

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.354 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE, DATED 6TH JULY, 1993, PASSED BY SHRI DANIEL BARLA, 2ND ADDITIONAL SESSIONS JUDGE, AURANGABAD, IN SESSIONS TRIAL NO. 38 OF 1989/266 OF 1992, ARISING OUT OF AURANGABAD (M) POLICE STATION CASE NO. 112 OF 1988, CORRESPONDING TO G.R. NO. 619 OF 1988.)

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1. Shailendra Rawani, S/o. Shambhu Rawani,
2. Jitendra Rawani, S/o. late Ganesh Rawani,
Both are resident of Village- Akauna, P.S. Aurangabad, District- Aurangabad.
..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

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Appearance :

For the Appellant/s : Mr. Bharat Lal, *Amicus Curiae*.

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

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

ORAL JUDGMENT

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

Date: 20-02-2015

Under the judgment, dated 06.07.1993, passed, in Sessions Trial No. 38 of 1989/266 of 1992, by learned 2nd Additional Sessions Judge, Aurangabad, the appellants, Shailendra Rawani and Jitendra Rawani, stand convicted under Section 302 read with Section 34 of the Indian Penal Code. Following their conviction, the accused-appellants have been 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) On 22.04.1988, at about 08.00 PM, while



Ganesh Rawani (since deceased), after taking his dinner, was cleaning his hand in his courtyard, Jitendra Rawani, appellant No.2, accompanied by his brother, Shailendra Rawani, appellant No.1, both of whom are sons of the said deceased from his first wife, Indra Pari Devi (DW 1), appeared there and Jitendra Rawani threw chilli powder into the eyes of Ganesh Rawani. Unable to bear the burning sensation in his eyes, because of the chilli powder thrown into his eyes, Ganesh Rawani tried to chase the said two of his sons, namely, Jitendra Rawani and Shailendra Rawani. At that point of time, Jitendra Rawani assaulted Ganesh Rawani by means of a *sword*, while accused Jitendra Rawani, appellant No.2, assaulted his father, Ganesh Rawani, by means of a *lathi*. Both the accused aforementioned gave several blows by *sword* and *lathi* in the manner as indicated hereinbefore.

3. Assistant Sub-Inspector of Police, Ramchandra Sahu (PW 8), while on patrolling duty, heard that a person, called Ganesh Rawani of village Akauna, had been killed by his two sons. On receiving the said information, PW 8 (Investigation Officer) hurriedly came to the house of the said deceased and, on finding Ganesh Rawani's dead body lying there, he held inquest over the said dead body, which was also subjected to *post mortem* examination. In the meanwhile, however, Kalawati Devi (PW 1), daughter of the deceased by



his second wife, lodged a written report, at the said police station, with regard to the occurrence and the information, which she gave to the police, was recorded in the form of *fardbeyan* and treating the same as First Information Report, Aurangabad (M) Police Station Case No. 112 of 1988 was registered, under Section 302 read with Section 34 of the Indian Penal Code, against Shailendra Rawani and Jitendra Rawani.

4. On completion of the investigation, a *charge sheet* was laid, *under* Section 302 read with Section 34 of the Indian Penal Code, against the two accused aforementioned.

5. At the trial, when a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against both the accused persons, both the accused pleaded not guilty thereto.

6. In support of their case, prosecution examined as many as eight (8) witnesses. Accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in their examinations aforementioned, both the accused denied that they had committed the offence, which was alleged to have been committed by them. In support of their case, the defence also adduced evidence by examining Indra Pari Devi (DW 1), mother of the two accused aforementioned, as a witness.

7. Having, however, arrived at the finding that accused-appellant, namely, Shailendra Rawani and Jitendra Rawani, had been proved guilty of the charge under Section 302 read with Section 34 of the Indian Penal Code, the learned trial Court also convicted them accordingly. Following their conviction, sentence has been passed against the convicted persons as mentioned above.

8. Aggrieved by their conviction and the sentence passed against them, both the accused, as convicted persons, have preferred this appeal.

9. We have heard Mr. Bharat Lal, learned Counsel, appearing as *Amicus Curiae*, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

10. While considering the present appeal, what attracts our attention, most prominently, is that according to the evidence of Dr. Nand Kishore Prasad (PW 7), who had, on 23.04.1988, admittedly, conducted *post mortem* examination on the dead body of Ganesh Rawani, he had found following *ante mortem* injuries on the said dead body:

"(i) *Incised wound in left forearm, in posterior aspect measuring 2 ½" x 2" x soft tissues deep;*

(ii) *Incised wound on the left cheek starting from part of left eye to the back of left ear with chopping of lower part of pinna of the*

left ear measuring 8" x 1" x bone deep and cutting of the facial bone of the left side.

(iii) Incised wound in left malar prominence to the left side of neck measuring 7" x 2" x bone deep;

(iv) Oblique incised wound on the lower jaw of left side extending to the left side of neck measuring 4" x 1¹/₂" x bone deep with cutting of the mandible on left side and cutting of neck vessels and nerves;

(v) Oblique incised wound on the back of the neck extending up to frontal part of pinna of left ear measuring 5" x 3" x bone deep with cutting of first cervical vertebra; spinal chord and cutting of neck vessels;

(vi) Oblique incised wound on the right parietal region measuring 6" x 1" x bone deep with fracture of right parietal bone and brain matter was out;

(vii) Incised wound of left parietal region obliquely placed measuring 4"x2"x bone deep and a portion of parietal bone was separated and brain substance was out;

(viii) Incised wound on left parietal region just by the side of midline measuring 6" x 1" x bone deep with fracture of left parietal bone;

(ix) Incised wound on left scapular region measuring 3" x 1" x bone deep;

(x) Incised wound on the left shoulder region measuring 2" x 1" x skin deep;

(xi) Incised wound and an

amputation of half of the proximal phalanx of middle finger and abscess of phalanx;

(xii) Incised wound on the left distal phalanx of the index finger 1" x ½" x bone deep;

(xiii) Incised wound on the upper part of right arm measuring 2" x 1" x 1½";

(xiv) Oblique abrasion on right intra scapular region measuring 5" x 1/6"

11. In the opinion of the doctor, the cause of death was massive hemorrhage and shock caused by laceration and churning of brain substance due to severe injuries caused by sharp cutting weapon and that the weapon used could have been a *sword*.

12. Neither the finding of the doctor nor his opinion with regard to cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing assault on, and death, of the said deceased were disputed either by the prosecution or by the defence. This apart, we, too, do not notice any thing inherently incorrect or improbable in the evidence given by the doctor.

13. From the unshaken and uncontroverted medical evidence on record, what transpires is that the said deceased had sustained as many as 14 (fourteen) incised wounds on several parts of his body including one on the scalp and/or abrasion on the right scapular region, the incised wound having obviously been caused by sharp cutting weapon, such

as, *sword*; whereas oblique abrasion can be attributed to either fall of the deceased on the ground or a blow by means of the *lathi*.

14. Bearing in mind the medical evidence on record, we, now, turn to the evidence of PW 1 (Kalawati Devi), daughter of the said deceased and the informant of the case. According to the evidence of PW 1, while her father was having meals, at about 8.00 PM, in the night of the occurrence, Jitendra Rawani was standing there and asked PW 1 to take the *lota* (water pot) inside the house and as she (PW 1) went inside the house to keep *lota* (water pot), Jitendra Rawani took her father to another part of the house. Shailendra Rawani, who was armed with *sword*, started assaulting mercilessly her father by means of *sword*. While Jitendra Rawani had assaulted with *lathi*, Shailendra Rawani assaulted his father by means of *sword* and as PW 1 started screaming for help, the assailants attempted to assault her, too, but she fled away towards their courtyard, where her younger brother, Raju, was sleeping. Ganesh Rawani died at the spot and, on hearing *hulla*, which had been raised, as indicated hereinbefore, Mohan Chaudhary, Dhaneshar, Nagendra, Jagdish and others came there and Shailendra Rawani, who was brandishing the *sword* after killing his father, threatened those, who had assembled there, that he would kill them, too, if anyone would come near him. The

motive of the killing of her father, according to PW 1, was with regard to the claim, which the two accused had on the shop of the said deceased.

15. Close on the heels of the evidence of PW 1 (Kalawati Devi), PW 3 (Marchhia Devi) has deposed that her house is situated adjacent to the house of the said deceased and, in the night of the occurrence, which was a moonlit night and lantern was burning in the courtyard of the said deceased and an earthen lamp (*dia*) was lying lit in her house, she saw Shailendra Rawani assaulting his father by means of *sword* and Jitendra Rawani assaulting his father by means of *lathi*, while the said deceased was having his meals, the assault having taken place on the said deceased after throwing chilli powder into his eyes. It is in the evidence of PW 3 that PW 1 raised *hulla* and the villagers arrived there. It is also in the evidence of PW 3 that when co-villagers assembled at the scene of the occurrence, both the accused left the place, but the villagers found Ganesh Rawani dead, whereas Jitendra and Shailendra had sneaked into the room, which was being run as a shop, and started threatening from there that they would kill anyone and no one, therefore, dared to apprehend them.

16. Before proceeding further, what needs to be noted is that PW 1 has not deposed as to whether the night was moonlit or not and whether there was any source of light at the



place of occurrence or not? PW 3 (Marchhia Devi) has deposed, as already indicated above, that there was an earthen lamp, which was lying kept in her house and so far as the house of the deceased was concerned, a lantern was lying lit there apart from the fact that the night of the occurrence was a moonlit night. When cross-examined by the defence, PW 3 asserted that she had stated before the Police that an earthen lamp was lying lit. However, the Investigating Officer (PW 8) has clearly denied that PW 3 never made any such statement before him.

17. Clearly, therefore, PW 3 has introduced the source of light, in her evidence, by making substantial improvement on her previous statement in order to make her evidence believable that she had seen, at night, the two accused persons assaulting the said deceased in the manner as has been deposed by her. A witness, who can go to the extent of making such substantial improvement, cannot be readily believed and even if the evidence of such a witness is not rejected outright, as wholly unreliable, her evidence would fall, at the most, in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

18. Coupled with the above, when we consider the evidence of PW 1 and PW 3 in the light of the medical evidence on record, we find that though evidence, as adduced by PW 1 and PW 3, shows that multiple blows were given by



Shailendra Rawani, who was armed with *sword*, and Jitendra Rawani by means of *lathi*, the *post mortem* examination reveals as many as 14 incised wounds on various parts of the body of the said deceased, whereas there was only one *abrasion* on the scapular region, which could not have been caused by *sword*, but by means of a *lathi*. If PW 1 had also given multiple blows by means of *lathi*, then, there would have been multiple injuries on the said dead body caused by means of *lathi*. The *post mortem* report, however, does not give indication of multiple assaults by *lathi* on the said deceased.

19. Logically extended, it would mean that the accused Jitendra Rawani was not involved in the occurrence or had not participated in the manner as has been projected by the prosecution witnesses.

20. Situated thus, it becomes clear that neither the evidence of PW 1 nor the evidence of PW 2 can be confidently held to be wholly reliable and even if, therefore, 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.

21. 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.

22. The evidence of PW 1 and PW 2, which the prosecution has adduced in the present case, cannot be safely relied upon unless the same is found to have been corroborated by some credible independent evidence, direct or circumstantial.

23. 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.

24. A reference, with regard to the above position 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."

25. Situated thus, it becomes clear that merely because PW 1 and PW 2 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.

26. Proceeding further with the evidence available on record, we notice that according to evidence of PW 5, who, admittedly, came to the place of occurrence on hearing *hulla*, when he (PW 5) on hearing *hulla* went inside the house of the said deceased, many of his co-villagers were present there and Ganesh Rawani was lying dead on the northern side of his house, his dead body having been covered by a bed sheet and, on removing the bed sheet, he saw the said deceased having cut marks on his neck, etc., and that his daughter (i.e., PW 1) told him that her two elder brothers, namely, Shailendra Rawani and Jitendra Rawani, had killed her father. We may, immediately, point out that so far as PW 1 is concerned, she does not claim to have reported the occurrence to PW 5. Necessarily, therefore, the evidence of PW 5 has to be treated as hearsay and cannot but be kept excluded from the purview of our consideration.

27. While taking note of the above aspect of the case, we may also not ignore to mention the fact that PW 1 has claimed that on the *hulla* raised by her, Mohan Chaudhary, Dhaneshwar, Nagendra, Jagdish and others had come and were reported by her (PW 1) that her brothers (the two appellants) had killed her father; but none of the witnesses, who had been

so named, have been examined and no explanation has been offered by the prosecution for their non-examination nor is there any explanation discernable, in this regard, on the evidence on record.

28. In a situation, as depicted above, one can have no escape from the conclusions, and we do conclude, that had Mohan Chaudhary, Dhaneshwar, Nagendra and Jagdish been examined as witnesses at the trial, they would not have supported the evidence of PW 1. No wonder, therefore, that the said persons were withheld from giving their evidence.

29. So far as PW 6 is concerned, his evidence is that on hearing *hulla*, he went to the house of the deceased and saw that many of his co-villagers had assembled there and the dead body of Shilendra's father was lying on the ground and Jitendra Rawani said that he had killed his father. This assertion of P.W.6 that Jitendra Rawani had claimed that he had killed his father has not been supported by any of the witnesses including PW 1 and PW 3 nor has the same been corroborated by the evidence of the co-villagers, who had, admittedly, arrived at the scene of the occurrence. Belying further the evidence of PWs 1 and 3, PW 6 deposes that Shailendra Rawani was armed with *lathi*, whereas the whole case of the prosecution is that it was Sheilendra Rawani, who was armed with *sword* and assaulted his father and killed him by means of *sword*.



30. What emerges from the above discussions is that the evidence adduced by the prosecution is admixture of half-truth and untruth and since the truth cannot be disengaged from half-truth and untruth, the benefit of such a poor quality of evidence on record must go to the accused-appellants and the accused-appellants ought to have, therefore, been accorded, at least, benefit of doubt.

31. The above inference gets strengthened, when we turn to the evidence of sole defence witness, DW 1 (Indra Pari Devi), who is the first wife and mother of the accused-appellants. It is the evidence of DW 1 that the villagers of Akauna village had killed her husband and that her sons (i.e., the appellants) ran away out of fear and that it was because of the threats given by those assailants that her daughter (PW 1) had been forced to give evidence against her sons (i.e., appellants) by falsely implicating them with the alleged offence.

32. Though the prosecution cross-examined DW 1, nothing particular was elicited from her to show that what she had deposed ought to be disbelieved. Looked at from this angle, too, the evidence, given by DW 1, cannot be ignored or brushed aside.

33. 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 deserve to be accorded, at least, benefit of doubt.

34. In the result and for the foregoing reasons, we allow this appeal. 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 offences, which they stand convicted of, and they are hereby acquitted of the same under benefit of doubt.

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

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

37. 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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