

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.240 of 1993

AGAINST THE JUDGMENT OF CONVICTION AND THE ORDER OF SENTENCE, DATED 20th MARCH, 1993, PASSED BY SRI MURARI LAL KEJRIWAL, LEARNED 3RD ADDITIONAL SESSIONS JUDGE, AT ARRAH (BHOJPUR), IN SESSIONS TRIAL NO. 65 of 1984, ARISING OUT OF CHARPOKHARI POLICE STATION CASE NO. 39 OF 1983.

1. BENGAL MUSAHAR, SON OF TAPESAR MUSHAR
 2. LAL MOHAR MUSHAR, SON OF AMBIKA MUSHAR
 3. SITARAM MUSHAR, SON OF AMBIKA MUSHAR
 4. BAHIR MUSHAR, SON OF SEORATN MUSHAR
- ALL RESIDENT OF VILLAGE- KARMAUL, POLICE STATION- CHARPOKHARI, DISTRICT-BHOJPUR.

.... **APPELLANTS**

Versus

STATE OF BIHAR **RESPONDENT**

Appearance :

FOR THE APPELLANTS : MR. AMISH KUMAR, AMICUS CURIAE
FOR THE RESPONDENT : Mr. AJAY MISHRA, A.P.P.

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
And
HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

ORAL JUDGMENT
(Per: **HONOURABLE MR. JUSTICE I. A. ANSARI**)

Date: 13-02-2015

Under the judgment, dated 20.03.1993, passed, in Sessions Trial No. 65 of 1984, by learned 3rd Additional Sessions Judge, at Arrah (Bhojpur), the appellants, Bengal Mushahar, Lal Mohar Mushahar, Sita Ram Mushahar and Bahir Mushahar, stand convicted under Sections 302 read with Section 34 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) On 15.05.1983, between 7.00 and 7.30 PM, when Awadhesh Singh (PW 3), accompanied by his maternal uncle, Dharam Singh @ Dharam Deo Singh, was returning home from Chandi Bazar and reached near Karnil canal bridge, he saw 10 – 12 persons, including accused-appellants, Benga Mushahar, Lal Mohar Mushahar, Sita Ram Mushahar and Bahir Mushahar, who were all armed with *lathis*, appearing before Dharam Singh and assaulting him indiscriminately by means of *lathis*. On being so assaulted, Dharam Singh became unconscious and fell down on the bridge in severely injured condition.

(ii) The accused aforementioned also assaulted Awadhesh Singh (PW 3) on his head and snatched away his wrist watch and a sum of Rs.250/-, in cash. Awadhesh Singh (PW 3) recognized, in the focus of a torch light, the four accused aforementioned and when he raised *hulla*, his relatives and co-villagers came running. Along with those, who had so come running to the place of occurrence, Tribhuban Singh (PW 2), Bishwanath Singh @ Vilar Singh (PW 4) and Hare Ram Singh (PW 7) were present and, out of the people, who had so reached the place of occurrence, PW 2, PW 4 and PW 7, too, had witnessed assault on Dharam Singh as well as Awadhesh Singh (PW 3) at the hands of the four accused aforementioned and their associates.

(iii) Awadhesh Singh (PW 3) and Dharam Singh

(since deceased) were carried, in injured condition, to Sadar Hospital, Ara. When injured Dharam Singh was brought to the hospital, the doctors found him dead; whereas Awadhesh Singh (PW 3) was treated for the injuries sustained by him on his head.

(iv) A *fardbeyan*, on being lodged on the following date, i.e., on 16.05.1983, at about 7.30 AM, at Charpokhari Police Station, by Awadhesh Singh (PW 3), Charpokhari Police Station Case No.39 of 1983 was registered, under Sections 147/148/341/323/302/379 of the Indian Penal Code, against the four accused persons aforementioned and their unidentified associates.

(v) Inquest was held on Dharam Singh's dead body, which was also subjected to *post mortem* examination, which revealed, bruise, measuring 4" x 1", over the back of right side of chest, and bruise, measuring 2" x 1", over the right parietal and temporal region, and, on dissection, fracture of right parietal bone of skull was detected, which had caused hemorrhage and shock resulting into the death of the said deceased.

(vi) During investigation, test identification parade (in short, 'T.I.P.') was held, wherein altogether seven persons were identified including the four accused persons aforementioned.

(vii) On completion of investigation, a *charge sheet*

was laid by police, under Sections 147/148/302 of the Indian Penal Code, against all the seven accused persons, namely, Benga Mushahar, Lal Mohar Mushahar, Sita Ram Mushahar, Bahir Mushahar, Birendra Mushahar, Channu Mushahar and Lala Mushahar.

3. At the trial, when charges, under Section 147/148/302 read with Section 34 of the Indian Penal Code, were framed against all the accused aforementioned, they all pleaded not guilty thereto. A separate charge was framed against accused Lal Mohar Mushahar under Section 323 of the Indian Penal Code. To the charge so framed, accused Lal Mohar Mushahar, too, pleaded not guilty.

4. In support of their case, prosecution examined as many as 11 (eleven) witnesses including two doctors, namely, Ravindra Kumar Singh (PW 8) and Dr. Girishdeo Narayan Singh (PW 9). While Ravindra Kumar Singh (PW 8) had examined and treated Awadhesh Singh (PW 3), Dr. Girishdeo Narayan Singh (PW 9) was the one, who had, admittedly, performed *post mortem* examination on the dead body of Dharam Singh. Accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure 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 and of the four accused aforementioned having been

implicated falsely in the case.

5. Having found four of the accused aforementioned guilty, learned trial Court convicted them under Section 302 read with Section 34 of the Indian Penal Code. This apart, the learned trial Court, having found accused Lal Mohar Mushahar guilty of the offence under Section 323 of the Indian Penal Code, too, convicted him accordingly. Following their conviction, sentences were passed against the accused aforementioned as mentioned hereinabove. The remaining three accused persons, namely, Birendra Mushahar, Channu Mushahar and Lala Mushahar, were, however, acquitted.

6. Aggrieved by their conviction and the sentences, which have been passed against them, the accused aforementioned, as convicted persons, have preferred this appeal.

7. We have heard Mr. Amish Kumar, learned Counsel, as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, for the State.

8. While considering the appeal, it needs to be noted that that according to the evidence of Dr. Ravindra Kumar Singh (PW 8), who had examined Awadhesh Singh (PW 3), on 16.05.1983, he found as follows:

"A one stitched wound 2'in length on right side scalp. Nature could not be ascertained as the injury was already stitched."

9. Since the finding of Dr. Ravindra Kumar Singh (PW 8) and his opinion, with regard to the nature of injuries sustained by PW 3, were not disputed at the trial and we, too, find nothing inherently incorrect or improbable in the evidence of PW 8, it logically follows that PW 3 was found to have sustained an injury on the right side of his scalp, which had been stitched.

10. Turning to the evidence of Dr. Girishdeo Narayan Singh (PW 9), who had conducted *post mortem* examination on the dead body of Dharam Singh, we find that according to him, he had found as follows:

"A. Rigor Mortis were present on neck and all four extremities;

(i) Bruise 4" x 1" over back of right side of chest.

(ii) Bruise 2"x 1" over right perital and temporal region.

(iii) There was bleeding from the nose.

There was haematoma swelling composed of blood effused into connective tissues on right perital region.

Right perital bone of skull was fractured.

There was laceration of right hemisphere of brain.

Heart – Left – Full, Right – empty.

Stomach contents of 8 ounce semi-digested food.

Liver, kidneys, spleen were – Pale (failed)

Bladder was empty."

11. In his evidence, Dr. Girishdeo Narayan Singh (PW 9) has opined that all the injuries were *ante mortem* in nature and were caused by hard and blunt substance, which could be *lathi* and that the injuries were sufficient, in the ordinary course of the nature, to cause death. PW 9 has concluded that death of Dharam Singh was caused by shock and hemorrhage due to injuries of brain.

12. Thus, the unimpeached medical evidence on record shows that the said deceased was found to have sustained one bruise, measuring 4" x 1", over the back of right side of chest, one bruise, measuring 2" x 1", over the right parietal and temporal region and, underneath the bruise, which was found on the right parietal and temporal region, fracture of right parietal bone of skull was detected, which led to laceration of the right hemisphere of brain and caused death of Dharam Singh.

13. Though the doctor, as already indicated above, opined that the injuries were caused by blunt substance, he, (PW 9), has conceded, in his cross-examination, that the injuries, which were found on the said deceased, could have been caused by fall as well. We are clearly of the view that a mere fall could have not caused fracture on the right parietal and temporal region of the skull of the said deceased unless the fall was from some height.

14. Bearing, therefore, in mind the findings of the



doctor, with regard to the injuries, which had been sustained by the said deceased and caused his death, when we turn to the evidence of PW 3, we notice that according to him, he was, on 15.05.1983, at about 7 – 7.30 PM, returning, accompanied by his maternal uncle, Dharam Singh, from market and when they reached near Karnil canal bridge, the four accused-appellants, accompanied by some others, all of whom were armed with *lathis*, appeared and started indiscriminately assaulting Dharam Singh, and having sustained injuries on being so assaulted, Dharam Singh fell down and became unconscious and that the accused-appellant, Lal Mohar Mushahar, assaulted Awadhesh Singh (PW 3), by means of *lathi*, and one of the accused persons had snatched away, according to the evidence of PW 3, his wrist watch and a sum of Rs.250/-, in cash.

15. Close on the heels of the evidence of Awadhesh Singh (PW 3), Tribhuban Singh (PW 2), Bishwanath Singh @ Vilar Singh (PW 4) and Hare Ram Singh (PW 7) have deposed that when they were returning from the market, they heard *hulla* and, on reaching near the said bridge, they saw 10 – 12 persons, armed with *lathis*, assaulting the said deceased as well as Awadhesh Singh (PW 3). Out of the persons, who had so assaulted, PW 2, PW 4 and PW 7 have identified the present accused-appellants as the ones, who were amongst those, who had assaulted Dharam Singh and Awadhesh Singh (PW 3).



16. If the evidence given by Awadhesh Singh (PW 3) and supported by Tribhuban Singh (PW 2), Bishwanath Singh @ Vilar Singh (PW 4) and Hare Ram Singh (PW 7) were true, Dharam Singh ought to have sustained multiple injuries on his body; whereas the *post mortem* examination revealed only two bruises, both on the right side of the deceased, one, bruise, measuring 4" x 1", on the back of right side of chest, and the other, measuring 2" x 1", on the right parietal and temporal region, and underneath the injury on the head, fracture of the right parietal bone on the scalp was detected with laceration of hemisphere. Thus, the medical evidence on record completely belies the ocular evidence on record.

17. When there is conflict between the medical evidence and ocular evidence, medical evidence cannot always be made the touchstone for testing the veracity of the ocular evidence and there is no impediment in convicting an accused person on the basis of ocular evidence even if the medical evidence points to the contrary provided that the ocular evidence is found to be wholly trustworthy and reliable.

18. Our quest, therefore, to determine if the ocular evidence on record can be relied upon and the medical evidence, adduced by the prosecution, be ignored, brings us to the evidence of Bindeshwary Pandey (PW 6), whose evidence is that on the day of occurrence, at about 7 – 7.30 PM, while he was returning from answering the call of nature, one Suchit



Mushahar met him and told him that some people of village Bajain were coming to assault and as he (PW 6) wanted to know why Mushahar people from Bajain village were coming to assault, he proceeded ahead and saw that a crowd had assembled near the said bridge and when he went there, he found Dharam Singh lying unconscious and people, who had assembled there, were saying that Mushahars of the village had killed Dharam Singh.

19. What is, now, of immense importance to note, in the evidence of PW 6, is that this witness has deposed that he found Dharam Singh lying on the bricks and stones scattered near the bank of the river. In the face of the evidence of PW 6, which has not been impeached either by prosecution or defence, it becomes abundantly clear that Dharam Singh's dead body was found not on the bridge, where the occurrence had allegedly taken place, but on the bank of the river.

20. Now, in the light of the evidence so given by PW 6, when the finding of the *post mortem* examination are considered, it becomes clear that Dharam Singh had a fall, on the bricks and stones lying on the bank of the river, on his right side and, therefore, sustained injuries on the right side of back his chest and also on the right parietal temporal region.

21. In the backdrop of the evidence of PW 6 and the findings of the *post mortem* examination, it becomes



abundantly clear that the evidence, given by Awadhesh Singh (PW 3) and supported by the evidence of Tribhuban Singh (PW 2), Bishwanath Singh @ Vilar Singh (PW 4) and Hare Ram Singh (PW 7), cannot be believed or cannot, at least, be safely relied upon inasmuch as their evidence is not merely contradicted by the medical evidence on record, but becomes highly doubtful. If Dharam Singh had been assaulted by 10 – 12 persons, by *lathis*, how could he sustain only two injuries, one on the right side of the back of chest and the other on the right parietal temporal region of scalp.

22. Situated thus, we find that the eye witnesses' account of the witness could not have safely been relied upon. It appears to have escaped the attention of the learned trial Court that the description of the occurrence, which Awadhesh Singh PW 3), supported by Tribhuban Singh (PW 2), Bishwanath Singh @ Vilar Singh (PW 4) and Hare Ram Singh (PW 7), had given, was not only being belied by the medical evidence on record, but also by the evidence of PW 6 as regards the place, where Dharam Singh was found lying dead.

23. Because of what have been discussed and pointed out above, we are clearly of the view that the accused-appellants ought to have been accorded, and deserved to be accorded, at least, benefit of reasonable doubt inasmuch as the prosecution had failed, in the light of the discussion of the evidence on record, to bring home the charges against the

accused appellants beyond all reasonable doubt.

24. 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.

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

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

27. 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)

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