

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 82 of 1993

With

Criminal Appeal (DB) No.170 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION, DATED 11TH FEBRUARY, 1993, AND THE ORDER OF SENTENCE, DATED, 12TH FEBRUARY, 1993, PASSED BY SHRI JALESHWAR RAM, 1ST ADDITIONAL SESSIONS JUDGE, EAST CHAMPARAN, MOTIHARI, IN SESSIONS TRIAL NO. 69 OF 1973 OF 1985/1992, ARISING OUT OF MOTIHARI MUFASSIL POLICE STATION CASE NO. 53 OF 1985).

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1. Shri Bhagwan Mahto son of Musahar Mahto
2. Basdeo Mahto son of Ramautar Mahto,
Both residents of village Godhawa, Police Station Motihari Muffasil,
District East Champaran
.... Appellants (**In Criminal Appeal (DB) No. 82 of 1993**)

With

1. Bhopal Mahto son of Kashi Mahto, resident of village Godba, P.S.Muffassil
Motihari, District East Champaran
.... Appellant (**In Criminal Appeal (DB) No.170 of 1993**)

Versus

The State of Bihar

.... Respondent (**In both the Appeals**)

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Appearance:

(In CR. APP (DB) No. 82 of 1993)

For the Appellants : Mr. Radheyshyam Prasad, Advocate
Mr. Santosh Kumar Singh, Advocate

(In CR. APP (DB) No. 170 of 1993)

For the Appellant : Mr. Bindhyachal Singh, Advocate
Mr. Rajesh Kumar, Advocate

For the Respondent: Mr. Ajay Mishra, APP (In both the Appeals)

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

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

Date: 21-04-2015

Under challenge, in the present appeals, are the
judgment, dated 11.02.1993, passed, in Sessions Trial No. 69 of
1973 of 1985/92, by learned 1st Additional Sessions Judge, East



Champaran, at Motihari, convicting the accused-appellants, Sree Bhagwan Mahto and Basdeo Mahto, under Sections 109 and 302 of the Indian Penal Code and accused-appellant, Bhopal Mahto, under Section 302 of the Indian Penal Code. Appellant Bhopal Mahto further stands convicted under Section 323 of the Indian Penal Code. In consequence of their conviction under Section 109 read with Section 302 of the Indian Penal Code, while the accused-appellants, Sree Bhagwan Mahto and Basdeo Mahto, stand, under the order, dated 12.02.1993, sentenced to suffer imprisonment for life, the accused-appellant, Bhopal Mahto, has been sentenced to undergo imprisonment for life for his conviction under Section 302 of the Indian Penal Code. For his conviction under Section 323 of the Indian Penal Code, the accused-appellant, Bhopal Mahto, has been further sentenced to undergo rigorous imprisonment for one year, both the sentences having been directed to run concurrently.

2. The case of the prosecution, as unfolded by the First Information Report, lodged by the informant, Sree Narain Mahto (PW 5) may, in brief, be described as under:

(i) On 15.05.1984, the informant, Sree Narain Mahto (PW 5), was returning with his wife from the house of his parents-in-law at village Sirha. While the wife of the informant was proceeding in one tyre cart, the informant boarded the other tyre cart with his brothers, Dasrath Mahto @ Dasrath Prasad



(since deceased) and Sheocharan Prasad. On the way to their house, when the informant, his wife, his said two brothers reached near the residence of one Ramavtar Sah, accused Bhagwan Mahto and accused Basdeo Mahto, suddenly, appeared in front of the said tyre carts and stopped the same. In the meanwhile, accused Bhopal Mahto, Raghuraj Mahto, Radha Mahto, Kailash Mahto, Kripal Mahto, Deepa Mahto and Madan Mahto, too, reached there holding *lathis* and *farsas* in their hands.

(ii) On being exhorted by accused Bhagwan Mahto and accused Basdeo Mahto, accused Bhopal Mahto gave a blow by means of *farsa* on the head of Dasrath Mahto and, then, all the accused persons indiscriminately assaulted informant's brother, Dasrath Mahto, by means of *lathis*. When the informant and his brother, Sheocharan Mahto, tried to save their brother, Dasrath Mahto, they, i.e., the informant, Sree Narain Mahto (PW 5), and his brother, Sheocharan Mahto, too, were also assaulted by accused Bhopal Mahto with *farsa* and by Deepa Mahto and Madan Mahto with *lathis*. On alarm being raised by the informant and his brothers, their co-villagers, namely, Ramanand Prasad (not examined), Prabhu Hazara (PW 2), Ram Bahadur Prasad (not examined) and Mahendra Prasad (not examined) arrived there and the accused fled away.

(iii) The informant's co-villagers, who so arrived

at the place of occurrence, carried the informant and his said two brothers, including Dasrath Mahto, to Sadar hospital, Motihari, for treatment, where Dasrath Mahto succumbed to his injuries.

(iv) The informant (PW 5) orally informed the police, at Motihari Mufassil Police Station, about the occurrence at 2.00 PM, on 15.5.1984. The information, so given by the informant, was reduced into writing in the form of his *fardbeyan* and treating the said *fardbeyan* as the *First Information Report*, Motihari Mufassil Police Station Case No. 53 of 1985, under Sections 147/148/149/323/324/341/302 of the Indian Penal Code, was registered, on 15.05.1984 itself, against accused Sree Bhagwan Mahto, Basdeo Mahto, Deepa Mahto, Madan Mahto, Radha Mahto, Kailash Mahto, Bhopal Mahto, Raghuraj Mahto, Rabindra Prasad, Kripal Mahto and Kashi Nath.

(v) During investigation, inquest was held over Dashrath Mahto's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid, under Sections 147/148/149/302/323 of the Indian Penal Code, against nine accused-appellants aforementioned.

3. At the trial, when charges, under Sections 147 and 148 and also under Sections 302 and 323 read with Section 149 of the Indian Penal Code, were framed against the accused

aforementioned, they all pleaded not guilty to the charges so framed.

4. During course of trial, the learned trial Court, taking resort to Section 319 of the Code of Criminal Procedure, brought accused Kashi Nath Prasad and accused Rabindra Nath Prasad to face trial on the charges framed against them under Sections 147 and 148 and also under Sections 302 and 323 read with Section 149 of the Indian Penal Code. To the charges so framed, accused Kashi Nath Prasad and accused Rabindra Nath Prasad, too, pleaded not guilty.

5. In support of their case, prosecution examined altogether 8 (eight) witnesses including the Investigating Officer. The accused were, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that the prosecution's case is concocted and has been instituted as a counter blast to the case, which was lodged by the accused for having been assaulted by Dasrath Mahto (since deceased) and his brother, Sheocharan Prasad. No evidence was adduced by the defence.

6. Having found the accused, Sree Bhagwan Mahto, Basdeo Mahto and Bhopal Mahto, guilty of the offences, which they stood charged with, learned trial Court convicted them



accordingly and passed sentences against them as mentioned above. Having not, however, found the prosecution's case proved, beyond reasonable doubt, against Deepa Mahto, Madan Mahto, Radha Mahto, Kailash Mahto, Raghuraj Mahto, Rabindra Prasad, Kripal Mahto and Kashi Nath, who had faced the trial, learned trial Court acquitted them accordingly.

7. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, who stand convicted, have preferred these appeals.

8. Both these appeals having, thus, arisen out of the impugned judgment of conviction, dated 11.02.1993, and the impugned order of sentence, dated 12.02.1993, these appeals have been heard together and are being disposed of by this common judgment and order.

9. We have heard Mr. Radheshyam Prasad, learned Counsel, appearing for the appellants, Sree Bhagwan Mahto and Basdeo Mahto, in Criminal Appeal (DB) No. 82 of 1993, and Mr. Bindhyachal Singh, learned counsel for the appellant, Bhopal Mahto, in Criminal Appeal (DB) No. 170 of 1993. We have also heard Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State in both the appeals.

10. At the time of hearing of these appeals, Mr. Radheshyam Prasad, learned counsel for the appellants, Shri Bhagwan Mahto and Basdeo Mahto, relying upon the decisions in



the case of **Rao (K) and others v. State of Andhara Pradesh**, reported in **1991 SCC (Cr.) 564**, **Amar Singh v. State of Punjab**, reported in **1987 SCC (Cr.) 232**, and **Maina Singh v. State of Punjab**, reported in **1976 SCC (Cr.) 332**, has contended that though as many as 11 accused persons were charged for having formed unlawful assembly and committed murder in prosecution of the common object of their unlawful assembly, yet as eight of the accused were acquitted, remaining 3 (three) accused persons, namely, Sree Bhagwan Mahto, Basdeo Mahto and Bhopal Mahto, could not have been convicted by taking aid of Section 149 of the Indian Penal Code inasmuch as three accused persons, namely, Sree Bhagwan Mahto, Basdeo Mahto and Bhopal Mahto, could not have formed an unlawful assembly and could not, therefore, been convicted with the aid of Section 149 of the Indian Penal Code in the manner as has been done in the present case.

11. Though as a proposition of law, what Mr. Radheyshyam Prasad, learned counsel for the appellants, has submitted cannot be said to be incorrect, the fact remains that in the case at hand, the conviction of accused-appellants, Bhagwan Mahto and Basdeo Mahto, are under Section 302 read with 109 of the Indian Penal Code, whereas accused Bhopal Mahto has been convicted under Sections 302 and 323 of the Indian Penal Code without taking aid of Section 149 of the Indian Penal Code.

The reference, therefore, made to the cases of **Rao (K)** (supra), **Amar Singh** (supra) and **Maina Singh** (supra), are clearly misplaced.

12. It has been pointed out by Mr. Bindhyachal Singh, learned counsel, appearing on behalf of the appellant, Bhopal Mahto, that the *First Information Report* was lodged on 15.05.1984, but the same reached the Court of Chief Judicial Magistrate, East Champaran, at Motihari, on 17.05.1984, though the distance between the police station and the place of occurrence is barely 5 kms.

13. Considering the fact that the First Information Report reached the Chief Judicial Magistrate, East Champaran, Motihari, after almost 48 hours of the alleged occurrence, Mr. Bindhayachal Singh, learned counsel for the appellant, submits that in the face of the delayed submission of the First Information Report to the Magistrate, a serious doubt is created on the genuineness of the First Information Report.

14. Repelling above submissions made on behalf of the appellant, Bhopal Mahto, Mr. Ajay Mishra, learned Additional Public Prosecutor, submits that merely because First Information Report is belatedly submitted before the jurisdictional Magistrate, prosecution's case cannot be doubted and the conviction cannot be interfered with. Reliance, in support of his submission, is placed by Mr. Ajay Mishra, learned Additional

Public Prosecutor, on the case of **Manga v. State of Uttarakhand**, reported in **(2013) 7 SCC 629**.

15. While considering the rival submissions made on the non-compliance of Section 167 of the Code of Criminal Procedure that the First Information Report, in the present case, was not sent, forthwith, as is warranted by Section 167 of the Code of Criminal Procedure, to the Chief Judicial Magistrate, East Champaran, at Motihari, it needs to be pointed out that the defence did not, while cross-examining the informant (PW 5) and/or the Investigating Officer (PW 8), express any doubt with regard to the genuineness of the First Information Report. In fact, while cross-examining the informant (PW 5) as well as the I.O. (PW 8), it was not even whispered by the defence that the FIR was *ante dated* or *manipulated* or that the original First Information Report was suppressed or substituted by the one, which has surfaced on the record.

16. In the light of what has been pointed out above, we do not find that in the facts and attending circumstances of the present case, any importance can be attributed to the fact that the First Information Report, in the case at hand, reached the Chief Judicial Magistrate, East Champaran, at Motihari, on 17.5.1984, though the First Information Report was shown to have been lodged on 15.5.1984.

17. As regards the *counter case*, it has been

submitted by Mr. Bindhyachal Singh, learned counsel, that no finding has been given, in the present case, with regard to the *counter case* or *cross case*, which was lodged from the end of the present appellants, though both the cases were heard and tried together.

CROSS CASE OR COUNTER CASE

18. Before we proceed further, let us determine the correctness of the submission made by Mr. Bindhyachal Singh that in the judgment under appeal, no finding has been recorded with regard to the *counter case* or *cross case*, which was lodged from the end of the present appellants, though the case, which has given rise to the present appeal, and the one, which was filed as a *counter case* or *cross case*, were heard together.

19. With regard to the *counter case* or *cross case*, it needs to be noted that though the Code of Criminal Procedure does not lay down any specific procedure regarding trial of *counter cases*, it is the practice adopted, in the interest of justice, by the Courts that if a case is committed to the Court of Session, the Counter Case, arising out of the same incident, should also be, ordinarily, committed to the same Court of Session even if the latter is not exclusively triable by a Court of Session. We have cautiously used the word '*ordinarily*', for, in an appropriate case, the Magistrate, instead of committing the case to a Court of Session, may have to discharge an accused in



terms of Section 245 of the Code of Criminal Procedure, particularly, when the case is not exclusively triable by the Court of Session. Undoubtedly, however, the case and the counter case should be tried by the same Presiding Officer in quick succession. The first case should be tried to a conclusion, but the judgment should be reserved till the second case is concluded and, thereafter, the judgment of the two cases should be pronounced separately. (See **Girijananda Bhattacharyya v. State of Assam, reported in MANU/GH/ 0022/1977 (Gauhati)**).

20. In **Kewal Krishan v. Suraj Bhan, [MANU/SC/ 0143/1980]**, the Supreme Court has held that simultaneous trials of both the cases, which are exclusively triable by Court of Session, before two different Courts over one and the same occurrence, are undesirable and both the cases should be tried by one Presiding Officer one after the other, for, there is a risk of two different Courts coming to conflicting findings.

21. While pronouncing the judgment on the guilt or otherwise of the accused facing the two trials, the judgment of each case shall be kept confined to the discussion of the evidence adduced in that particular case and a Court shall not make use of the evidence of one case for the purpose of enabling it to pronounce the judgment in the other case or allow its findings in one case to be influenced in any manner

whatsoever to the prejudice of the accused by the views, which it may have formed in the other case.

22. In other words, while considering the guilt or otherwise of an accused in a case, the evidence from the *counter case* or *cross case*, as it is commonly called, cannot be imported into the case and based on the evidence adduced in a *cross case*, the guilt or otherwise of an accused cannot be determined. This, however, does not mean that a person, who is an accused in the *cross case*, cannot give evidence in the case launched against him even if the evidence, which he seeks to give, has some bearing or may have some bearing in the *cross case*.

23. The contention of Mr. Bindhyachal Singh, learned counsel for the appellant, is that in the case at hand, the finding of the *cross case* has not been indicated, is. in our considered view, completely misplaced inasmuch as the learned trial Court has rightly dealt with and decided the present case in the light of the evidence adduced in the present case by the parties concerned.

24. Having pointed out that the mere fact that the First Information Report reached the Chief Judicial Magistrate, East Champaran, at Motihari, belatedly cannot, and does not, in the present case, make this Court draw adverse inference against the prosecution, let us, now, determine as to whether the evidence, adduced by the prosecution, was of such quality,

which could have been safe enough to base conviction of the accused-appellants thereon.

25. Bearing in mind what is indicated above, let us, briefly refer to the evidence of Dr. B.K.Agarwala (PW 6), who, on 15.05.1984, at 2.30 PM, had examined the informant, Sree Narain Prasad (PW 5). According to the doctor (PW6), he found the following injuries on the person of the informant:

"(i) One lacerated wound measuring 1" x 1¹/₄" x scalp deep on the front of right side of scalp;

(ii) Swelling 3" x 2" with tenderness over deltoid region left arm. He opined that both injuries were simple caused by hard blunt substance to be possible by blunt portion of Pharsa also, aged within 6 hours.

26. The doctor (PW 6) had also deposed that on the same day, i.e., on 15.05.1984, at 12.55 PM, he examined Sheocharan Prasad, i.e., brother of the informant, and found the following injuries:

"(i) One lacerated wound 1"x ¼"x scalp deep in front of left side of scalp with swelling 3"x2" with tenderness.

(ii) Swelling 3"x2"on back of the right side of scalp and adjoining right side of back of neck.

(iii) Abrasion 3"x ¼" and 4"x ¼"over back of left forearm.

(iv) Two bruises 2"x ¾" and 2"x ½" over lower part of back.

(v) One bruises 2"x 1" over right loin

(vi) Abrasion 1/2" x 1/4" back of left shoulder.

(vii) Abrasion 3/4" x 1/3" over back of right shoulder with swelling over right arm.

(viii) Swelling and tenderness on right buttock and

(ix) Abrasion in left knee."

27. In the opinion of the doctor, all injuries sustained by Sree Narain Prasad (i.e. the informant) and Sheocharan Mahto were simple and caused by hard blunt substance. While the injury report, in respect of the informant, Shri Narain Prasad (PW 5), has been proved and marked as Exhibit-1, the injury report of the informant's brother, Sheocharan Prasad, has been proved and marked as Exhibit 1/A.

28. Keeping in view the fact that all the injuries sustained by the informant, Shri Narain Mahto, and his brother, Sheocharan Prasad, were, according to the medical evidence on record, caused by hard blunt substance, let us, now, deal with the evidence of Dr. Krishna Narain Jha (PW 7), who had, admittedly, conducted, on 15.5.1984, at 5.30 PM, at Sadar hospital, Motihari, *post mortem* examination on the dead body of Dasrath Prasad. According to this witness (PW 7), on conducting the *post mortem* examination, he found as follows:

"(i) Semilunner stitched wound 3 1/2"x in length on the left side of head, 2" above, and behind left ear. On removing stitch

the lacerated wound was present 3 ½"x1/2" x compound communicated fracture of left parietal and left side of occipital bone and echymosis was present underneath and around the wound. On opening of skull, one haematoma (Jama Khun) 2"x1/2" was present around the wound and the brain matter under the wound was lacerated.

(ii) Bruise 5"x ¾"on back of right side of thorax.

(iii) Abrasion 1"x ½"on left knee

(iv) Abrasion ¾"x 1/3"on right knee.

(v) Swelling ½"x ½" on right side of chest."

29. In the opinion of the doctor (PW 7), death was caused due to head injury (injury No. 1) sustained by the said deceased, the injuries having been caused by hard and blunt substance.

30. From the medical evidence on record with regard to the injuries, which were claimed to have been sustained by the informant, Sree Narain Mahto, and his brother, Sheocharan Prasad, what clearly transpires is that all the injuries on the informant and his brother, Sheocharan Prasad, were caused by hard blunt substance.

31. Similarly, even from the evidence of the doctor (PW 7), who had conducted *post mortem* on the dead body of Dasrath Prasad, it is clear that all the injuries, sustained by the said deceased concerned, were found to have been caused by hard blunt substance.

32. In short, the injuries found not only on the dead body of Dasrath Prasad, but also on the persons of the informant, Sree Narain Prasad, and his brother, Sheocharan Prasad, were, according to the medical evidence on record, caused by hard blunt substance.

33. In the backdrop of the fact that that the injuries, sustained by the said deceased, Dasrath Mahto, and/or by the informant (PW 5) and his brother, Sheocharan Prasad, were caused by hard blunt substance and not by a sharp-edged weapon, such as, *farsa*, let us, now, take note of the ocular evidence on record.

34. It may be noted that the prosecution has examined altogether five witnesses, namely, PWs 1, 2, 3, 4 and 5 as eye-witnesses. While, however, considering the evidence of the eye-witnesses, it needs to be borne in mind that P.W 5 is the informant of the case, whereas PWs 2 and 3 are chance witnesses inasmuch as they were present around the place of occurrence by chance.

35. The consistent evidence of the prosecution witnesses is that Dasrath Mahto (deceased) was given blows by means of *farsa*, which is a sharp-edged weapon, by accused Bhopal Mahto and after Dasrath Mahto fell down, he was indiscriminately assaulted by other accused persons by means of *lathis*. Medical evidence, however, as noted above, completely

believes the assault on the head of the said deceased by means of *farsa*, which is a sharp-edged weapon, inasmuch as the injury, on the head of the said deceased, was caused by hard blunt substance.

36. It is noteworthy that in the First Information Report (Exhibit 4), not a word has been mentioned as to what part of the weapon was used.

37. Necessarily, therefore, in terms of the contents of the First Information Report, the said deceased was assaulted by the sharp-edge of *farsa* in the manner as is ordinarily done meaning thereby that the said deceased was assaulted by sharp-edge of *farsa* allegedly used by accused Bhopal Mahto.

CONSEQUENCES OF BLUNT EDGE OF A SHARP EDGED WEAPON IF CLAIMED TO HAVE BEEN USED BY ASSAILANT

38. In **Hallu and Others v. State of Madhya Pradesh (AIR 1974 SC 1936)**, the Supreme Court has clearly pointed out that ordinarily, when a witness deposes that an axe or a spear was used to attack, there is no warrant for the supposition that what the witness meant was that the blunt side of the weapon was used and if that be the implication, it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon.



39. In the case of **Hallu** (supra), all the eye-witnesses account of the occurrence was that two men were attacked by means of *lathis*, spears and axes, but their evidence was found to have been falsified by the medical evidence inasmuch as none of the injuries was found to have been caused by a spear or an axe. The High Court, in such a situation, refused to attach any importance to the discrepancy between ocular evidence and the medical evidence by observing that the axes and spears might have been used from the blunt side and, therefore, the evidence of the eye-witnesses could safely be accepted.

40. Dealing with the above observation made by the High Court in **Hallu's** case (supra), the Supreme Court pointed out thus,

"We should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon."

41. in the case of **Bhola Singh v. State of Punjab (AIR 1999 SC 767)**, too, the Supreme Court pointed out, "*.....As was done before the Courts below, it was*

contended before us that injuries suffered by the deceased-Saun Singh were from blunt weapon as indicated by the post- mortem report and the same could not have been inflicted with Gandasa and, as such, there is no good reason to hold that Didar Singh and Kartar Singh witnessed the occurrence. We have carefully gone through the evidence of Kartar Singh (PW-1) and Didar Singh (PW-2), the two eye-witnesses. If they had really witnessed the occurrence as had taken place, they would have certainly described the weapons used in causing injuries to the deceased-Saun Singh, leading to his death”.

42. Having noted what has been indicated above, the Supreme Court, in **Bhola Singh’s** case, further observed, thus:

*“It is highly improbable and unlikely that when the accused armed with sharp weapons like Gandasa and Ghop had used only the blunt edged side and not the sharp edged side of the said weapons. **We are convinced that these two eye-witnesses had set out this version only to fit in what had been found in the post mortem report.** The normal way in which a Gandasa and Ghop could be used was only from the sharp edged side and not from the blunt edged side. Therefore, it is highly unlikely that the two eye witnesses PW-1*



and PW-2 could have seen the incident as had taken place. It gives rise to serious doubt as to their presence at the time of incident. The trial Court and the High Court did not duly appreciate this aspect of the matter and, therefore, we are of the view that there is an error in this regard. Hence, we accept the case as set forth on behalf of the appellant. We allow this appeal, set aside the conviction passed by the trial Court as confirmed by the High Court and set him at liberty. Appeal allowed."

(Emphasis is supplied)

43. In the present case too, the prosecution witnesses have, while explaining the injuries caused to the said deceased, deposed, at the trial, that it was the blunt edge of *farsa*, which was used for causing assault on the said deceased. Since the manner of assault and the intent of the assault, according to the prosecution, were for the purpose of causing death of Dasrath Mahto, the accused would have, ordinarily, used the sharp-edge of a weapon like *farsa*.

44. The evidence, given by the prosecution witnesses, at the trial, that the blunt edge of the *farsa* was used, cannot be readily believed, when the initial disclosure of the manner of occurrence made by the informant was without the clarification that it was the blunt edge of *farsa*, which had been

used, while assaulting the said deceased.

45. Thus, the introduction of the explanation in the evidence of the prosecution witnesses that it was the blunt edge of the *farsa*, which had been used, while assaulting the said deceased, cannot but be regarded as an attempt made by the informant and other witnesses to bring their ocular evidence in tune with the findings of the *post mortem* report, which showed that the said deceased had sustained such injuries, which could not have been caused by a sharp-edged weapon, such as, *farsa*, but a hard blunt object.

46. In other words, it becomes abundantly clear that the facts of the present case being akin to the cases of **Hallu** (supra) and **Bhola Singh** (supra), we have no escape from the conclusion that having noticed the kind of injuries, which had been sustained by the said deceased, the witnesses have come out at the trial, with the explanation that the blunt edge of the sharp-edged weapon of the *farsa* was used and the informant has gone to the extent of saying that it was the handle of the *farsa*, which was used, while assaulting Dasrath Mahto.

CLASSIFICATION OF WITNESSES

47. Coupled with the above, it is the evidence of the prosecution witnesses that Dasrath Mahto was assaulted indiscriminately by 8-9 accused persons by means of *lathis*, whereas Dasrath Mahto was found to have sustained, apart from

single injury on his head, abrasion on the back of right side of thorax and swelling. These injuries completely bely the prosecution witnesses' assertions that the said deceased was indiscriminately assaulted by *lathis* by as many as 8-9 accused persons.

48. The impression that the evidence, adduced by the prosecution witnesses as to how Dasrath Prasad happened to sustain injuries and died, is not true, gets reinforced if the evidence on record is looked into from another angle. The evidence of PW 1 is that Dasrath Prasad was assaulted by accused Bhopal Mahto by the backside of *farsa*, i.e., by the blunt edge of *farsa*, which is a sharp-cutting weapon and when the informant, Sree Narain Mahto, and his brother, Sheocharan Prasad, went out to save him, then, accused Bhopal assaulted Sree Narain on his head with the backside of *farsa* and accused Rabindra, too, Sheocharan with the backside of *farsa*; whereas others hit Dasrath Mahto by means of *lathis*.

49. To the same effect is the evidence of PW 2, PW 3 and PW 4, who have deposed that accused Bhopal Mahto hit Dasrath Mahto by the backside of *farsa* and others hit Dasrath Mahto by means of *lathis* and when PW 5 (Shree Narain Mahto), Sheocharan Prasad, and their brother, went to save Dasrath Mahto, accused Rabindra Lal hit Sheocharan on his head by the backside of *farsa*.

50. However, the informant, Sree Narain Mahto (PW 5), has claimed that accused Bhopal Mahto had assaulted Dasrath Mahto with the *handle* of *farsa* and that when he (informant) and his brother, Sheocharan Prasad, went to save Dasrath, they, too, were assaulted by the *handle* of *farsa*.

51. Thus, there is clear discrepancy in the description of the occurrence given by PW 1, PW 2, PW 3, PW 4 on the one hand, and the informant (PW 5), on the other. This apart, the evidence of PW 5 does not at all inspire confidence that an assailant, such as, Bhopal Mahto, who wanted to kill Dasrath Mahto, would only use the *handle* of a *farsa* to cause injury on Dasrath Mahto's head; whereas he could have very well used the sharp-edge of the *farsa*. In no circumstance, a person, who is intending to kill a person, will use the *handle* of a *farsa* for assaulting or for causing injury.

52. Coupled with the above, while it is alleged by the prosecution witnesses that Rabindra Lal was the one, who had assaulted Sheocharan on his head by means of *farsa*, Rabindra Lal was not even named in the First Information Report, though the informant is claimed to be injured and eye witness.

53. What, now, needs to be noted is that according to the First Information Report, when the occurrence took place, the informant was returning from the house of his



parents-in-law along with his wife and two brothers, namely, Dasrath Mahto (deceased) and Sheocharan Prasad. Even in his evidence, the informant (PW 5) has claimed that while in one cart, his (informant's) wife was traveling, the occupants of the other cart were the informant himself, his brother, Dasrath Mahto (since deceased) and Sheocharan Mahto.

54. Coupled with above, the First Information Report mentions that on alarm being raised, Ramanand Prasad (not examined) and Prabhu Hazra (PW 2) came along with Ram Bahadur Prasad (not examined) and Mahendra Prasad (not examined) and, noticing them coming, the accused fled away; whereas Prabhu Sah (PW 1) claims that Prabhu Hazra and Ram Ayodhya were present nearby along with PW 1 and others from before the occurrence.

55. It is of immense importance to note, now, that according to P.W.2 (Prabhu Hazra), Dasrath Mahto (deceased) and Sheocharan (not examined) were the only ones present in the tyre cart, when the occurrence took place. This is wholly inconsistent with the contents of the First Information Report inasmuch as the First Information Report claims, as already indicated above, that the informant was returning in one of the two tyre carts along with his brother, Dasrath Mahto, and Sheocharan. If the informant was along with Dasrath and Sheocharan, he would have also been present in the same cart,

which had been boarded by Dasrath and Sheocharan, whereas, according to the evidence of PW 2, the informant was not present in the tyre cart at the place of occurrence.

56. There is, therefore, considerable force in the submissions made on behalf of the appellants that neither the informant, Sri Narain Mahto, nor Prabhu Sah (PW1) were present in the tyre cart, which had been boarded by Dasrath Mahto and Sheocharan Mahto and, therefore, none of them can be treated to have been truthful to the Court and, consequently, cannot be relied upon.

57. We may also pause here to point out that the informant (PW 5) claims that Rabindra Nath and Kashi Nath, too, were present in their cart; but the name of Rabindra Nath and/or Kashi Nath did not appear at all in the First Information Report as persons present in the cart, wherein Dasrath Mahto and Sheocharan Mahto were traveling.

58. In fact, belying completely the informant's version of the occurrence, P.W 2 (Prabhu Hazra) has deposed that only one tyre cart was seen at the place of occurrence meaning thereby that in the tyre cart, where Dasrath Mahto and Sheocharan were present, the informant was not present and that is why, the tyre cart, which Dashrath Mahto and Sheocharan had boarded, was the lone tyre cart found at the place of occurrence. Logically extended, it would mean that the

informant (PW 5) was present in that tyre cart, which had been boarded by his wife, and it was for this purpose that the tyre cart, which had been boarded by the informant's wife, was not even seen at the place of occurrence.

59. The impression, gathered above, gets strengthened, when we notice that even PW 3 has deposed that he saw only Dasrath and Sheocharan in the tyre cart and this witness (PW 3) has further clarified by deposing that he saw only one tyre cart at the place of occurrence.

60. What can also not be ignored is that PW 4 (Mathura Mahto) has claimed that he was returning from village Sirha along with informant and his bride, whereas the First Information Report gives no indication at all that PW 4 (Mathura Mahto) was also returning from Sirha along with the informant, his wife and his brothers.

61. In fact, even PW 4 has deposed that only Dasrath Mahto and Sheocharan were sitting in the tyre cart, when the accused appeared before the cart, and though Dasrath Mahto tried to save himself by running away, he (Dasrath Mahto) was assaulted by accused Bhopal Mahto and others.

62. We may further note that PWs 3 and 4 were not found reliable witnesses even by the learned trial Court. As to why these two witnesses were not found reliable, the learned trial Court has assigned cogent reasons at paragraph 17 of the

judgment under appeal. The observation of the learned trial Court, appearing at paragraph 17, in this regard, read thus,

"17. Apart from P.Ws. 1, 2 and 5, P.W. 5 Ram Ayodhya Puri and Mathura Mahto also have been examined and they have fully supported the case of prosecution on the manner of occurrence and offences alleged against the accused persons. These two witnesses were not mentioned in the fardbeyan. P.W. 5 in his evidence has stated the name of Mathura Mahto, Dev Narain Mahto and Prabhu Sah also, other than the persons named in the fardbeyan returning along with from his sasural, but has not named Ram Ayodhya Puri. He stated that there were 10 members including two children coming with him but has not named two other persons. In his cross-examination para 7, he admitted the fact that he had stated before police that on his raising hulla, the villagers Ramanand, Prabhu Hazra and Prabhu Sah had come and saved him. P.Ws. 3 and 4, the other two persons, if had accompanied and coming along with, they would must come forward and rescued the informant and his victim brothers. P.W. 1 Prabhu Sah also has not stated if P.Ws. 3 and 4 and other persons not named by informant had accompanied the informant in the said Bidagari. This witness is the son of Bhikhari Sah and as such on behalf of accused Raghuraj Mahto, Bhopal Mahto and Radha Mahto who filed their counter case S.Tr. 73 of



1985, the defence simply asked that Sarswati Devi was his mother and two months before the occurrence of this case, she had filed a case against Raghuraj Mahto, Bhopal Mahto and Radha Mahto which is still pending. The witness admitted that said three persons were pattidars. On behalf of rest of accused, two defence question, the witness stated that prior to occurrence of this case some of the accused used to call his mother as Dain which was not true. He asserted that he has mixing with the family of Sree Narain Mahto and had taken his tyre cart in the Donga ritual of Sree Narain Mahto. As discussed above, P.W. 2 also had not named P.Ws. 3 and 4 coming along with the informant in his tyre cart. So the evidence of P.Ws. 3 and 4 as the eye-witnesses of the occurrence cannot be relied upon. They might have been introduced after thought and in consultation with the Mukhiya Ram Bahadur who might have natural sympathy of the family of the informant, because deceased Dasrath Matho and Sheocharan Mahto were accused with him, in S. Tr. No. 72 of 1980.

63. We find that the reasons, assigned by the learned trial Court, are cogent and convincing and we see no reason to take a view different than what the learned trial Court has taken. Necessarily, therefore, PW 3 and PW 4 had to be held, and we hold them, as *unreliable witnesses*.



64. Further-more, in the light of the evidence, which we have discussed above, PW 2 has deposed that only Dasrath and Sheocharan were in the tyre cart and only one tyre cart was found present at the place of occurrence and even the evidence of PW 3 shows that Dasrath and Sheocharan were seen sitting in the tyre cart at the place of occurrence, when the occurrence took place.

65. In the light of the above evidence of PWs 2 and 3, one cannot escape from the conclusion that the informant (PW 5) was not present near the place of occurrence and that was the reason why he was not seen in the tyre cart, wherein Dasrath Mahto and Sheocharan Prasad was seen at the place of occurrence, and the tyre cart, where the informant was traveling with his wife, was not consequently seen at the place of occurrence.

66. What crystallizes from the above discussion is that the evidence, adduced by the prosecution, is an admixture of half-truth and untruth and since the truth, if any, is so inextricably mixed with the falsehood that it has become wholly impossible to disengage the truth from the half-truth and untruth, the prosecution's evidence has to be held, and we do hold, as wholly unsafe and unreliable.

67. Though it has been agitated, on behalf of the appellants, that various incriminating circumstances, which the



learned trial Court has relied upon, were not put to the accused-appellants and without eliciting the answers of the accused-appellants, no reliance ought to have been placed on the incriminating circumstances appearing against the accused-appellants and though we might have been tempted to set aside the conviction of the accused-appellants and sentences passed against them and remand the case to the learned trial Court for appropriate examination of the accused-appellants, yet, considering the fact that we do not find the evidence, adduced by the prosecution, credible to place the reliance upon, we eschew from remanding the case to the learned trial Court inasmuch as the accused-appellants could not have, in our considered view, been convicted on the basis of the unreliable nature of evidence, which the prosecution had adduced.

68. The fall out of the above discussion is that none of the incriminating circumstances, which the learned trial Court has relied upon, could be proved legally and convincingly. In the face of such a state of evidence on record, the accused-appellants ought to have given benefit of reasonable doubt.

69. 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 be held, to have proved their case beyond reasonable doubt against the accused-appellants. Consequently, the accused-appellants deserve to be accorded, at least, benefit

of doubt.

70. In the result and for the foregoing reasons, we allow both the appeals. The impugned conviction of the accused-appellants and the sentence 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.

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

72. 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.)

(Nilu Agrawal, J.)

A.I./ **N.A.F.R.**

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