

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 431 of 2008

Against the judgment of conviction, dated 29.02.2008 and the order of sentence, dated 01.03.2008, passed, by Sri Som Prakash Pandey, learned Additional Sessions Judge, F.T.C. Vth, Gaya, in Sessions Trial No. 14 of 2007/39 of 2007 in G.R. Case No. 2239 of 2006 arising out of Belaganj P.S. Case No. 154 of 2006

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Nitya Nand Sharma, Son of Devi Singh, Resident of Village – Agani, P.S. – Belaganj, District - Gaya

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant	:	Mrs. Soni Srivastava, Advocate Mr. Ravi Bharadwaj, Advocate Mrs. Madhuri Kumari, Advocate
Fro the Opposite Parties	:	Sri Akhileshwar Prasad Singh, Sr. Advocate Mr. Abhishek Anand, Advocate
For the Respondent	:	Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

and

HONOURABLE MR. JUSTICE I. A. ANSARI

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE GOPAL PRASAD)

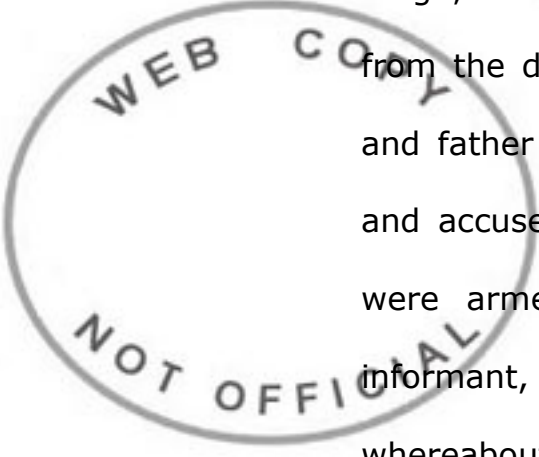
Date: 03-07-2015

Under the judgment, dated 29.02.2008, passed, in Sessions Trial No. 14 of 2007/39 of 2007, by learned Additional Sessions Judge, Fast Track Court No. V, Gaya, the sole accused-appellant, Nitya Nand Sharma, stands convicted under Sections 148, 302 read with Section 149 and 386 read with Section 120B of the Indian Penal Code and also under Section 27 of the Arms Act, 1959. Following his conviction, under the order, dated 01.03.2008, the accused-appellant has been sentenced, under Section 302 read with Section 149 of the Indian Penal Code, to

suffer imprisonment for life and pay a fine of Rs. 10,000/-, in default of payment of fine, to undergo rigorous imprisonment for a period of three years. Following his conviction under Section 386 read with Section 120B of the Indian Penal Code, the accused-appellant has been sentenced to undergo rigorous imprisonment for a period of five years and pay a fine of Rs. 3,000/- and, in default of payment of fine, to undergo imprisonment for a period of one year. Following his conviction under Section 148 of the Indian Penal Code, the accused appellants has been sentenced to undergo rigorous imprisonment for a period of three years and for his conviction under Section 27 of the Arms Act, 1959, the accused appellant has been sentenced to undergo rigorous imprisonment for a period of three years and pay a fine of Rs. 3,000/- and, in default of payment of fine, to undergo rigorous imprisonment for a period of one year. All the sentences have been directed to run concurrently.

2. The case of the prosecution, as unfolded by the First Information Report, may, in brief, be described thus:

(i) On 16.09.2006, the informant, Sahendra Singh (PW 5), being the Chairman, was sitting in the ICDP Godown –cum- Office, situated at village Agni and his son, Sonu @ Vivek along with the father of the informant, Nathun Singh, was grazing buffalo in the field, adjacent to the office of the informant. At about 03:00 PM, on 16.09.2006, accused persons, namely, Nitya Nand Sharma, Bipin Singh, Avinash Kumar @ Karu Singh,



Ranvijay Singh @ Wakil Singh, Rajeshwar Singh @ Bhushan Singh, Mritunjay Kumar @ Pintu Kumar, Mantu Kumar, came, from the direction of the village of the informant, near the son and father of the informant. While accused Nitya Nand Sharma and accused Bipin Singh were armed with rifles, other accused were armed with pistol. On reaching near the son of the informant, accused Nitya Nand Sharma asked Sonu about the whereabouts of his father (i.e., informant) and, when Sonu told him that his father was not present in the house, accused Ranvijay Singh told Sonu that his father was asked to deposit Rs. 50,000/- in the Organization, which his father had not deposited and also told Sonu that the Incharge of the Organization, Devi Singh, from jai, has ordered them (i.e., accused persons) to kill him (i.e., Sonu), the only son of the informant, Sahendra Singh and, then, on the orders of accused Ranvijay Singh, accused Nitya Nand Sharma and accused Nipin Singh fired from the rifles, which they were carrying in their hands, which hit Sonu above and below the left side of his back. On sustaining two bullet injuries, son of the informant, Sonu, fell down in the field and died. The accused persons also assaulted the father of the informant.

(ii) It is claimed by the informant, Sahendra Singh, that he (i.e., informant) witnessed the entire occurrence from his Office. Apart from the informant himself, as claimed by the informant, informant's wife, Prabha Devi, informant's brother,

Jitendra Singh, informant's bhabhu (i.e. younger brother's wife of the informant), Savita Devi, and some co-villagers had also witnessed the occurrence. Among the co-villagers, Santosh Kumar (not examined), Ravikant Sharma (PW 3), Ram Janam Singh (not examined), Ajay Singh (not examined), Kishori Ram (PW 2), Pappu @ Dhananjay, had witnessed the occurrence.

(iii) When the co-villagers of the informant tried to catch the accused persons, the accused persons fired at them, too, and thereafter fled away.

(iv) The reason, as disclosed by the informant, behind the occurrence was that the accused were demanding Rs. 50,000/- from the informant as extortion and the informant was asked to deposit the said extortion amount within one week, to which the informant had refused and the informant was earlier assaulted by the accused five months prior to the occurrence for non-deposit of the said amount.

(v) The police, after receiving a telephone message, at about 5:00 P.M., on 16.09.2006, to the effect that some persons in the village Agani has been killed by fire-arm, recorded the information in the Genera Diary, bearing Sanha Entry No. 287, dated 16.09.2006, and proceeded for verification of the said telephonic information and reached the place of occurrence. At the place of occurrence, the informant, Sahendra Singh, handed over to police, a written report, and treating the said written information as the First Information Report, Belaganj Police

Station Case No. 154 of 2006 was registered, under Sections 147/148/149/386/ 302/120B of the Indian Penal Code and Section 27 of the Arms Act, 1959, against ten accused persons, namely, (i) Nitya Nand Sharma, Bipin Singh, Avinash Kumar, Ranvijay Singh, Rajeshwar Singh, Mritunjay Kumar, Mantu Kumar, Devi Singh, Subedar Singh and Kishori Singh.

(vi) During investigation, inquest was held on Sonu's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid under Sections 147/148/149/386/302/120B of the Indian Penal Code and Section 27 of the Arms Act, 1959, against accused Nitya Nand Sharma, showing other accused persons as *absconders*.

3. At the trial, charges, under Sections 302 read with Section 149, Section 386 read with Section 120(B), 120(B), 148 of the Indian Penal Code and Section 27 of the Arms Act, 1959, read with Section 149 of the Indian Penal Code was framed against the accused Nitya Nand Sharma. To the charges, so framed, the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 8 (eight) witnesses. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial

and false implication. However, no evidence was adduced on behalf of the defence.

5. Having, however, arrived at the finding that accused-appellant, Nitya Nand Sharma, had been found 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 Ms. Soni Shrivastava, 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. Akhileshwar Prasad Singh, learned Senior Counsel, appearing on behalf of the informant.

8. While considering the preset appeal, let us, first, take note of the medical evidence. According to the evidence of the doctor (PW 6), who had, admittedly, on 17.09.2006, at about 02:45 AM, conducted *post mortem* examination on the dead body of Sonu, he found as follows:

"(i) Wound of entry ½"x½" (circular) on left side of back of chest about 4" external (outside) T5/T6 vertebra with inverted margin. The wound was cavity deep.

(ii) Wound of exit 1½" x 1" (circular) into cavity deep on front of left chest 2" inner to left nipple with inverted



margin and blood oozing.

The wound Nos. (i) and (ii) were communicating and in the intervening portion, the track of wound fractured and dislocated 3rd to 6th ribs on left side and lacerated the left lung with presence of blood and dark blood clots in thoracic cavity.

(iii) Wound of entry ½" x ¼" x cavity deep on lower back slightly towards right side about 6" inside right anterior, superior iliac spine with irregular inverted margins.

(iv) Wound of exit 2½" x 2" x cavity deep on left side of front of abdomen about 1" outside and 6" lower to umbilicus with everted, irregular margin, abdominal tissues and coils of intestine protruding, blood oozing.

The wound Nos. (iii) and (iv) were communicating and in the intervening portion, the track of wound lacerated the abdominal muscles of tissues, pierced large intestine and lacerated bladder with presence of blood and blood mixed urine in lower abdomen."

9. In the opinion of the doctor (PW 6), the death was due to shock and haemorrhage as a result of the injuries, which had been sustained on the back by the said deceased, the weapon being used was fire-arms and the time elapsed since death being 6 to 18 hours. The *post mortem* report has been proved as

Exhibit-3.

10. The findings of the doctor and/or his opinion, with regard to the cause of death and/or with regard to the nature of weapons used, have not been disputed by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence of the doctor (PW 6) and his opinion, as indicated above, clearly establishes the fact that Sonu had died, because of the injuries, which had been found by the doctor (PW 6) to have been sustained by the said deceased.

11. In the light of the medical evidence on record, it becomes clear that Sonu's death was homicidal in nature.

12. The question, however, remains: whether the accused-appellant had caused the death of Sonu?

13. The question, posed above, brings us to the evidence of the informant (PW 5), who is father of the deceased, Sonu. According to the evidence of this witness (PW 5), on the day of the occurrence, the informant was Chairman of I.C.D.P. Godown - cum- Office and, at about 3:00 P.M., the informant was sitting in the said godown and in front of the godown, there was a field, in which his son along with his grand father (P.W. 4), was grazing buffalo and, in the meantime, accused-appellant, Nitya Nand Sharma, along with others, came, accused-appellants, Nitya Nand Sharma and Bipin Singh, were armed with rifles, and accused-appellant, Nitya Nand Sharma, asked the son of the informant (PW 5) about the whereabouts of the informant, on

which the deceased told that his father was not at his house and, then, accused Ranvijay Singh retorted that Rs.50,000/- was demanded from Sahendra as *rangdari* on the direction of Devi Singh, Incharge of the Organization, and he (Devi Singh) had ordered them (i.e., accused persons) to kill the only son of the informant if the informant was not found and, then, Nitya Nand Sharma and Bipin Singh fired from their rifles

14. It is in the cross-examination of PW 5 that he was in his godown and had heard the altercation from the godown itself and had also seen the occurrence. It is further in the cross-examination of PW 5 that at the time of firing, the accused were about 2½ feet away from Sonu and has stated that the firing was made from west and the victim was facing east.

15. Broadly in tune with the above evidence of PW 5 (the informant), describing the occurrence, is the evidence given by PW 4 (grandfather of the deceased and father of the informant), PW 1 (uncle of the deceased and brother of the informant), PW 2 (Bataidar of the informant) and PW 3 (co-villager of the informant). PW 4 has also deposed that Sonu was shot by fire-arms at a point black range.

16. Though PW 5 has stated that Sonu was shot from a distance of 2½ feet, PW 4 has stated that Sonu was shot from a point black range. The finding of the doctor (PW 6) is contrary to this evidence of PW 4 and PW 5 inasmuch as no burn injury or charring has been found by the doctor around the bullet injuries

sustained by the said deceased and, moreover, the doctor (PW 6), in his cross-examination, has stated that most probably, fire-arms would have been used from a long distance and, thus, the finding of the doctor is not corroborating the evidence of the prosecution witnesses. Thus, the medical evidence is contrary to the ocular evidence.

17. Moreover, it is alleged that the occurrence took place at about 3:00 P.M. and, thereafter, the police was informed and the police came at 5:00 PM and, thereafter, a written report was handed over by the informant to the police. However, on the said First Information Report, an endorsement had been made for lodging a First Information Report; but no time has been mentioned on the said endorsement by the Investigating Officer, while lodging the case.

18. It is in the evidence of the Investigating Officer (PW 7) that he had received an information on telephone regarding use of fire-arms in village Agni and, after making General Diary Entry, at 05:00 PM, he (PW 6) came to the said village, where the informant (PW 5) handed over a written report, which was recorded as Sanha, at 5:00 PM.

19. The Investigating Officer (PW 7), in his evidence, has stated that he found a window in the I.C.D.P. godown-cum-Office, which was at a height of 3 feet from the ground. The Investigating Officer (PW 7) has stated this fact from his memory and has not mentioned the height of the window present in the

I.C.D.P. godown-cum-Office in the case diary. PW 7 has further stated that he had not seized the blood-stained clothes of the deceased and had also not seized the blood-stained mud from the place of occurrence.

20. However, the most special feature of the case is that the most competent witness are PW 4 and PW 5, the grandfather and the father of the deceased respectively; but their evidence are not corroborating the medical evidence in connection with the distance from where the firing took place and, thus, the medical evidence is not corroborating the ocular evidence as no charring or tattooing or blackening around the wound of entries was indicated by the doctor and the doctor opined, in his cross-examination, regarding distance that the firing had been made from a long distance and this casts a doubt regarding the prosecution witnesses having seen the occurrence.

21. It has also surfaced from the evidence on record that the police was intimated at about 5:00 PM. Thus, the matter was not reported to the police immediately after the occurrence, which took place at about 3:00 P.M. This apart, the evidence of P.W. 3 that police reached at the spot at 3:30 PM, if taken to be true, fails to explain as to why the Investigating Officer has deposed that he started for village Agni for verification of the telephonic information at about 5:00 P.M and this, in turn, casts a serious doubt on the prosecution case regarding the testimony of the prosecution witnesses that they had actually seen the

occurrence.

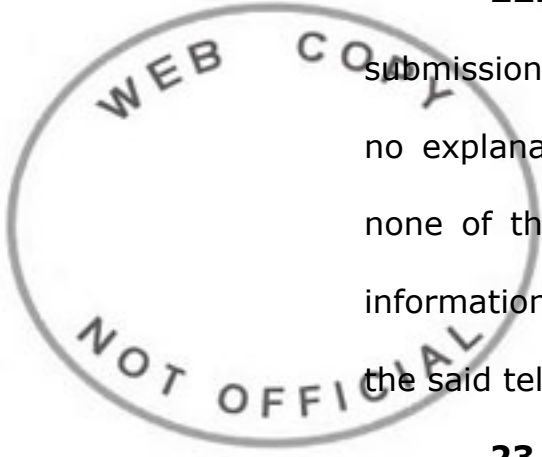
22. There is, therefore, considerable force in the submissions of Ms. Soni Shrivastava, learned Counsel, that since no explanation has been offered by the prosecution as to why none of the accused was named as assailant in the telephonic information given to the police, who had reached village Agni on the said telephonic information.

23. What also needs to be noted, now, is that according to the evidence of PW 7, while he was present at Belaganj Police Station, he received information, on the telephone, that somebody had resorted to firing in village Agni and it was pursuant to this information that he (PW 7) arrived at the place of occurrence.

24. Clearly, thus, the information, which PW 7 had received, on the telephone, at 05:00 PM, was an information relating to commission of *cognizable offence* and it was in order to determine the truth of the information that PW 7 had arrived at the place of occurrence.

25. The information, therefore, which PW 7 had received, on the telephone, and which had set the law into action, was, strictly speaking, the First Information Report.

26. Hence, the *fardbeyan* (Exhibit-2), though treated as First Information Report really constitutes nothing, but a statement recorded during investigation of the case and could not have been treated, and ought not to have been treated, as the



First Information Report. Reference, in this regard, made by Mr. Baxi, learned Senior Counsel, to the case of **The State of Bihar v. Rajendra Mahalda**, reported in **2015 (2) PL JR 79**, is not misplaced.

27. That the evidence of the informant (PW 3), describing the occurrence and implicating the appellant as one of the assailants, is untrue becomes glaring to the eyes, when we notice that according to the doctor (PW 6), the firing took place from a long distance

28. In the face of the above undisputed finding of the doctor, there can be no escape from the conclusion that the assertion of PW 5 and PW 4 that the deceased was shot from a close distance cannot but be regarded as wholly untrue.

29. It is also worth pointing out that if the eye-witnesses' account is found either unbelievable and unsafe, no reliance can be placed on the remaining ocular evidence on record inasmuch as it is the case of the prosecution, as has been made out by the evidence on record, that the deceased was shot from a very close distance; whereas the doctor has not found any burn injury or charring, If the informant's evidence is not found to be sufficiently safe to place reliance upon, other witnesses cannot be readily believed.

30. What crystallizes from the above discussions is that the names of the accused were disclosed to the police not at the earliest point of time. This apart, medical evidence on record

does not support the version of the occurrence as depicted by the informant (PW 5) and other witnesses.

31. In the background of the discrepancies with which the evidence of the eye witnesses suffer from, we are clearly of the view that none of the witnesses can be safely relied upon.

32. In the absence of any other evidence, supporting the description of the occurrence given by the eye-witnesses, one has no option, but to hold, and we do hold, that none of these witnesses, who have claimed themselves to be eye-witnesses, can be treated or held to be *wholly reliable*. Even if their evidence is not rejected by the Court as *wholly unreliable*, their evidence would fall, at best, in the category of those witnesses, who are *neither wholly reliable nor wholly unreliable*.

33. 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.

34. 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.

35. It is also an undisputed position 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. (See, **Muluwa, S/o Binda and others Vs. The State of Madhya Pradesh, AIR 1976 SC 989**)

36. Situated thus, it is clear that merely because some persons, claiming themselves to be eye-witnesses, have given evidence describing the occurrence in tune with each other, their evidence cannot be relied upon or could have been made the

basis of conviction of the accused-appellant.

37. Situated thus, 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.

38. 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.

39. Since the accused-appellant, Nitya Nand Sharma, is in custody, let him be set at liberty, forthwith, unless he is required to be detained in connection with any other case.

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

(Gopal Prasad, J.)

I.A. Ansari, J. :- I agree

(I.A. Ansari, J.)

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