

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.35 of 2010

Arising out of the judgment of conviction, dated 21.11.2009, and the order of sentence, dated 24.11.2009, passed, in Sessions Trial No. 240 of 1988, by Shri A. K. Srivastava, Additional Sessions Judge, Fast Track Court No. 1, Banka, arising out of Shambhooganj Police Station Case No. 64 of 1983

Shankar Mistri, son of Late Santu Mistri, residence of village Naroun, Police Station shambhooganj, District Banka, at present, resident in village Dalba More, Police Station Balhar, District Banka

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : NONE

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

Mr. Sajid Salim Khan, Advocate, as Amicus Curiae

**CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND
HONOURABLE MR. JUSTICE VIKASH JAIN**

ORAL JUDGMENT

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

Date: 21-07-2015

Under challenge in the present appeal is the judgment, dated 21.11.2009, passed, in Sessions Trial No. 240 of 1988, by learned Additional Sessions Judge, Fast Track Court No. 1, Banka, whereby the accused-appellant, Shankar Mistri, was convicted under Section 302 and 201 of the Indian Penal Code. Following his conviction under Section 302 of the Indian Penal Code, the accused-appellant, Shankar Mistri, has been sentenced, under the order, dated

24.11.2009, to suffer imprisonment for life and, for his conviction under Section 201 of the Indian Penal Code, the accused-appellant, Shankar Mistri, has been sentenced, under the order aforementioned, to undergo rigorous imprisonment for a period of 7 (seven) years.

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

(i) Kathuri Devi @ Kaili Devi (since deceased), mother of the accused-appellant, Shankar Mistri, was a patient of leprosy. The accused-appellant, Shankar Mistri, and his wife, Kavita Devi (since acquitted) used to live together with the said deceased. The said deceased was a friend of Kusumi Devi (not examined), who, on 15.10.1983, informed Charendra Prasad Singh (PW 3) that for the past few days, Kathuri Devi (i.e., the said deceased) had not been seen and, on the previous night, when she (Kusumi Devi) had gone to answer nature's call, she had seen Shankar Mistri (i.e., the accused-appellant) and his wife, Kavita Devi (since acquitted), at the backyard of their house and while Kavita was holding a lantern in her hand, accused Shankar Mistri was digging earth at their backyard and, therefore, Kusumi Devi suspected that Kathuri Devi had been done to death.

(ii) On the information so received, PW 3 shared the information with others and, accompanied by PW 1 and



others, went to the house of the accused and asked him about the whereabouts of his mother, Kathuri Devi. As the accused did not give any satisfactory reply with regard to where his mother was, the suspicion against accused Shankar Mistri thickened and that was why the co-villagers of Shankar Mistri took Shankar Mistri to the backyard of his house and, on looking around the backyard of the house, accused Shankar Mistri's co-villagers noticed that at a particular place at the backyard, the ground had been freshly dug. On the insistence of the co-villagers, when accused Shankar Mistri had dug the said place, foul smell started emanating therefrom. Suspecting that accused Shankar Mistri's mother, Kathuri Devi, stood buried at the place, where the foul smell was emanating from, accused Shankar Mistri was tied by his co-villagers; but one of the co-villagers of accused Shankar Mistri helped accused Shankar Mistri run away.

(iii) On 18.10.1983, at about 06:00 PM, while Kedar Singh (not examined), a Sub-Inspector of Police, who, later on became the Investigating Officer, was on patrolling duty, *dafadar* of the village, Arvind Singh (not examined), informed him that there was a rumour in village Narauna that Kathuri Devi had been murdered. On receiving the information, when the said police officer, accompanied by other police personnel, came to the house of the accused, he



was informed by Kavita Devi, wife of accused Shankar Mistri, that her mother-in-law had gone somewhere on 14.10.1983. Thereafter, having made some queries here and there, the said police officer went to the backyard of the house of the accused and on noticing freshly dug earth, the police got the said place dug and a decomposed body of a female was disinterred, which was identified to be the dead body of Kathuri Devi by her co-villagers.

(iv) With the said body, the police party reached Shambhooganj Police Station and on arriving there, the said police officer lodged a *fardebayan*, which was treated as the First Information Report and became the basis for registration of Shambhooganj Police Station Case No. 64 of 1983, under Sections 302/201 of the Indian Penal Code, against accused Shankar Mistri and accused Kavita Devi.

(v) During investigation, inquest was held over the said dead body, which was also subjected to *post mortem* examination. The *post mortem* examination revealed that Kathuri Devi had been severely injured and the haemorrhage and shock, resulting therefrom, caused death of Kathuri Devi. The two accused aforementioned were arrested and, on completion of investigation, a *charge sheet* was laid, under Sections 302/201/34 of the Indian Penal Code, against the accused aforementioned.

3. At the trial, charges, under Sections 302 and 201 read with Section 34 of the Indian Penal Code, were framed against the two accused aforementioned. To the charges, so framed, both the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 4 (four) witnesses. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in their examinations aforementioned, 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 of denial and having being falsely implicated. However, no evidence was adduced by the defence.

5. Having arrived at the finding that there is no incriminating material against accused Kavita Devi, the learned trial Court acquitted her. Having, however, arrived at the finding that accused Shankar Mistri had been proved guilty of the charges aforementioned, learned trial Court convicted him accordingly. Following his conviction, sentences have been passed against the convict as mentioned above.

6. Aggrieved by his conviction and the sentences passed against him, the accused, as a convict, has preferred this appeal.

7. We have heard Mr. Sajid Salim Khan, learned

Counsel, appearing as Amicus Curiae, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State.

8. While considering the preset appeal, let us, first, take note of the medical evidence on record. According to the doctor (PW 4), who had, admittedly, on 19.10.1983, conducted *post mortem* examination on the dead body of Kathuri Devi, he found as follows:

"(a) There was collection of blood under chest skin and muscular layers of chest wall.

(b) There was fracture of fourth, fifth and sixth rib on left side on front aspect.

(c) There was fracture of sixth and seventh rib on right side of chest on front aspect.

(d) Both the lungs were torned and extensively lacerated.

(e) Chest cavity contained liquid blood."

9. While considering the findings of the *post mortem*, it needs to be pointed out that according to the doctor (PW 4), dead body was decomposed with cornea having fallen back and concave purplish, red streaks of veins prominent overlined and splinter relaxed.

10. There is no indication from the medical evidence on record or from the other evidence, which we would discuss, as to how the said dead body was identified as the dead body of Kathuri Devi, when it was in decomposed state.

11. Necessarily, therefore, while the findings of the

doctor as to what injuries had been found on the said dead body and what was the cause of death of the person, whose dead body was subjected to *post mortem* examination, remains undisputed, there is no evidence on record showing as to how the said dead body was identified as the dead body of Kathuri Devi.

12. Neither the findings of the doctor (PW 4) nor his opinion, with regard to the cause of death of the said deceased, were disputed by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 4).

13. Logically, therefore, the said dead body was treated as the dead body of Kathuri Devi, because the dead body was disinterred from the backyard of the house of accused-appellant.

14. The fact that the said dead body was in a decomposed state may not, in itself, be sufficient to exonerate the accused, what needs to be pointed out is that according to the evidence on record, it is Kusumi Devi, a friend of the deceased, who had informed the co-villagers including PW 3, that on 15.10.1983, when she had gone to answer nature's call, she had seen the accused-appellant and his wife, Kavita Devi, at the backyard of their house and while Kavita Devi was holding a lantern in her hand, the accused-appellant was

digging earth at their backyard.

15. Sadly enough, Kusumi Devi was not examined as a witness, who is claimed to having given the said information, and the evidence of those witnesses, therefore, who have claimed to have received the said information from Kusumi Devi, cannot, but be treated to be *hearsay*.

16. There is, therefore, no evidence on record that the accused and/or his wife was seen either digging the earth at the backyard of their house or burying the said dead body.

17. There is also, admittedly, no evidence on record of anyone having seen the accused-appellant either causing death of his mother and/or burying her dead body. Though the First Information Report alleges that according to the co-villagers of the accused-appellant, since Kathuri Devi had been suffering from leprosy, the accused-appellant and his wife, Kavita Devi, wanted to get rid of Kathuri Devi, there is, however, no cogent evidence to support this allegation.

18. Out of the four witnesses examined by the prosecution, PW 2 was declared hostile and, therefore, the prosecution rests its case on the evidence of PW 1 and PW 3. While PW 3 is silent with regard to the nature of relationship, which the accused-appellant and/or his wife maintained with Kathuri Devi, the clear evidence of PW 1 is that the relationship between Kathuri Devi, on the one hand, and the

accused-appellant and his wife, Kavita Devi, on the other, was cordial.

19. What surfaces from the above discussion of the evidence, which has been adduced by the prosecution, is that Kathuri Devi disappeared and a dead body was disinterred from the backyard of the house of accused-appellant. There can, therefore, be a reasonable inference that the said dead body was of Kathuri Devi.

20. The questions, however, which remain to be answered, are: whether Kathuri Devi was put to death by the accused-appellant, Shankar Mistri, or his wife, Kavita Devi, who already stands acquitted, or Kathuri Devi was, in the light of the charge framed against the accused-appellant, put to death by the accused-appellant, Shankar Mistri, and his wife, Kavita Devi, (who already stands acquitted) in furtherance of their common intention. The evidence, adduced by the prosecution, does not furnish clear answer to this vital question.

21. When two person were in occupation of the house, where the said deceased used to live, one of the two persons, namely, Shankar Mistri, the accused-appellant, could have not been, in the absence of any clear, cogent, convincing or concrete evidence, convicted as the one, who had killed his mother inasmuch as the possibility of the accused-appellant

being innocent and his wife, Kavita Devi, having put to death her mother-in-law cannot be confidently ruled out.

22. Similarly, in the absence of the fact that Kusumi Devi has not been examined as a witness at the trial, there is no admissible evidence that it was the accused-appellant, who had buried the said dead body at the backyard of his house.

23. The prosecution was left with no other witness, whose evidence could have been used against the accused-appellant. It is, indeed, disturbing to note that the learned trial Court relied upon the previous statement of Kusumi Devi recorded under Section 164 of the Code of Criminal Procedure. Not only the statement of Kusumi Devi, but even the statements of Ambika Singh, Charender Singh and Karu Singh, recorded under Section 164 of the Code of Criminal Procedure, have been relied upon treating their statements as substantive evidence.

24. We may pause here to point out that a statement of a witness, recorded under Section 164 of the Code of Criminal Procedure, 1973, is not substantive evidence and no conviction can be founded on the basis of the statement of a witness recorded under Section 164 of the Code of Criminal Procedure. A distinction needs to be drawn in this regard between the scheme of trial of a *sessions case* governed by the Code of Criminal Procedure, 1973, vis-à-vis

the scheme of trial of a *sessions case* under the Code of Criminal Procedure, 1898.

25. Did law permit the learned Trial Court to adopt such a course and rely on such previous statements of some witnesses to convict the appellant, especially, when the four witnesses aforementioned, namely, Kusumi Devi, Ambika Singh, Charender Singh and Karu Singh, were not even examined at the trial?

26. While the previous statement of a witness recorded under Section 161 of the Code of Criminal Procedure, can be used only for the purpose of proving contradictions by prosecution, a statement, recorded under Section 164 of the Code of Criminal Procedure, may be used for contradiction as well as, at times, for corroboration. If a witness resiles from his/her previous statement, he or she may be punished for *perjury*, i.e., for making or giving false evidence on oath before the Magistrate; but, as a corollary, it cannot be held that the statement, recorded under Section 164 of the Code of Criminal Procedure, is the truthful version of the occurrence. Reference may be made, in this regard, to **Ram Kishan Singh v. Harmit Kaur & Another**, reported in **MANU/SC/0169/1971**.

27. We have noticed a growing tendency in the courts to refer to **Dhanbal v. State of Tamil Nadu**, reported



in **MANU/SC/0103/1979**, for the purpose of wholly relying on the witnesses' statements recorded under Section 164 of the Code of Criminal Procedure treating the same as substantive evidence. Reliance so placed by the learned trial courts on **Dhanbal's** case (supra) is incorrect. The case, so relied upon, was a case conducted under the old Code of Criminal Procedure. In the committal proceeding, the witnesses gave evidence sticking to their said statements. In the trial before the Sessions Court, when the witnesses admitted to have given the evidence, in question, in the committal proceeding, the evidence given by the witnesses in the committal proceeding was transposed in *extenso* to the record of the Sessions Court under section 288 of the Code of Criminal Procedure. This procedure was objected to on the ground that the procedure applied was wrong and it made the evidence an admissible. The objection raised by the defence becomes clear from the following observations in **Dhanabal** (supra) :-

"The plea of the learned counsel is that the evidence marked under section 288 is inadmissible as it was only read in full to the witnesses and had not been put to them. The procedure that was adopted in the Sessions Court was that when the witnesses started giving a version hostile to the prosecution, he was asked whether he was examined in the Committal Court. The evidence marked as

given by him in the Committal Court was read over to the witnesses by the Public Prosecutor. The witnesses admitted that he had given evidence as found in the Ext. And that he had signed it. The evidence given in the Committal Court was transposed to the record of the Sessions Court under section 288 of the Code of Criminal Procedure."

28. Repelling the above objection of the defence, the Supreme Court, in **Dhanabal** (supra), laid down as follows:-

"It is thus clear from the authorities referred to above that the requirements of section 288 would be fully complied with if statements of the witnesses are read in extenso to them and they admit that they have made these statements in the committal Court. The required procedure has been followed in this case and the attack made by the learned counsel has to fall."

29. Dealing with the question as to whether a witness, whose statement has been recorded under Section 164 of the Code of Criminal Procedure, out of apprehension that he/she might resile from their version, is inherently unreliable, the Supreme Court, in **Dhanabal** (supra), observed as follows :-

"The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the Police had reasons to suspect that the



witnesses might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus, recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under Section 164 Cr.PC no problem arises. If the witness resiles from the statement given by him under Section 164 in the Committal Court, the witness can be cross/examined on his earlier statement. But, if he sticks to the statement given by him under Section 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under section 288 Cr.PC, will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled In coming to the conclusion as to whether the witness should be believed or not. The fact that the Police had Section 164 statement recorded by the Magistrate, would not by itself make his evidence suspect."

30. That in view section of 157 Evidence Act, a statement under Section 164 of the Code of Criminal Procedure can be used for corroboration is also clear from the following observation made in **Dhanabal** (supra) :-

"Section 157 of the Evidence Act makes it clear that the statement recorded under Section 164 of the Cr.PC can be relied on nor corroborating the statements made by the witness in the Committal Court. This Court has expressed its view that though the

statements made under Section 164 of the Cr.PC is not evidence, it is corroborative of what has been stated earlier in the Committal Court vide MANU/SC/0198/1970 The High Court was right in relying on the statement of the witnesses under Section 164 as corroborating their subsequent evidence before the Committal Court."

31. The Supreme Court has, thus, laid down that the statements made by the witnesses under Section 164 of the Code of Criminal Procedure could be used for corroborating their evidence given in the committal proceedings. In other words, there has to be substantive evidence on record to enable the Court to use the previous statements of the witness, recorded under Section 164 of the Code of Criminal Procedure, for the purpose of corroboration. The Supreme Court nowhere laid down in **Dhanabal's** case (supra) that the statement, under Section 164 of the Code of Criminal Procedure, is substantive evidence. Such haphazard and superficial reading of judicial precedents is highly undesirable.

32. What crystallizes from the above discussion is that the previous statements recorded under Section 164 of the Code of Criminal Procedure, which have been treated as substantive evidence in the present case, were not substantive evidence under the scheme of the Code of Criminal Procedure, 1973, and if the said previous statements are kept excluded

from the purview of the Court's consideration, the only evidence, which, at best, remains against the accused-appellant, is the fact that his mother died, while living with him and a female dead body was recovered from the backyard of the house of the accused-appellant.

33. Under the circumstances, which we have indicated, there is great degree of suspicion that it is the accused-appellant, who might have killed his mother, Kathuri Devi.

34. On the basis of an information that an accused may have killed, the accused cannot be convicted inasmuch as the conviction for an offence requires convincing state of mind that the person, accused of commission of an offence, was the one and no one else, who had committed the offence, or the accused was the one, and no one else, who must have committed the offence charged with.

35. While considering the probative value of the evidence given by PW 1 and PW 3, who are co-villagers of accused-appellant, Shankar Mistri, it may be noted that since none of them can be treated as a wholly reliable witness, they can, at best, be treated as *hearsay* witnesses, who are neither wholly reliable nor wholly unreliable.

36. 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.

37. The evidence of the eye-witnesses, 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.

38. 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.

39. 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."

(Emphasis is added)

40. Situated thus, it is clear that merely because PW

1 and PW 3 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 evidence of another infirm witness.*

41. When there is distinct possibility of Kathuri Devi having been put to death by the wife of the accused-appellant, Shankar Mistri, cannot be ruled out, the accused-appellant could not have been convicted; more so, when his wife, Kavita Devi, has been acquitted on the basis of the same set of evidence on record, which had been considered and relied upon against the accused-appellant. No conviction of the accused-appellant was, therefore, in the absence of any other additional material, permissible. It is trite that suspicion, howsoever grave, cannot become basis of conviction.

42. Because of what have been discussed and pointed out above, we are clearly of the view that in the facts and attending circumstances of the present case, prosecution has failed to prove its case beyond reasonable doubt and the accused-appellant ought to have been accordingly acquitted under benefit of doubt.

43. In the result and for the forgoing reasons, we allow this appeal. The impugned conviction of the accused-

appellant and the sentences passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offences, which he stands convicted of, and he is hereby acquitted of the same under benefit of doubt.

44. Since the accused-appellant, Shankar Mistri, is in custody, let him be set at liberty, forthwith, unless he is required to be detained in connection with any other case.

45. The Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the lower court record.

46. Learned Amicus Curiae be paid a fee of Rs. 5,000/-.

(I. A. Ansari, J.)

(Vikash Jain, J.)

Prabhakar Anand/AFR

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