witnesses of same brand cannot be taken to have corroborated each other. Thus, when a witness is neither wholly reliable nor wholly unreliable, his evidence cannot be taken to have been corroborated by a witness of the same brand, namely, a witness, who is neither wholly reliable nor wholly unreliable, for, evidence is not to be counted, but weighed. It is not the number of the witnesses, which determines the outcome of a trial; rather, it is the inherent falsity or truth of the evidence given by the witness, which decides the outcome of trial. If each one of a large number of witnesses is found to be wholly unreliable, their evidence cannot become acceptable as true merely because a large number of similar brand of witnesses has corroborated each other.

44. A reference, with regard to the above proposition of law, may be made to the case of **Muluwa, S/o Binda and others Vs. The State of Madhya Pradesh, [AIR 1976 SC 989]**, wherein the Supreme Court has observed as

follows :

"It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. Since the evidence of P.Ws. 5 and 6 suffered from the same infirmities as that of Smt. Jugatia, it cannot be said that the trial Judge had no basis, whatsoever, for stigmatising it as unreliable."

(Emphasis is added)

45. Situated thus, it is clear that merely because PW 1, PW 2 and PW 3 have given evidence corroborating each other's evidence, their evidence cannot be made basis for holding them truthful witnesses, when each one of them is a witness, who is neither wholly reliable nor wholly unreliable, for, one infirm witness cannot be treated to have corroborated the evidence of another infirm witness.

46. In the light of the evidence, which has surfaced, it clearly follows that PW 1, PW 2 and PW 3 could not have seen, and cannot, therefore, be said to have seen, any of the accused-appellants setting ablaze their house, when PW 3 had already seen flames erupting from the direction of their village, when they were still at their agricultural field reaping *arhar* (lentil) crops. Moreover, the evidence, given by PW 1, PW 2 and PW 3, clearly show that their neighbours were



already trying to extinguish fire, when PW 1, PW 2 and PW 3 arrived at the place of occurrence. This evidence on record also makes it well-nigh impossible to confidently hold that any of the three material witnesses, namely, PW 1, PW 2 and PW 3, had seen either the accused-appellants setting their house on fire or fleeing away.

47. The above inference gets reinforced from the fact that though the co-villagers and neighbours of PW 1, PW 2 and PW 3 were material witnesses inasmuch as they were obviously the ones, who had, according to what PW 1, PW 2 and PW 3, reached the place of occurrence before PW 1, PW 2 and PW 3 arrived there, yet, amongst the neighbours, the only person examined is Sriram Pandit (PW 4), who has been declared hostile inasmuch as he did not at all support the case of the prosecution and so far as other neighbours and co-villagers of PW 1, PW 2 and PW 3, are concerned, they were not examined at all. Withholding them from Court constrains this Court to draw the adverse inference against the prosecution, the inference being that had the neighbours and co-villagers of PW 1, PW 2 and PW 3 been examined at the trial, they would not have supported the prosecution's case and that was the reason why they were withheld from the Court.

48. Considering the fact that there is no credible and convincing evidence on record that the accused-appellants



were seen setting the house on fire, the consequence is — even if, for a moment, one assumes, that they were seen running away from the place of occurrence — that the accused-appellants cannot be, confidently and boldly, held to be the ones, who had set the house on fire. When the witnesses, who had arrived at the place of occurrence and had been found by PW 1, PW 2 and PW 3 to have been extinguishing fire, have either not been examined or have not supported the case of the prosecution, it was wholly unsafe and hazardous to found the conviction of the accused-appellants on the evidence of PW 1, PW 2 and PW 3, when there is evidence, as has been discussed above, is highly doubtful in nature.

49. Situated thus, we are clearly of the view that in the facts and attending circumstances of the present case, the appellants ought to have been accorded, at least, benefit of doubt.

50. 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 offences, which they stand convicted of, and they are hereby acquitted of the same under benefit of doubt.

51. Since the accused-appellants are on bail, their

bail bonds are hereby cancelled and their sureties shall stand discharged.

52. 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.)

Samarendra Pratap Singh, J.: I agree.

(Samarendra Pratap Singh, J.)

Pawan/AFR

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