

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.228 of 1993

With

Criminal Appeal (DB) No.304 of 1993

Against the judgment of conviction, and the order of sentence, dated 28.04.1993, passed by Shri Prabhu Nath Prasad, 3rd Additional Sessions Judge, Munger, in Session Case No. 32/91, arising out of Sheikhpura Police Station Case No. 39/1990.

1. Kishori Chouhan son of Tetar Chouhan
 2. Ram Bilash Chouhan son of Ram Charitra chouhan
 3. Bengali Chouhan son of Lala Chouhan
 4. Nandu Chouhan son of Sadhu Saran Chouhan
 5. Bijoy Chouhan son of Shisha Chouhan
 6. Singhashan Chouhan son of Hari Chouhan
 7. Sadhu Saran Chouhan son of Bira Chouhan,
- All residents of village Yarpur, P.S. Araria, District Munger

....APPELLANTS (IN CR.APP. (DB) NO. 228 of 1993)

With

Lakhpati Chouhan son of Sarjun Chauhan, resident of village- Yarpur, P.S. Araria, District Munger

....APPELLANTS (IN CR.APP. (DB) NO. 304 of 1993)

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance:

(In CR. APP (DB) No. 228 of 1993)

For the Appellants : Mr. Bharat Kumar, Advocate.
Mr. Rabindra Kumar, Advocate.

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

(In CR. APP (DB) No. 304 of 1993)

For the Appellant: Mr. Bharat Kumar, Advocate.
Mr. Rabindra Kumar, Advocate.

For the Respondent: Mr. Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

ORAL JUDGMENT

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

Date: 16-02-2015

Under challenge, in the present appeals, is the

judgment, dated 28.04.1993, of conviction, in Session Case No. 32 of 1991, by 3rd learned Additional Sessions Judge, Munger, and the order, dated 28.04.1993, whereby sentences have been separately passed against the accused-appellants.

2. By the impugned judgment under appeal, while the learned trial Court convicted the accused-appellant, Lakhpatri Chauhan (since dead), under Section 302 of the Indian Penal Code, the accused-appellants, namely, Kishori Chouhan, Sadhu Sharan Chouhan, Bijoy Chouhan, Singhasan Chouhan, Nandu Chouhan, Bangali Chouhan and Ram Bilash Chouhan have been convicted under Sections 302 read with Section 34 of the Indian Penal Code. Following their conviction under Section 302 read with Section 34 of the Indian Penal Code, the appellants aforementioned have been sentenced to undergo imprisonment for life.

3. During the pendency of Criminal Appeal (DB) No. 304 of 1993, which had been preferred by Lakhpatri Chouhan as convicted person, the appellant, Lakhpatri Chouhan, has died and, therefore, the appeal stands abated.

4. With regard to Criminal Appeal (DB) No. 228 of 1993, it needs to be pointed out that during the pendency of the appeal, the appellant No.2, Ram Bilash Chouhan, has died and, hence, Criminal Appeal (DB) No. 228 of 1993 stands abated as against the appellant No.2, namely, Ram Bilash

Chouhan.

5. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) On 11.03.1990, at 5.30 PM, when the informant, Rajendra Prasad Chauhan (P.W.4), and his wife, Jagat Devi (deceased), his uncle, Siaram Chauhan (P.W.2), his son, Arun Chauhan (P.W.1), his Bhabhi Indrabati Devi (not examined) his mother, Mahajani Kuar (not examined), and his daughter were on the roof of their house, they heard voices of quarrelling of female persons coming from the house of their neighbour, Rajendra Mistry, whose house, according to the informant, Rajendra Prasad Chouhan, was situated on the eastern side of the house of the informant at a distance of about 200 feet from the house of the informant. The informant (P.W.4), along with his wife, Jagat Devi (since deceased), went, out of curiosity, to look from the roof of their house into the house of Rajendra Mistry to find out what the quarrel was all about. At that point of time, the informant (PW 4) and others standing on the roof of the informant's house saw Gobardhan Chouhan, Lakhpati Chouhan (since dead), Ram Bilash Chouhan (since dead), Kishori Chouhan, Sadhu Sharan Chouhan, Bijoy Chouhan, Singhasan Chouhan, Nandu Chouhan and Bangali Chouhan armed with guns and rifles standing on the lane; and while so standing there, accused Lakhpati



Chouhan (since dead) and Gobardhan Chouhan (*absconder*) fired from their country-made guns and the bullets, so fired, hit the chest and right arm of Jagat Devi, wife of the informant (PW 4), causing her death instantly. As the members of the family of the said deceased raised alarm, people from the neighbourhood started assembling near the house of the informant (PW 4) and the assailants took to their heels with their fire-arms.

(ii) Following a *fardbeyan* (Ext-3) lodged by Rajendra Prasad Chouhan with regard to the occurrence and treating the said *fardbeyan* (Ext-3) as *First Information Report*, Seikhpura Police Station Case No.39 of 1990 was registered, under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against all the said nine accused persons, namely, (i) Gobardhan Chouhan, (ii) Lakhpatri Chouhan (since deceased), (iii) Ram Bilash Chouhan (since deceased), (iv) Kishori Chouhan, (v) Sadhusharan Chounah, (vi) Binay Chouhan, (vii) Singhashan Chouhan, (viii) Nandu Chouhan and (ix) Bangali Chouhan.

(iii) During the course of investigation, inquest was held over the said dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959,

against all the nine accused persons aforementioned.

(iv) As accused Gobardhan Chouhan *absconded*, his case was split up from Sessions Case No. 32 of 1991, wherein the remaining eight accused persons faced trial.

6. At the trial, a charge, under Section 302 of the Indian Penal Code, was framed against accused-appellant, Lakhpatri Chouhan (since deceased), and another charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against the remaining 7 (seven) accused persons. All the 8 (eight) accused persons pleaded not guilty to their respective charges.

7. In support of their case, prosecution examined altogether six (6) witnesses. Out of these six witnesses, PW 1 (Arun Chouhan), PW 2 (Sriram Chouhan), PW 3 (Sunil Kumar Chouhan) and PW 4 (Rajendra Prasad Chouhan), who is the informant, have claimed to be the eye witnesses of the occurrence. While PW 5 (Dr. S. Fazaluddin) was the one, who had performed *post mortem* examination on the said dead body, PW 6 (Narendra Prasad) is the investigating officer of the case.

8. The accused persons were, then, examined under Section 313(1)(b) of the Code of Criminal Procedure and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were

alleged to have been committed by them, the case of the defence being that of denial. The defence did not, however, adduce any evidence.

9. Having found the accused persons guilty of the offence charged with, the learned trial Court convicted them accordingly and passed sentence against them as indicated above.

10. Aggrieved by their conviction and sentence passed against them, all the eight accused, as convicted persons, preferred both these appeals.

11. We have heard Mr. Bharat Kumar, learned Counsel, appearing on behalf of the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State. Heard also Mr. Abhimanyu Sharma, learned Additional Public Prosecutor, appearing on behalf of the State.

12. Before proceeding further, what needs to be borne in mind is that while PW 1 (Arun Chouhan) is the son of the informant (PW 4), PW 2 (Sriram Chouhan) is the uncle of the informant (PW 4) and PW 3 (Sunil Kumar Chouhan) is the brother of the informant (PW 4). All these four persons, who have claimed to be eye witnesses to the occurrence, are, thus, members of the same family.

13. Merely because of the fact that PW 1, PW 2, PW 3 and PW 4 are members of the same family, their



evidence cannot be discarded as evidence of interested witnesses. However, in the backdrop of the fact that there was, admittedly, enmity existing between the informant and his family, on the one hand, and the accused persons, on the other hand, the Court is required to scan the evidence of PWs. 1, 2, 3 and 4 carefully so as to avoid possibility of any false implication or roping in any of any innocent along with the guilty ones inasmuch as enmity is a double edged-weapon and enmity, therefore, cuts both the ways. While enmity may furnish the motive for committing an offence, it may, at the same time, become the reason for falsely implicating a person. To put it a little differently, since the eye witnesses are members of the same family, their evidence needs to be minutely scrutinized in order to ensure that in their zeal to get an accused convicted, they may not have given colourised version of the occurrence with a view to rope in an innocent person along with guilty one.

14. In the light of what have been pointed out above, when we turn to the evidence of the eye witnesses, namely, PW 1, PW 2, PW 3 and PW 4, we find that each one of them has claimed that accused Gobardhan Chouhan and Lakhpati Chouhan had fired one shot each from their respective country-made guns and the bullets so fired hit the deceased (Jagat Devi) on her chest and her right arm. Can these assertions of the witnesses aforementioned, who have claimed

to be eye witnesses, be implicitly relied upon?

15. Our quest for an answer to the question, posed above, brings us to the evidence of the doctor (PW 5), who had, as already indicated above, conducted *post mortem* examination on the dead body of Jagat Devi. According to the evidence of this witness (PW 5), he had found as follows:

"(i) **Lacerated wound** on the back of the right fore-arm $1\frac{1}{2}$ " x $\frac{1}{2}$ " x muscle deep with **blackening of margin of the wound.**

(ii) Three **circular lacerated wounds** $\frac{1}{4}$ " in diameter on the lateral aspect of the right upper arm, below the right shoulder 1" – 2" apart.

On dissection: Blood clots were present on the muscle and soft tissues. There was fracture of the head of the right humerus. One deformed pellet was removed from the wound.

(iii) One **lacerated circular wound** $\frac{1}{4}$ " in diameter with **blackening of skin around it** on the front of the left shoulder.

On dissection, blood clots were present in the soft tissues. There was fracture of the acromial end of the left clavity. One deformed pellet removed from the wound.

(iv) One **lacerated circular wound**

¼" in diameter on the upper inner quadrant of the right breast.

On dissection- blood clots were present.

(v) One **lacerated circular wound**

on the left side of the chest adjacent to the left border of the sternum in the left third inter costal space.

On dissection of the chest cavity, blood clots were present in both the chest cavities. Both lungs were lacerated. Haematoma was present. Right pulmonary vessels were found ruptured. Right third rib was found fractured. One deformed pellet was removed from right chest cavity and one from the left."

(Emphasis is added)

16. It is in the evidence of the doctor (P.W.5) that four deformed pellets were removed from the dead body, the pellets were sealed in a glass container, signed and handed over to the Constable Nos.138 and 693.

17. In the opinion of the doctor (P.W.5), death was due to shock and hemorrhage as a result of the above injuries, especially, injuries to both lungs and pulmonary

vessels, the injuries having been caused by fire-arm and time elapsed since death being from 12 to 24 hours.

18. From a cautious and minute examination of the findings of the doctor, what inspires is that the said deceased had received four bullet injuries; whereas PW 1, PW 2, PW 3 and PW 4 claim that only two bullets were fired, one each by accused Lakhpati Chouhan (since dead) and Gobardhan Chouhan from their respective country-made guns. Though one may have, perhaps, ignored the inconsistency between the evidence of the eye witnesses aforementioned that only two bullets were fired at the said deceased and the medical evidence on record indicating that as many as four bullets were fired at, and sustained by, the said deceased, what cannot be ignored and must not be ignored is the nature of the injuries, which were, according to *post mortem* report, found to have been sustained by the said deceased.

19. With regard to the above, it is of immense importance to note that according to the medical evidence on record, the said deceased had sustained as many as four bullet injuries, namely, (i) lacerated *circular wound* ¼" in diameter with *blackening of skin around it* on the front of the left shoulder, (ii) One lacerated *circular wound*, measuring ¼" in diameter with *blackening of skin around it* on the front of the left shoulder, (iii) One lacerated *circular wound*, measuring ¼"

in diameter, on the upper inner quadrant of the right breast and (iv) one lacerated *circular wound* on the left side of the chest adjacent to the left border of the sternal in the left third inter postal state.

20. The question, therefore, is: whether a *circular wound* could have been caused if the accused, namely, Gobardhan Chouhan (absconder) and appellant Lakhpatri Chouhan (since dead) had fired from their country-made guns to the roof of the house of the informant, while accused-appellants were standing on the lane, and the informant (P.W.4), along with his wife, Jagat Devi (since deceased), his uncle, Siaram Chauhan (PW 2), his son, Arun Chauhan (P W 1), his sister-in-law, Indrabati Devi (not examined), his mother, Mahajani Kuar (not examined), and his daughter, claim to have been standing on the roof of their house.

21. While considering above aspect of the prosecution's case, it is unavoidably noticeable that since the doctor (PW 5) had found *blackening of the margin of the wound*, he has deposed, in his cross-examination, that blackening is caused, because of deposit of gun powder and the blackening of the margin of the wound would not be caused if a fire-arm is used from a distance of more than 3 to 4 feet.

22. We may, at this stage, pause and refer to **Modi's Medical Jurisprudence and Toxicology, (21st**

Eddition), Page-268, where the observations read;

"Blackening is found if fire-arm like shotgun is discharge from a distance of not more than 3 feet and a revolver or pistol discharged with about 2 feet."

23. In the backdrop of the fact that blackening of the margin of the wounds would not have been possible if the fire-arm was used from a distance of more than 3 feet to 4, when we turn to the evidence on record, we find that accused Lakhpati Chouhan and accused Gobardhan Chouhan were alleged to have fire from the ground level to the roof and had this description of the occurrence been true, no blackening of margin of the wounds would have been found.

24. Coming to the evidence of PW 1 (Arun Chouhan), we notice that according to him, the accused persons, namely, Lakhpati Chouhan and Gobardhan Chouhan, had fired on the person of his mother by means of guns.

25. Close on the heels of the evidence of PW 1, PW 2 has deposed that accused Lakhpati Chouhan and accused Gobardhan Chouhan had fired by means of guns, which hit Jagat Devi.

26. Broadly in tune with the evidence of PW1 and PW 2, PW 4 (informant) has deposed that accused Lakhpati Chouhan and accused Gobardhan Chouhan had fired, *in air*, by means of guns, which hit the chest and right arm of his wife.

27. Coupled with the above, it is in the evidence of PW 1, that the height of their house is more than twenty four feet. Closely following the evidence of PW 1 (son of the deceased), PW 3, uncle of the informant has deposed that the height of the house would be 23 to 24 feet. As regards the height of the roof from the lane, the investigating officer (PW 6) has deposed that the height of the house is 30-35 feet.

28. From the above evidence of PW 1, PW 2 and PW 6 (Investigating Officer), it becomes clear that when the said deceased was at least 23-24 feet above the lane, the assailants were standing on the lane, while firing from their country-made guns.

29. In the face of the above evidence given by PW 1, PW3 and PW 6, when we revert to the evidence of doctor (PW5), we notice that according to the evidence of the doctor (PW5), a *circular wound* is caused if victim is face to face with the assailant and if assailant is on the lower level and victim is on upper level, *oval shaped* wound would be caused.

30. What the medical evidence on record, thus, clearly shows is that had the victim been shot from a close range with the assailant standing face to face, the circular wounds, which were found by the doctor (PW 5), could have been caused provided that the assailants had fired from a close range of 3 to 4 feet and had the said deceased been fired at,

while she was standing on the roof of her house, when the assailants were standing on the lane at the lower level, it is not *circular wounds*, but *oval shaped 'wounds'*, which wound have been sustained by the said deceased.

31. What logically follows from the above is that if the eye witness's account of the occurrence were true and if the assailants had fired by standing on the lane, then, the said deceased would not have sustained *circular wounds*, rather, she would have sustained *oval shaped wounds* and since the victim was found to have sustained, '*circular wounds*', the nature of the wounds indicate that she had been shot at, while the assailants were standing face to face at a close range.

32. Situated thus, it becomes abundantly clear that the medical evidence on record belies the description of the occurrence, which PWs 1, 2, 3 and 4, claiming as eye witnesses, have given and/or projected at the trial.

33. When there is conflict between ocular evidence and medical evidence, a Judge cannot shirk his shoulders helplessly and acquit the accused; rather, endeavour has to be made to determine as to which one of the two versions — one given by the eye-witnesses and the other by the doctor — is true. It is possible to convict an accused on the basis of ocular evidence if the Court believes that the ocular evidence is true and reliable even if the medical evidence

points out to the contrary. When, however, the Court cannot determine whether the eye witness's account of the occurrence is true, the benefit of conflict between the ocular evidence, on the one hand, and the medical evidence, on the other, has to be given to the accused.

34. While considering the question as to whether the Court shall, in the present case, ignore medical evidence on record and accept the evidence of PW 1, PW 2, PW 3 and PW 4, who have claimed to be eye witnesses, it may be noted, as already indicated above, that the prosecution's case is that on hearing voices coming from the house of Rajendra Mistry, whose house, according to the evidence of PW 4 (informant), was located on the eastern side of his (informant's) house, the informant and his wife, out of curiosity, went towards the eastern side of the roof of their house and when the informant's wife, Jagat Devi, was on the eastern side of the roof of her house, she was shot at. Can the evidence so given by PW 1 be believed is in the question, which, now, arises for consideration?

35. In order to test the veracity of the evidence of the informant (PW 4), whose evidence is that there was a quarrel between the female persons in the house of Rajendra Mistry and that the house of Rajendra Mistry is at a distance of about 200 feet towards east of his (informant's) house, we may



point out that in his cross-examination, PW 4 has denied that the house of Rajendra Mistry is not on the eastern side of the informant's house. On the contrary, the Investigating Officer's evidence is that after the eastern side of the lane, there are houses of Sadhu Saw and Kedar Sah and after the western side of the lane, there is house of Rajendra Lohar.

36. From the evidence given by the Investigating Officer, it becomes clear that the very genesis of the occurrence has not been convincingly proved by the prosecution inasmuch as the said deceased is claimed to have sustained bullet injuries, while she was on the eastern side of his roof looking into the house of Rajendra Mistry; whereas Investigating Officer's evidence is clear that Rajendra Mistry's house is intervened by a lane on the western side of the informant's house. Looked at from every angle, too, the evidence of PW 4 as well as the evidence of the remaining eye witnesses, namely, PW 1, PW 2 and PW 3, cannot be held to be trustworthy and reliable.

37. In view of what we have discussed above, we do not find that the prosecution has been able to prove its case beyond all the reasonable doubt.

38. Situated thus, we are clearly of the view that in the facts and attending circumstances of the present case, the appellants ought to have been accorded, at least,

benefit of doubt.

39. In the result and for the foregoing reasons, we allow the appeal. The impugned conviction of the accused-appellants and the sentence passed against them by the judgment and order, under appeal, is 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.

40. Since the surviving accused-appellants, namely, (i) Kishori Chouhan, (ii) Bangali Chouhan, (iii) Nandu Chouhan, (iv) Bijoy Chouhan, (v) Singhashan Chouhan and (vi) Sadhu Saran Chouhan, are already on bail, their bail bonds are hereby cancelled and their sureties shall stand discharged.

41. 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.)

A.I./Mkr.-

(Samarendra Pratap Singh, J.)

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