

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.98 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION, DATED 13TH JANUARY, 1993, AND ORDER OF SENTENCE, DATED 15TH JANUARY, 1993, PASSED BY SHRI RAM NATH, 1ST ADDITIONAL SESSIONS JUDGE, ROHTAS, AT SASARAM, IN SESSIONS TRIAL NO.59 OF 1991/12 OF 1991, ARISING OUT OF KOCHAS POLICE STATION NO.61 OF 1990.)

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Jamwant Choudhary, son of late Prasad Choudhary, resident of village- Kapasian, Police Station- Kochas, District-Rohtas.

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.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Ashok Kumar Mishra, Advocate.

Mr. Varun Kumar, Advocate.

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

Mr. Ravi Bhardwaj, *Amicus Curiae*

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

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

Date: 24-03-2015

By the judgment, dated 13.01.1993, passed, in Sessions Trial No. 59 of 1991/12 of 1991, by learned 1st Additional Sessions Judge, Rohtas, at Sasaram, the appellant, Jamwant Choudhary, stands convicted under Section 302 of the Indian Penal Code. In consequence of his conviction, the appellant stands, under the order, dated 15.01.1993, sentenced to suffer imprisonment for life.

2. The case of the prosecution, as unfolded at

the trial, may, in brief, be described as under:

(i) Deceased Budhu Mushahar was brother of the informant, Rama Shankar Mushahar (PW 6). Smt. Tetari Devi (PW 7) is paternal aunt of the informant. On 26.10.1990, accused Jamwant Choudhary, accompanied by one Dhrub Choudhary, came to the house of his paternal aunt, Tetari Devi (PW 7), where Budhu Mushahar was also present, and took away with them Budhu Mushahar. When they were leaving the house of PW 7 (Tetari Devi), PW 7 asked them as to when they would come back. To the query so made, accused Jamwant Choudhary replied by saying that they would come back after smoking *ganja*. Since thereafter, Budhu Mushahar was not seen alive; rather, his dead body was found, on the next day, at the house, belonging to accused-appellant, Jamwant Choudhary, where the accused-appellant used to maintain poultry and sell chicken. Ram Shankar Mushahar (PW 6), then, went to Kochas Police Station and orally informed the police, at 7.00 AM, on 27.10.1990, about the occurrence by stating that accused Jamwant Choudhary and Dhrub Choudhary had taken away with them Budhu Mushahar on the previous night and that Budhu Mushahar's dead body was found as indicated hereinbefore.

(ii) The oral information, so given by PW 6

(informant), was reduced into writing as his *fardbeyan* and treating the same as First Information Report, Kochas Police Station Case No.61 of 1990, under Section 302/34 of the Indian Penal Code, was registered, on 28.10.1990, against accused Jamwant Choudhary and Dhrub Choudhary.

(iii) During investigation, inquest was held over Budhu Mushahar's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Section 302 of the Indian Penal Code, against accused Jamwant Choudhary. No *charge sheet* was submitted against co-accused, Dhrub Choudhary.

3. At the trial of the present accused-appellant, Jamwant Choudhary, a charge, under Section 302 of the Indian Penal Code, was framed. To the charge so framed, the accused-appellant pleaded not guilty.

4. In support of their case, prosecution examined altogether 10 (ten) witnesses including the doctor, who had conducted the *post mortem* examination. The accused was, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offence, which was alleged to have been committed by him, the case of the defence being that of denial. The defence also adduced evidence by examining two

witnesses to prove that the accused did not maintain any poultry farm.

5. Having, however, found the accused-appellant, Jaswant Choudhary, guilty of the offence, which he stood charged with, learned trial Court convicted him accordingly and passed sentence against him as mentioned above.

6. Aggrieved by his conviction and the sentence, which has been passed against him, accused Jamwant Choudhary, as a convicted person, has preferred this appeal.

7. We have heard Mr. Ashok Kumar Mishra, learned Counsel, appearing on behalf of the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State. We have also heard Mr. Ravi Bhardwaj, learned Counsel, appearing as *Amicus Curiae*.

8. Before we come to the merit of the present appeal, it may be noted that according to the evidence of Dr. Umajeet Ranjan (PW 9), who had, admittedly, conducted, on 27.10.1990, at 3.30 PM, *post mortem* examination on Budhu Mushahar's dead body, he (PW 9) found following *ante mortem* injuries:

"(i) $1\frac{1}{4}$ " x skin deep incised wound over base of right thumb,

(ii) 2" x $\frac{1}{2}$ " x $1\frac{1}{2}$ " x skin deep incised wound

behind right ear,

(iii) *1^{1/2}" x 1/2" x skin deep incised wound over right part of occipital bone,*

(iv) *2^{1/4}" x 1/2" x bone deep incised wound over centre of head with fracture of both parietal bones,*

(v) *2" x 1" x skin deep incised wound just above stomach,*

(vi) *Multiple abrasions over left part of back,*

(vii) *3" x 1/4" x cavity deep incised wound 1" right of midline and 1" x 1/4" above the navel through which loops of large, small gut and omentum were protruding.*

On dissection the following injuries were found:

(i) Fracture of both parietal bones,

(ii) Brain and meninges congested,

(iii) Heart empty, parietal cavity contains blood clots and undigested food particles,

(iv) Stomach and small intestines ruptured,

(v) Bladder contained 3 ounces of urine."

9. In the opinion of the doctor (PW 9), death was caused due to shock and haemorrhage resulting from the above injuries sustained by the said deceased, the injuries

having been caused by sharp-edged weapon, such as, *dagger*. From the above evidence of the doctor (PW 9), it clearly transpires that Budhu Mushahar had met with *homicidal* death.

10. From the unshaken evidence of the doctor (PW 9), what clearly transpires is that Budhu Mushahar had met with *homicidal* death. The question, which, however, falls for consideration, is: whether the accused-appellant was involved in causing death of Budhu Mushahar?

11. Our quest for an answer to the question, posed above, brings us to the ocular evidence on record and, in this regard, we find that out of the ten witnesses examined by the prosecution, PWs 1 to 5 were declared hostile by the prosecution and cross-examined by them.

12. From the cross-examination of the hostile witnesses, nothing could, however, be elicited by the prosecution to show that PWs 1 to 5 had witnessed the occurrence of assault on, and/or killing of, Budhu Mushahar. PWs 1 to 5 cannot, thus, be regarded as eyewitnesses to the alleged occurrence of assault on Budhu Mushahar and/or his killing by the accused-appellant. In fact, the entire case of the prosecution, thus, comes to rest on circumstantial evidence.

13. With regard to the above, we notice that the informant (PW 6) of this case, namely, Rama Shankar Mushahar,



who is brother of the said deceased, has deposed that accused Jamwant Choudhary, accompanied by Dhrub Choudhary, came to the house of the informant's paternal aunt, Tetari Devi (PW 7), and the informant (PW 6) saw his brother, Budhu Mushahar, accompanied by Jamwant Choudhary and Dhrub Choudhary, going away and, thereafter, Budhu Mushahar did not come back home and, in the morning, he (PW 6) found the dead body of Budhu Mushahar.

14. Close on the heels of the evidence of PW 6, his maternal aunt, Tetari Devi (PW 7), has deposed that Budhu Mushahar used to have, sometimes, meals at her house and, sometimes, he used to cook himself.

15. As regards the occurrence, PW 7 has deposed that on the day of occurrence in the evening, when deceased Budhu Mushahar was sitting at her house, accused Jamwant Choudhary and Dhrub Choudhary came to her house and left with Budhu Mushahar and when she asked Budhu Mushahar as to when he would return, accused Jamwant Choudhary replied by saying that they would return after smoking *ganja*, but Budhu Mushahar did not come back thereafter; rather, his dead body was found, according to the evidence of PW 7, at the *Gumti* (i.e., a small room) of the accused-appellant, Jamwant Mushahar.

16. It is also in the evidence of PW 7 that with regard to theft of a radio, which had taken place at her house, the relation between accused Jamwant Choudhary and the said deceased was, somewhat, strained.

17. So far as PW 8 (Shankar Mushahar) is concerned, his evidence is that on the day of occurrence, he heard, at night, somebody crying '*Babu, please save my life*', but presuming that someone was dying at the hospital located nearby, he (PW 8) did not pay any heed and, on the following day, Budhu Mushahar's dead body was seen by him (PW 8) at the poultry farm of accused Jamwant Choudhary.

18. What emerges from the prosecution's evidence, which we have discussed above, is that the prosecution's case rests on the evidence of PWs 6, 7 and 8 inasmuch as PWs 6 and 7 have claimed that on the day of the occurrence in the evening, the accused-appellant, Jamwant Choudhary came, accompanied by one Dhrub Choudhary, to the house of PW 7 and took away with them Budhu Mushahar, when PW 7 asked them as to where they were going, the accused-appellant replied by saying that they would be back after smoking *ganja*, but thereafter, Budhu Mushahar did not come back home, rather, his dead body was found, on the following day, in the house, which used to be maintained, according to the

evidence of PWs 6 and 7, as a poultry farm by the accused-appellant.

19. From the evidence of the Investigating Officer, it transpires that Budhu Mushahar's dead body was found lying on a cot near the said poultry farm of the accused-appellant.

20. So far as the motive for alleged commission of the offence is concerned, we are unable to attribute to the accused-appellant any such motive, which could have made him kill Budhu Mushahar inasmuch as it was about a year before the occurrence that a radio was stolen away from the house of PW 7 and, according to PW 7, the said theft had strained their relation with the accused-appellant. The theft, which had so taken place, was at such a distant point of time that it is impossible to confidently hold that the said theft had soured the relation of the said deceased with the present appellant so much that it would have made the appellant put to death Budhu Mushahar. This impression gets strengthened from the fact that at the time, when the accused-appellant, accompanied by Dhrub Choudhary, according to the evidence of PW 7, came to the house of PW 7 and took away Budhu Mushahar, no apprehension was expressed by Budhu Mushahar or his brother, Ram Shankar Mushahar (PW 6), and/or by Tetari Devi (PW 7).



21. Coupled with the above, what cannot be ignored is that even according to the evidence of PWs 6 and 7, the accused-appellant was not the sole person in whose company the said deceased had left his paternal aunt's house. When two persons had allegedly taken the said deceased away from his house, only one of the two persons could not have been confidently held to have been responsible for the commission of offence of murder, particularly, when there is nothing in the evidence on record to show as to how, when and where Dhrub Choudhary happened to part company with the accused and the said deceased. Even if, therefore, we assume, for a moment, that Budhu Mushahar was put to death, while in the company of the accused-appellant, the possibility of Budhu Mushahar having been put to death by Dhrub Choudhary cannot be completely ruled out. There may be variety of reasons, which may make a person incapable to depose as to how an occurrence of killing had taken place in a situation in which the accused-appellant was placed. Above all, greatest hindrance, we find, in the present appeal, is the appellant's examination under Section 313 (1)(b) of the Code of Criminal Procedure, 1973.

22. When the evidence on record indicated that it was the accused-appellant in whose company the said deceased had left the house of his maternal aunt (PW 7), it was



incumbent, on the part of the learned trial Court, to have to put the said piece of evidence to the accused-appellant and his response ought to have been sought thereto; but the said piece of evidence was never put by the trial Court to the accused-appellant and, hence, the evidence, so given, could not have been considered by the learned trial Court and cannot be considered by this Court, in the present appeal, against the accused-appellant.

23. Though we toyed, for a while, with the idea of setting aside the conviction of the accused-appellant and the sentence passed against him, remanding the case to the learned trial Court for examining the accused-appellant in accordance with the requirements of Section 313(1)(b) of the Code of Criminal Procedure, 1973, and, then, disposing of the case in accordance with law, we, however, refrain from doing so. In fact, in the case at hand, the set of facts, as discernible from the materials on record, do not encourage us to remand the case to the learned trial Court for the purpose of examining the accused-appellant under Section 313(1)(b) of the Code of Criminal Procedure, 1973, after more than twenty years of filing of the appeal by the accused-appellant. We have not been able to ignore the fact that the accused-appellant was, according to the evidence on record, not the lone person, who was in the



company of the said deceased; rather, one Dhrub Choudhary was also present with the said deceased, when the accused-appellant was present in the company of the accused-appellant. In such circumstances, a reasonable possibility of Dhrub Choudhary being the assailant cannot be confidently excluded and, hence, the accused-appellant deserves to be given, at least, benefit of reasonable doubt.

24. Thus, 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 appellant. Consequently, the accused- appellants deserved to be accorded, at least, benefit of doubt.

25. Situated thus, we are clearly of the view that in the facts and attending circumstances of the present case, the appellant ought to have been acquitted by according to him benefit of doubt. It, therefore, logically follows that the conviction of the accused-appellant and the impugned sentence passed against him cannot be sustained.

26. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, are hereby set aside. The

accused-appellant is held not guilty of the offence, which he stands convicted of, and he is hereby acquitted of the same under benefit of doubt.

27. Since the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall stand discharged.

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

(I. A. Ansari, J.)

(Gopal Prasad, J.)

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