

IN THE HIGH COURT OF JUDICATURE AT PATNA

(Against the judgment of conviction and order of sentence, dated 24.03.1993, passed by Shri Awadhesh Kumar Ojha, 2nd Additional Sessions Judge, Katihar in Sessions Trial No. 72 of 1992, arising out of Katihar (M) P.S. case No. 494 of 1991, G.R. No. 1993 of 1991)

Criminal Appeal (DB) No.243 of 1993

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1. Nanhu Mandal @ Nahu Mandal, son of Uday Mandal
2. Nanhaku Mandal @ Nanhka Mandal, son of Chulhaya Mandal
Both residents of village Harganj Koriya Tola, P.S. Katihar, District Katihar
..... Appellants

Versus

The State of Bihar
..... Respondent

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Appearance :

For the Appellant/s : Mr. Sanjay Kumar, Advocate
For the Respondent/s : Mr. Ajay Mishra, Addl. P.P.
Mrs. Rina Sinha, Advocate as *Amicus Curiae*

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

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 18-03-2015

The appeal has been filed against the judgment of conviction and order of sentence, dated 24.03.1993, under Sections 302 and 201 of the Indian Penal Code, passed, by the learned 2nd Additional Sessions Judge, Katihar, in Sessions Trial No. 72 of 1992, arising out of Katihar (M) P.S. case No. 494 of 1991, against the two accused-appellants and sentenced each of them to suffer imprisonment for life under Section 302 of the Indian Penal Code and rigorous imprisonment for three years under Section 201 of the Indian Penal Code. However, both the sentences have been ordered to run concurrently.

2. The prosecution's case, as reflected by the *fardbayan* of Sita Ram Mandal, son of late Balli Mandal, resident of Hariganj Koriatoli, P.S. Katihar recorded by S.I. P. K. Jha, Katihar Muffasil Police Station, on 29.09.1991, at 5.00 P.M., at village Tarjani Camp is, in short, as follows:

(i) The father of the informant, namely, Balli Mandal, was sitting at his house, on the previous day, at about 4.00 P.M., and at that time, his neighbours, Nanhu Mandal and Nanhku Mandal, residents of Hariganj, Korea Toli, arrived and asked the informant's father to accompany them to Madhepura for bringing 40 Kgs. of paddy for which he would be paid Rs.20/- as wage, besides some refreshment. The informant's father went with them. When he did not return till 10 O' clock in the night, the informant went to the house of Nanhu Mandal and Nanhku Mandal looking for his father; but both the accused turned *volte face* and denied that his father had gone with them. Later on, both these persons absconded in the night, which strengthened the suspicion of the informant that after killing his father, the accused had also concealed his dead body. The informant's father used to protest against unauthorized sale of liquor by the two accused aforementioned, which had ended up in strained relationship between the informant's father and the two accused aforementioned.

(ii) When Balli Yadav did not return even by 10:00



A.M., on 29.09.1991, the informant along with his co-villagers went in search of his father to Madhepura and when they reached Tarjani, the villagers there informed the informant and his co-villagers that on the previous evening, at about 8.00 P.M., somebody was heard crying out, near Tarjani river, "save me, save me". On hearing cries, the villagers had rushed towards the spot and saw Nanhu Mandal and Nanhku Mandal coming out of the said river. Some of the villagers informed the informant and his co-villagers that one person had been drowned at Tarjani river. Thereafter, the villagers searched for the dead body till 10.00 P.M. in the night, but could not trace out any dead body. Only at about 2.00 P.M. on 29.09.1991, the dead body of the informant's father was taken out from the river with the help of local villagers. The dead body wore some injuries. According to the informant, the accused persons, on the pretext of taking his father to Pranpur, Madhepura, committed his murder and threw his dead body into the river.

3. On the basis of the *fardbeyan*, Katihar (Mufassil) Police Station Case no. 494 of 1991 was registered, on 29.09.1991, under Sections 302/201 of the Indian Penal Code, against two accused aforementioned.

4. The police, upon completion of investigation, submitted *charge sheet* against the two accused persons aforementioned. After commitment of the case, when charges

were framed, under Sections 302 and 201 of the Indian Penal Code, against the two accused-appellants, both of them pleaded not guilty and claimed to be tried.

5. Prosecution examined altogether 10 (ten) witnesses in support of its case, who are as follows: P.W. 1 is Rahmatulla, P.W. 2 is Abdul Kalam, P.W. 3 is Md. Halim, P.W. 4 is Lagin Mandal, P.W. 5 is Banarsi Mandal, P.W. 6 is Sita Ram Mandal, P.W. 7 is Gulai Mandal, P.W. 8 is Guddu Mandal, P.W. 9 is Pramod Kumar Jha, and P.W. 10 is Dr. Bipin Kumar Jha. Out of these prosecution witnesses, P.W.1, P.W. 2 and P.W. 3 were declared hostile by the prosecution. P.W. 7 and P.W.8 are witnesses to the *inquest report*. P.W. 9 is the Investigating Officer of the case and P.W. 10 is the doctor, who conducted *post mortem* examination on the said dead body. P.W. 6 Sita Ram Mandal is the informant of the case and, admittedly, he is not an eye-witness to the commission of the crime.

6. The defence did not examine any witness or produce any evidence in support of their case. In the statement made under Section 313 of the Code of Criminal Procedure, there is complete denial of the commission of the offences by the accused-appellants. The learned trial Court, upon considering the materials on record, convicted the appellants under Sections 302 and 201 of the Indian Penal Code.

7. Being aggrieved, the two accused persons, as

convicted persons, have preferred this appeal.

8. We have heard Ms. Rina Sinha, learned Counsel, appearing as Amicus Curiae and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

9. The case of the appellants is that no witness had actually seen the occurrence and it is a case of no evidence. The learned trial Court erred in law while convicting the appellants under Sections 302 and 201 of the Indian Penal Code.

10. As already indicated above, the prosecution has examined 10 witnesses in support of its case.

11. Before, however, we enter into the discussion of the evidence of the witnesses to the occurrence, let us take note of the evidence of the doctor (PW 10), who had, admittedly, performed, on 30.09.1991, post mortem examination on the dead body of the said deceased. According to the doctor (PW 10), on conducting post mortem examination, he found as follows:

"(i) Rigor mortis present in all four limbs, whole body was swollen, mud plus sand present in the whole body. Tongue protrude mouth open.

(ii) Blackish swelling right side of temporal region 3" x 2"

(iii) Face was swollen, mark at

eye region

*(iv) Incised circular wound below
right knee joint, 1" circular x skin deep*

*(v) Incised circular wound below
left eye brow ½" x skin deep"*

12. In the opinion of the doctor (PW 10), the death was caused due to shock and haemorrhage as a result of the head injury caused by hard blunt substance. In the opinion of the doctor (PW 10), all other injuries were caused by sharp-pointed weapon.

13. The prosecution did not dispute the correctness of the findings of the doctor and/or his opinion with regard to the nature of the injuries, which had been found on the said dead body, the cause of his death or the nature of weapon, which might have been used. Even the defence did not dispute the evidence given by the doctor (PW 10). This Court, too, does not find anything inherently incorrect or improbable in the evidence given by the doctor (PW 10).

14. In the light of the injuries, which have been sustained by the said deceased, it becomes evidence that the said injuries were not self-inflicted and the death of the said deceased can safely be concluded to be homicidal in nature.

15. Once we find and hold that the death was homicidal in nature, we would, now, proceed to examine whether the prosecution has been able to prove the charges, beyond all reasonable doubt, that the appellants were the ones,

who had murdered the said deceased.

16. As noticed above, P.W.1, P.W. 2 and P.W. 3 have been declared hostile. P.W. 4 (Lagin Mandal) is the brother of the deceased. He states that on the fateful day the accused persons came and took his brother to Pranpur. When his brother did not return till late in the night, he went to the house of the accused and enquired about him, but in their reply, the two accused were evasive. PW 4 has deposed that his brother, Balli Mandal, used to protest against illegal sale of liquor by the accused persons, which annoyed them and consequently they had murdered his brother. In his cross-examination, this witness has deposed that though his brother was not on good terms with the accused persons, he, nonetheless, agreed to go with them in order to earn some money as they are poor people. In view of his own evidence, P.W. 4 is, admittedly, not an eye-witness to the actual commission of occurrence.

17. P.W. 7 and P.W. 8 have supported the recovery of the dead body from water and they are witness to the inquest report.

18. P.W. 5 (Banarsi Mandal) has claimed to be an eye-witness. He has deposed that while he was returning after doing ferry work, he saw Balli Mandal taking betel in a stall, in village Pranpur, along with the accused persons and, thereafter,



they started for their village. However, P.W. 5 stopped and took some refreshment and, thereafter, proceeded for his village. As he reached near Tarjani river, he heard sound like "*bachao, bachao*" and noted the two accused killing the deceased on the road by pressing his body. Thereafter, Balli Mandal was thrown into the river. On account of fear, he climbed on a seesam tree and, out of fear, stayed entire night on the top of the tree. At about 3:00 A.M. the two accused took out two containers of wine from the river and left the place. Only in the morning, he got down from the tree at 6:00 A.M. and, again, started for his village and, on reaching the village, he informed the informant's family about the incident at about 8:00 A.M.

19. The issue is whether the evidence, given by P.W. 5, is worthy of credence to sustain conviction of the appellants. P.W.5, in paragraph 3 of his deposition, has stated that at 8.00 A.M., he informed P.W. 4 (brother of the deceased) and P.W. 6, the informant (son of the deceased). However neither P.W. 4 nor P.W. 6, in their evidence, stated that they had received any information from any one, much less P.W. 5. It is relevant to state that as per P.W. 4 and P.W. 6, the villagers were searching the deceased whole night, yet no information was given to any of the villagers by P.W. 5. Further-more, the evidence of P.W. 5 also does not find support from the *post mortem* report inasmuch as according to the



medical evidence, informant's father had sustained incised circular wounds; whereas, according to this witness (PW 5), the deceased was drowned to death by pressing his neck into water. Thus, we find that the evidence of P.W. 5 suffers from glaring infirmities and it would not be safe to sustain conviction of the two accused-appellants on basis of the testimony of PW 5.

20. We have already noticed that P.W. 6 is not an eye witness of the occurrence and P.W. 7 and P.W. 8 are only witnesses to the recovery of the dead body and inquest report.

21. On careful consideration of the evidence on record, we find that the prosecution has been able to establish only one aspect of its case, namely, that the accused persons came in the evening at 4.00 P.M. on 28.09.1991 and took the deceased from his house to Pranpur for carrying paddy for which he was to be paid some wages. Once they proceeded from the house of the informant, there is no credible eye-witness, who could say as to what happened thereafter. P.W. 5, who has claimed to be eye witness of the occurrence, has not been found reliable. The *post mortem* report only establishes that the deceased has been murdered. However, the evidence is absolutely lacking on the point of commission of murder at the hands of the accused-appellants. Further-more, there is no reliable evidence that anyone had seen the deceased in the

company of the appellants prior to his murder.

22. At any rate, in the light of the nature of the evidence on record, the prosecution could not have been held, and ought not to have been held, to have proved their case beyond reasonable doubt against the accused-appellants. Consequently, the accused-appellants deserved to be accorded, at least, benefit of doubt.

23. Situated thus, we are clearly of the view that the present one is a case, where the accused-appellants ought to be accorded benefit of 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.

(Samarendra Pratap Singh, J.)

I. A. Ansari, J: I agree.

(I. A. Ansari, J.)

Uday/NAFR

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