

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 19 of 1993

(Against the judgment of conviction and the order of sentence, dated 30th November, 1992, passed by Shri Diwakar Jha, 1st Additional Sessions Judge, Bhabua, in Sessions Trial No. 97 of 1981/78 of 1990, arising out of Bhabua Police Station Case No. 4(8) of 1980.)

1. Buttur Singh
 2. Kullan Singh alias Kundan Singh
 3. Lallan Singh
 4. Radhey Singh, son of Naresh Singh
 5. Diwan Toufique Khan alias Danne Khan, son of Mumtaj Khan
 6. Tetar Mushahar, son of Madhav Mushahar
- All sons of Sumer Singh
All residents of Chauthi, P.S. Bhabhua, District Bhabhua
Both 5 and 6 are residents of village Dumraith, P.S. Bhabhua, District Bhabhua

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellants : Mr. Makardhwaj Upadhyay, Advocate

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

Ms. Soni Shrivastava, Advocate as Amicus Curiae

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

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

Date: 24-03-2015

By the judgment and order, dated 30.11.1992, passed, in Sessions Trial No. 97 of 1981/98 of 1990, by learned 1st Additional Sessions Judge, Bhabua, while the appellants, Buttur Singh, Kullan Singh @ Kundan Singh, Lallan Singh, Radhey Singh and Tetar Musahar, stand convicted under Section 302 read with Section 149 of the Indian Penal Code and sentenced to suffer

imprisonment for life each, the accused-appellant, Kullan Singh @ Kundan Singh, stands convicted under Section 379 of the Indian Penal Code too and sentenced to undergo, imprisonment for three years, and the accused-appellant, Diwan Toufique Khan @ Danne Khan, stands convicted under Section 302 read with 109 of the Indian Penal Code and sentenced to undergo imprisonment for life.

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

(i) On 05.08.1980, at about 9:00/10:00 A.M., when the informant, Kamta Singh (P.W. 6), was busy in irrigating his land, at Maital Badhar, by making a channel from Sagra *payeen* (i.e., a canal) for the purpose of water to be flown into the field of the informant, accused Bal Ram Singh and Kullan Singh @ Kundan Singh of village Chauthi, along with their co-villagers, namely, Butur Singh, Lallan Singh, Radhey Singh and others came, armed with *garasa* (*sharp-edged weapon*), *ballam* (*pointed weapon*), *lathi*, etc., to the field of the informant and asked the informant to stop the irrigation and call his brother, Badri Singh (since deceased), who was the *surpanch*.

(ii) The informant went to his village to call Badri Singh and when the informant, accompanied by Badri Singh, came back to the said field, Badri Singh had a licensed gun with him, because of fear of dacoits. By the time, the informant, accompanied his brother, Badri Singh, came to the field, it was about 12:00 noon, when, apart from accused Bal Ram Singh,

accused Kullan Singh @ Kundan Singh, Buttur Singh, Lallan Singh and Radhey Singh of village Chouthi, Danne Khan, Tetar Musahar of village Dumraith and some unknown persons were sitting on the *payeen* near the field of the informant.

(iii) While a talk with regard to the sharing of water, for the purpose of irrigation, was in progress between all the accused, on the one hand, and Badri Singh and his brother, Kamta Singh, on the other, accused Kullan Singh @ Kundan Singh, at about 1:00 A.M., snatched away the gun from the hands of Badri Singh and accused Danne Khan, then, asked other accused persons to do away with the lives of informant and his brother, Badri Singh. Completely unarmed, as the informant and his brother, Badri Singh, started running to save their lives, the accused chased them and assaulted them by various weapons including a number of assaults by *ballam* (a pointed weapon) and *garasa* (a sharp-edged weapon). When the informant raised *hulla*, his co-villagers, Kuer Singh, Ram Jag Singh, Bilash Tiwary, Bal Ram Singh and Bahadur Singh, came there, but by that time, Badri Singh was already killed.

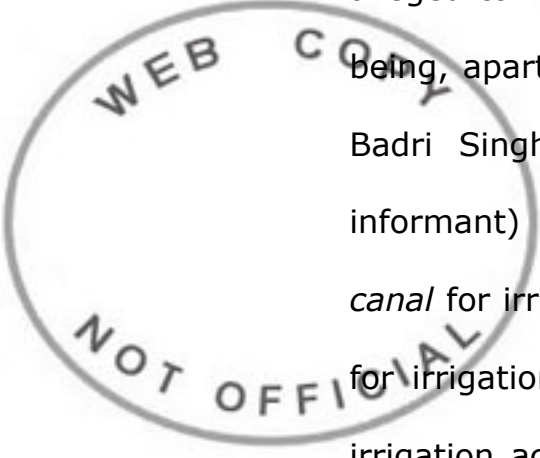
(iv) The informant, then, carried the dead body of Badri Singh to Bhabua Police Station and orally informed the police about the occurrence. The information, so given, by the informant, was reduced into writing as his *farbeyan* (*Exhibit 3*) and treating the informant's said *fardebayan* as the First Information Report, Bhabua Police Station Case No. 04(08) of 1980, under Sections

148/149/379/302 of the Indian Penal Code, was registered against Kullan Singh, Bal Ram Singh, Buttur Singh, Lallan Singh, Radhey Singh, Danne Khan and Tetar Mushahar.

3. During investigation, police held *inquest* over Badri Singh's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid, under Section 302 of the Indian Penal Code, against the accused aforementioned.

4. At the trial, when *charges*, under Section 302 read with Section 34 and under Section 148 of the Indian Penal Code, were framed against the accused, Kullan Singh, Butur Singh, Lallan Singh, Radhey Singh, Diwan Taufique Khan, Tetar Musahar, all the accused aforementioned pleaded not guilty thereto. A substantive *charge* was also framed against all the accused under Section 302 of the Indian Penal Code and to the *charge* so framed, too, all the accused aforementioned pleaded not guilty. This apart, a *charge* was framed against accused Kullan Singh, under Section 379 of the Indian Penal Code, and to this further *charge*, accused Kullan Singh pleaded not guilty.

5. In support of their case, prosecution examined as many as 11 (eleven) witnesses. Out of the witnesses so examined, P.Ws. 1, 3, 4, 5 and 6 are claimed to be eye-witnesses to the occurrence, P.W. 6 being the informant. The accused were, then, examined under Section 313 (1) (b) of the Criminal Procedure Code 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, apart from a case of denial, a *counter case* by alleging that Badri Singh and his brother, namely, Kamta Singh (i.e., the informant) had dug a separate channel for bringing water from *canal* for irrigation of their own field, whereas the *canal* was meant for irrigation of the agricultural fields of others, too, and as the irrigation activities of the people, living in the nearby village, got adversely affected, they came armless to meet Badri Singh, because Badri Singh was *surpanch*, but Badri Singh came armed with a gun and when they were all in the midst of conversation, Badri Singh and his associates started assaulting and shooting the villagers, who had come from nearby villages, and, as a result of firing, Rishad Khan and Gaurai Khan of village Dumraith suffered bullet injuries and, while Rishad Khan and Gaurai Khan were lying injured, at Bhabhua hospital, receiving treatment for bullet injuries sustained by them, Rishad Khan's statement was recorded, on 05.08.1980, at about 10:00 P.M., by the police, and treating the said statement as the First Information Report, Bhabua Police Station Case No. 05(8) of 1980 was registered (Exhibit A), the said statement having, in fact, been recorded, when Rishad Khan receiving treatment for the injuries sustained by them. No evidence was adduced by the defence.

6. Having, however, arrived at the finding that the accused persons aforementioned had been proved guilty of the

offences charged with, they were convicted accordingly and sentences were passed against them as already mentioned above.

7. Aggrieved by their conviction and the sentences passed against them, the convicts, Buttur Singh, Kullan Singh @ Kundan Singh, Lallan Singh, Radhey Singh, Diwan Taufique Khan @ Danne Khan and Tetar Musahar, have preferred this appeal.

8. We have heard Mr. Makardhwaj Upadhyay, learned Counsel, appearing for the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecution, appearing for the State. We have also heard Ms. Soni Shrivastava, learned counsel, appearing as *Amicus Curiae*.

9. While considering the present appeal, what needs to be noted, at the very outset, is that while the occurrence, in question, allegedly took place on 05.08.1980, at 1:00 P.M., the information, with regard to the occurrence, was given, at Bhabua Police Station, by Kamta Singh, brother of deceased Badri Singh, on 05.08.1980, at 8:15 P.M., though according to evidence on record, soon after the occurrence, the dead body of Badri Singh had been carried to the said police station. No explanation has, however, been offered for the delay, which has taken place in reporting the occurrence to the police.

10. Though mere delay may not be fatal in every case, the fact remains that delay, which is unexplained, gives rise to the possibility of a concocted and colourized version of the occurrence being reported to the police. This apart, unexplained belated



information given to police about an occurrence gives rise to possibility of suppression of truth from the police and/or presentation before the police of a case, which may be an admixture of half-truth and untruth roping thereby innocent along with the guilty ones.

11. In the present, apart from the fact that no explanation has been offered by the informant for the delay, which has taken place in lodging the First Information Report, no explanation is discernible, in this regard, from the materials on record.

12. In the backdrop of the fact that the First Information Report was lodged, in the present case, belatedly and no explanation is available on record in this regard, when we proceed further, what attracts our attention, most prominently, is that according to defence, there is a *counter case*, namely, Bhabhua Police Station Case No. 05(8) of 1980, the informant of the case being Rishad Khan, a resident of village Dumraith and a co-villager of accused-appellant, Danne Khan, the case of the defence being, as we have already indicated above, that Badri Singh, his brother, i.e., informant, and their co-villagers, were the ones, who had opened fire and injured Rishad Khan, Ghurai Khan and others so much so that Gurai Khan and Rishad Khan had to be hospitalized and received treatment for having suffered injuries from firearms.

13. What is, however, impossible to ignore is that the



informant (P.W. 6) has denied that with regard to use of water for irrigation, a quarrel took place between residents of his village and village Dumraith. What may be noted, in this regard, is that P.W. 1 has deposed at the trial that he does not know Ghurai Khan and Rishad Khan nor does he (PW 1) know that Rishad Khan and Gaurai Khan, too, had received, in the same occurrence, injuries from firearm. PW 1 has also denied knowledge of the fact that his co-villager, Rishad Khan, had filed a case against his co-villagers, whereas P.W. 4 (Kuer Singh) and P.W. 5 (Ram Jug Singh) admit that a *counter case* has, indeed, been instituted against them at the instance of Rishad Khan, a villager of Dumraith, and, the same is pending in the Court, where the informant (P.W. 6), Kamta Singh, and others are accused.

14. With regard to the above, the evidence of the Investigating Officer, (P.W. 10), Sri K. C. Dubey, is of material significance inasmuch as it is his evidence that he recorded the *fardbeyan* of Rishad Khan, at Bhabhua hospital, at 10:00 P.M., on 05.08.1980, when Rishad Khan was receiving treatment, at Bhabua hospital, for having sustained injuries from firearm.

15. The defence has also proved Exhibits D and D/1 (certified copies of the injury reports of Rishad Khan and Ghurai Khan respectively) showing bullet injuries having been sustained by Rishad Khan as well as Ghurai Khan.

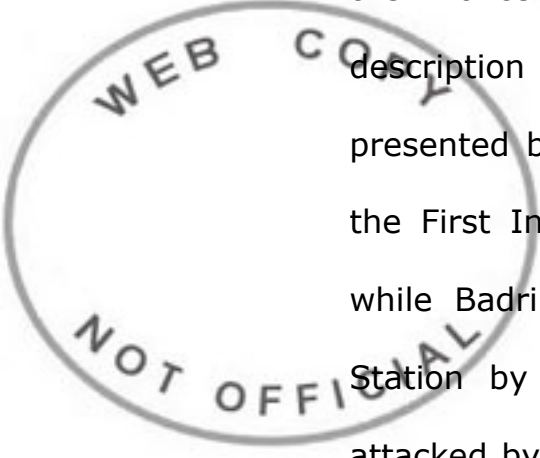
16. It is in the evidence of the Investigating Officer, (P.W. 10) that he conducted investigation into Bhabua Police

Station Case No. 5(8) of 1980, i.e., the *cross case*, and, in Bhabua hospital, he found Rishad Khan in injured stage receiving treatment and their injury reports, namely, Exhibits D and D/1 were prepared and he has submitted the injury reports on completion of investigation. The Investigating Officer has also clarified that he had seen some bullet injuries on the person of Rishad Khan.

17. From the evidence on record, which we have depicted above, it clearly transpires that there is a *cross case*, namely, Bhabua Police Station Case No. 5(8) of 1980, wherein Rishad Khan and Ghurai Khan had sustained bullet injuries and had to receive treatment at Bhabua and while they were lying as patients at the said hospital, Rishad Khan's *fardbeyan* was recorded; yet even the knowledge of this *cross case* was being denied by the prosecution witness, though P.Ws. 4 and 5 admit that in the *cross case* instituted against them, the informant (P.W. 6) and others are facing trial in the same Court.

18. Considering the fact that the injuries, which had been sustained by Rishad Khan and Ghurai Khan, were not superficial in nature, rather, their injuries were caused by firearm, it follows that the prosecution witnesses have endeavoured to suppress the truth and produce before the Court a colourized, if not wholly untruthful, version of the occurrence.

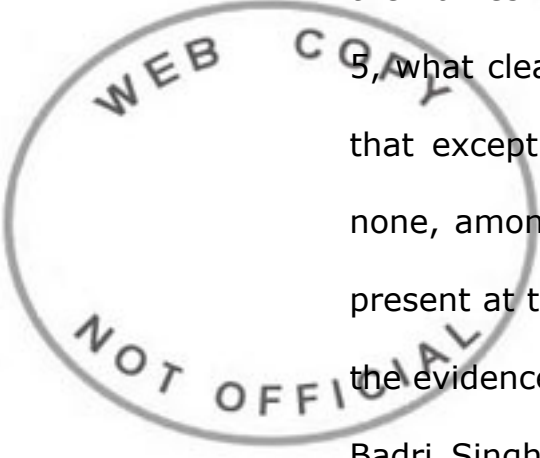
19. The above inference gets strengthened, when we notice that at the trial, it has been deposed by P.Ws. 1, 3, 4, 5 and 6 that when they were carrying the dead body of Badri Singh to the



Police Station, the accused-appellants and their associates attacked them once again and injured them there. If this part of the description of the occurrence, which P.Ws. 1, 3 4, 5 and 6 have presented before the Court, were true, there was no reason why the First Information Report makes no mention of the fact that while Badri Singh's dead body was being carried to the Police Station by the informant and others, they were, once again, attacked by the accused. Even the learned trial Court has rejected this newly added version of the occurrence as unreliable.

20. What logically follows from the above discussion is that the witnesses, who can go to the extent of making such substantial improvements on the case, which they had earlier presented during the investigation, cannot be implicitly relied upon and their evidence need to be, therefore, closely scrutinized and cautiously approached.

21. While on the above aspect of the case, we must point out that it is the case of P.Ws. 1, 3, 4 and 5 that they were present at place of occurrence, when Badri Singh was assaulted and killed, whereas the evidence of P.W. 6 (i.e., brother of Badri Singh and informant of the case) is that when the accused persons were chasing him (PW6) and his brother, Badri Singh, and shouting "*Maro Maro*" (i.e., "kill him, kill him"), nobody else came to the place of occurrence and it is only after the accused persons had fled away having assaulted Badri Singh that P.Ws. 1, 3, 4 and one Bal Ram Singh came to the place of occurrence.



22. Apart from the fact that P.W. 6, while mentioning the names of P.Ws. 1, 3 and 4, did not mention the name of P.W. 5, what clearly emerges from the evidence, so given by P.W. 6, is that except the informant, P.W. 6, and his brother, Badri Singh, none, among those, who have been examined eye-witnesses, was present at the place of occurrence inasmuch as they, in the light of the evidence of PW 6 himself, came to the place of occurrence after Badri Singh had already been killed. On this aspect, it may be further noted that P.W. 6 has deposed, in his evidence, that when he was shouting for help, nobody could be seen in the vicinity, because it was around 1:00 P.M. and the people had gone to take their meals.

23. In the face of categorical evidence having come on record from none other than the informant himself, who, according to the prosecution, remained present from the very inception of the occurrence till Badri Singh was put to death, there can be no escape from the conclusion that so far as P.Ws. 1, 3, 4 and 5 are concerned, they had come to the place of occurrence— if the evidence of P.W. 6 is to be believed—after the occurrence was already over.

24. What is also noticeable is that according to the evidence of P.W. 6, Badri Singh (deceased) came to the place of occurrence armed with gun. It is in the evidence of P.W. 6 that Badri Singh had licence for the said gun, because of fear from the dacoits. The evidence of P.W. 6 does not, however, explain as to

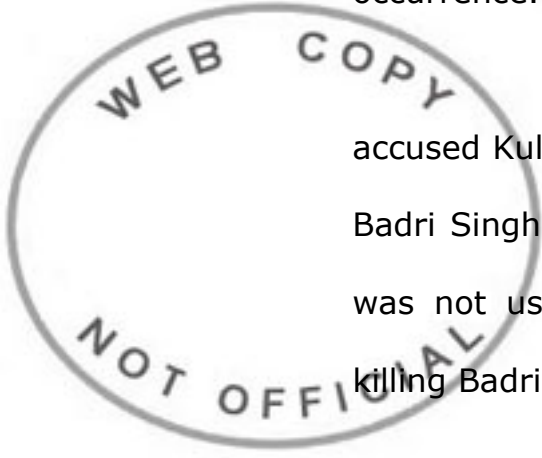
why Badri Singh had carried gun, while coming to the place of occurrence.

25. Be that as it may, it is the evidence of P.W. 6 that accused Kullan Singh @ Kundan Singh snatched away the gun from Badri Singh. If the gun had already been snatched, why the same was not used for shooting Badri Singh if any was interested in killing Badri Singh? The evidence on record furnishes no answer.

26. While, at one stage of his evidence, P.W. 6 has deposed that Badri Singh had not loaded the gun, but had kept the bullets in his pocket, he (PW6) has himself deposed, in his cross-examination, that he does not remember whether Badri Singh had loaded the gun or not. This apart, if accused Kullan Singh @ Kundan Singh had snatched away Badri Singh's gun, then, how Rishad Khan and Ghurai Khan sustained bullet injuries remains unanswered by the evidence on record.

27. What is more important note is that though P.W. 3, P.W. 4, P.W. 5 and P.W. 6 have all deposed that gun had been snatched away by accused Kullan Singh @ Kundan Singh from Badri Singh, none of these witnesses made such a statement during investigation, when the occurrence was fresher in their mind. This is yet another circumstance, which shows that the witnesses, who have been examined as eye-witnesses, are capable of making improvements, twisting and turning their evidence to fasten the accused-appellants.

28. The above impression gets re-enforced from the



fact that while P.W. 6 claims that he called Badri Singh to the place of occurrence at the behest of the accused persons, the remaining witnesses, namely, P.Ws. 1, 3, 4, and 5 have deposed that Badri Singh was already present at the place of occurrence with the informant irrigating his field, having licensed gun with him. In fact, P.W. 5 has deposed, in this regard, that Badri Singh and the informant were present at their field and engaged in watering the field for around 10 minutes prior to the arrival of the accused persons at the place of occurrence.

29. Thus, with every passing moment, P.Ws. 1, 3, 4, 5 and 6 become noticeably more and more unreliable.

30. Let us, now, turn to the medical evidence on record. We notice, in this regard, that according to the evidence of the doctor (P.W. 8), who had, admittedly, conducted *post mortem* examination on the dead body of Badri Singh, on 06.08.1980, at 6:30 hours, he found following *ante mortem* injuries:-

- (i)** *One incised wound on the right side of the occipital area of the head size 4" x 1" x bone deep cutting the bone.*
- (ii)** *Another incised wound on the right side of the temporo occipital area of the head size 1½" x 1" x deep to the bone.*
- (iii)** *Another incised wound on the back of the head size 1" x ½" x deep to the bone.*
- (iv)** *Another incised wound on the vertex (top most part of the head) measuring 3" x bone deep, cutting the bone.*
- (v)** *Another incised wound on the left side of*



the temporal area of the head measuring 3" x 1" x deep to the bone.

- (vi)** *Another incised wound on the left side of the neck measuring 1" x ½" x ½"*
- (vii)** *Another incised wound on the back of the neck measuring 1" x ½" x ½".*
- (Viii)** *Another incised wound on the left side of the neck measuring 2" x 1" x 1½".*
- (ix)** *Another incised wound on the right side of the chin measuring 4" x 1½" x 2" cutting the mandible.*
- (x)** *Another incised wound on the back of the left shoulder measuring 1" x ½" x 1".*

31. In the opinion of the doctor, death was caused due to shock and hemorrhage as a result of damage to skull bone.

32. From the medical evidence on record, which has remain unchallenged by the prosecution, it clearly transpires that the said deceased had sustained incised wounds and no injury was found to have been caused by a pointed weapon, such as, *ballam* or *bhala*; whereas P.W. 3 claims that Badri Singh sustained 3 to 4 injuries below his neck by *bhala* and P.W. 5 claims that accused had assaulted Badri Singh by *ballam*.

33. Thus, the medical evidence on the record belies the manner of the occurrence and the nature of weapon of assault, which is attributed to the accused-appellants.

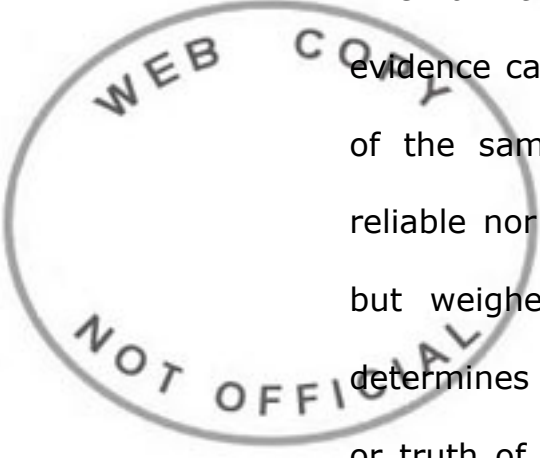
34. From the discussions held above, what clearly emerges is that none of the witnesses, who have been examined in

the present case, can be held to be wholly reliable witnesses and even if their evidence is not rejected out-right as evidence of wholly unreliable witnesses, their evidence would, at best, fall in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

35. 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.

36. The evidence of P.W. 3, P.W. 4, P.W. 5 and P.W. 6, 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.

37. 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

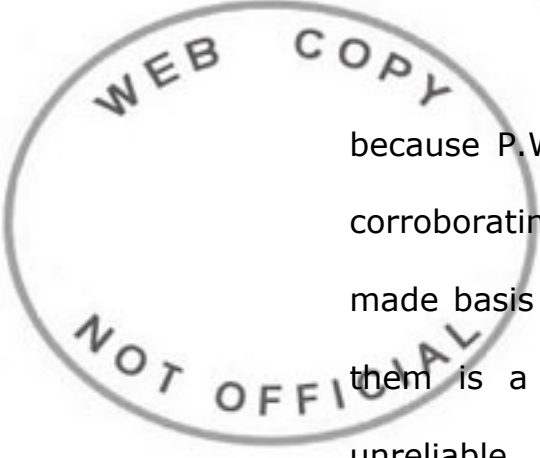


brand cannot be taken to have corroborated each other. Thus, when a witness is neither wholly reliable nor wholly unreliable, his evidence cannot be taken to have been corroborated by a witness of the same brand, namely, a witness, who is neither wholly reliable nor wholly unreliable, for, evidence is 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.

38. 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."



39. Situated thus, it becomes clear that merely because P.W. 3, P.W. 4, P.W. 5 and P.W. 6 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.

40. Because of what have been discussed and pointed out above, we do not find that the prosecution's evidence, adduced at the trial, can be held to be reliable and trustworthy. In fact, we are clearly of the view that the prosecution failed to prove the case beyond reasonable doubt and the accused-appellants, therefore, were entitled to, at least, benefit of doubt.

41. 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.

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

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

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



(I. A. Ansari, J.)

(Gopal Prasad, J.)

A.I./Kundan
N.A.F.R.

U	√	T	√
---	---	---	---