

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.263 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE, DATED 20.04.1993, PASSED BY SHRI CHAKRADHAR RAI, 1ST ADDITIONAL SESSIONS JUDGE, SAMASTIPUR, IN SESSIONS TRIAL NO. 116 OF 1983/94 OF 1989, ARISING OUT OF DALSINGSARAI POLICE STATION CASE NO. 61 OF 1981, CORRESPONDING TO G.R.NO.517 OF 1981).

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Arun Kumar Choudhary, S/o. late Baleshwar Choudhary, resident of village- Keota, P.S. Dalsingsarai, District- Samastipur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant : None

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

Mr. Amish Kumar, Advocate as *Amicus Curiae*

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

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

Date: 20-04-2015

By the judgment and order, dated 20.04.1993, passed, in Sessions Trial No. 116 of 1983/94 of 1989, by learned 1st *Additional* Sessions Judge, Samastipur, the accused-appellant, Arun Kumar Choudhary, stands convicted under Section 302 read with Section 34 of the Indian Penal Code. In consequence of his conviction, the accused-appellant stands sentenced to suffer imprisonment for life.

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

under:

(i) On 12.03.1981, at 9.30 PM, on hearing cry of Ram Sagar Choudhary, the informant, Deepak Kumar Choudhary, went running to Bichla Temple and saw that Ram Sagar Choudhary had been caught by accused Baleshwar Choudhary (since deceased) and accused Arun Kumar Choudhary was assaulting him with *lathi*. On being injured as a result of being assaulted by lathi, Ram Sagar Choudhary fell on the ground. Because of hue and cry so raised at the place of occurrence, Naresh Choudhary, Ram Ballam Choudhary, Vinay Kumar Choudhary and others came to the place of occurrence and the two accused started running away. While accused Baleshwar Choudhary (since deceased) managed to run away, accused Arun Kumar Choudhary was caught by those, who had come running to place of occurrence.

(ii) As the injured Ram Sagar Choudhary succumbed to his injuries at the very place of the occurrence, an information, in this regard, was orally lodged by the informant, Deepak Kumar Choudhary, with the police, which was reduced into writing in the form of his *fardbeyan* and treating the said *fardbeyan* as the First Information Report, Dalsinghsarai Police Station Case No. 61 of 1981, under Section 302/34 of the Indian Penal Code, was registered, on 12.03.1981, against accused Baleshwar Choudhary (since

deceased) and Arun Kumar Choudhary.

(iii) During investigation, inquest was held over Ram Sagar Choudhary's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, a *charge sheet* was laid, under Section 302/34 of the Indian Penal Code, against the accused aforementioned.

3. At the trial, when a charge, under Section 302 read with Section 34 of the Indian Penal Code, was framed against Baleshwar Choudhary and his son, i.e., the present accused-appellant, Arun Kumar Choudhary, both of them pleaded not guilty thereto.

4. In support of its case prosecution examined altogether 9 (nine) witnesses.

5. During the pendency of the trial, accused Baleshwar Choudhary died and the trial, as against accused Arun Kumar Choudhary, continued. On closing of the prosecution's evidence, accused Arun Kumar Choudhary was examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offence, which was alleged to have been committed by him, the case of the defence being that of denial. No evidence was adduced by the defence.

6. Having, however, found the accused guilty of the offence, which he stood charged with, learned trial Court

convicted him accordingly and passed sentence against him as mentioned above.

7. Aggrieved by his conviction and the sentence, which has been passed against him, the accused has preferred this appeal.

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

9. While considering the present appeal, what needs to be pointed out is that Ram Ballav Choudhary (PW 2) was examined as an eye-witness to the occurrence. This witness, however, turned hostile and expressed his ignorance as to who the assailants of Ram Sagar Choudhary were. Though put to cross-examination by the prosecution, nothing could be elicited by the prosecution to show that PW 2 had witnessed the occurrence and/or accused-appellant, Arun Kumar Choudhary, along with his father, Baleshwar Choudhary, had caused the death of Ram Sagar Singh in furtherance of their common intention.

10. The previous statement, which was claimed to have been made by PW 2, was not proved in the present case inasmuch as the Investigating Officer was not examined.

11. There was, thus, no substantive evidence on

record obtained from PW 2 fastening the accused-appellant, Arun Kumar Choudhary, with the act of assault on, and killing of, Ram Sagar Choudhary far less in furtherance of his common intention with accused Baleshwar Choudhary (since deceased).

12. So far as PW 3 (Vinay Kumar Choudhary) is concerned, he was tendered by the prosecution. Thus, there was no substantive evidence elicited by the prosecution from PW 3 to show, far less prove, that the accused-appellant had assaulted and caused the death of Ram Sagar Choudhary in furtherance of his common intention with his co-accused Baleshwar Choudhary (since deceased). PW 4 and PW 7 are witnesses, who had merely carried the dead body of Ram Sagar Choudhary to Samastipur Hospital for *post mortem* examination. Their evidence, when considered together, do not show involvement of the accused-appellant, Arun Kumar Choudhary, and/or his father, Baleshwar Choudhary, in the assault on, or killing of, Ram Sagar Choudhary.

13. Coming to the medical evidence on record, it may be noted that PW 1 (Dr. P.C. Jain) was, admittedly, the doctor, who had performed, on 13.03.1981, at about 1.00 PM, *post mortem* examination on the dead body of Ram Sagar Choudhary and found following *ante mortem* injuries:

"(i) *Transverse echymosis on the front of the chest 10" x 1" on the base*

of the neck.

(ii) Echymosis on the abdomen near the xipboid sternum 6"x1".

(iii) Transverse and oblique echymosics on the chest near the nipple right upper side to nipple left side 8" x 1".

(iv) Transverse echymosis on the upper part of the neck in front 9" x1" from the right side to left side.

(v) Swelling in the front neck 6" x 4".

(vi) Swelling of the molar region 2¹/₂" x 1¹/₂" in area.

(vii) Lacerated wound 1¹/₂" x1/3" in bone deep in front of the forehead.

(viii) Abrasion of the right knee 1¹/₂" x 1" in area."

On Dissection

There is blood in the subcutaneous tissues and muscle of the chest wall. Right side clotted with blood in front of the tracheaa and blood in the muscle of the neck. Fracture of the body of the sterman. About 100 c.c. blood in the cavity and laceration of the right lung upper part. There is lineal and vertical trachea of the frontal bone and laceration of the brain tissue anterior. There is sub-

archnoid blood clots."

14. In the opinion of the doctor (PW 1), death was due to shock and haemorrhage resulting from the injuries sustained, the injuries having been caused by hard blunt substance, such as, *lathi*.

15. Neither the finding of the doctor nor his opinion, with regard to cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing assault on, and death of, the said deceased, were disputed either by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 1).

16. So situated, it becomes clear that Ram Sagar Choudhary's death was *homicidal* in nature.

17. The question, however, remains: whether the accused-appellant, Arun Kumar Choudhary, had caused the death of Ram Sagar Choudhary in furtherance of his common intention with his father, Baleshwar Choudhary.

18. Coming to the evidence of PW 5, who is the informant, we notice that according to him, when he reached near the temple, he saw accused Baleshwar Choudhary and accused Arun Kumar Choudhary assaulting Ram Sagar Choudhary by means of *lathis*. In his cross-examination,

however, he has deposed that when he first saw the occurrence, accused Baleshwar Choudhary had pushed Ram Sagar Choudhary towards the house and, as a result thereof, Ram Sagar Choudhary fell down and it was, thereafter, that accused Arun Kumar Choudhary started assaulting Ram Sagar Choudhary.

19. Belying and contradicting the above description of the occurrence given by PW 5, PW 8 has deposed that both the accused came with *lathis* in their hands raising the slogan of '*Bajrang Bali*' and when Ram Sagar Choudhary started running away, accused Baleshwar Choudhary caught hold of Ram Sagar Choudhary and accused Arun Kumar Choudhary assaulted him by means of *lathi* and, upon being so assaulted, Ram Sagar Choudhary fell down and, then, both the accused persons aforementioned assaulted Ram Sagar Choudhary.

20. There is, thus, clear contradiction between the description of occurrence, which has been given by PW 8 as against the description of the occurrence, which has been given by PW 8, inasmuch as according to PW 8, accused Baleshwar Choudhary caught hold of Ram Sagar Choudhary and accused Arun Kumar Choudhary assaulted Ram Sagar Choudhary by means of *lathi* and when Ram Sagar Choudhary fell down, then, both of them assaulted Ram Sagar Choudhary meaning



thereby that Ram Sagar Choudhary fell down on being assaulted by accused Arun Kumar Choudhary by means of *lathi*, whereas the assertion of PW 5 is that on being pushed by the accused Baleshwar Choudhary, Ram Sagar Choudhary fell down and, then, it was accused Arun Kumar Choudhary alone, who had started assaulting Ram Sagar Choudhary. The two versions of the occurrence, one given by PW 5 and the other given by PW 8, are so inherently inconsistent that they eventually destroy the credibility of each other and, based on their evidence, it cannot be held, boldly and confidently, that they had, or anyone of them, had witnessed the occurrence.

21. Further-more, the evidence of PW 6 shows that when he reached the place of occurrence, Ram Sagar Choudhary was already dead. His evidence, however, does not show the presence of either the informant (PW 5) or Naresh Choudhary (PW 8) at the place of occurrence. This is yet another circumstance, which make it too hazardous and unsafe to place implicit reliance on the evidence of PW 5 and PW 8, because PW 8 has not been declared hostile and hence, his evidence is binding on the prosecution.

22. We may point out that evidence of a prosecution witness, supporting the defence case and not declared hostile by the prosecution, while the witness was in the witness box, can safely be relied upon and such evidence

cannot be ignored. On this score, we may gainfully rely on the decisions of the Supreme Court in the case of **Rajaram v. State of Rajasthan**, reported in **(2005) 5 SCC 272**, and **Mukhtar Ahamad Ansari v. State of Delhi**, reported in **(2005) 5 SCC 258: AIR 2005 SC 2804**.

23. It is also a settled proposition of law that if two versions surfaced in a prosecution case, one contradicting the other, the version, which favours the accused, shall be accepted. The Supreme Court, in **Harchand Singh v. State of Haryana**, reported in **(1974) 3 SCC 397 : AIR 1974 SC 344**, has observed, *"if in a case prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation."*

24. The two contradictory versions, appearing from the evidence on record, make the prosecution's case seriously doubtful as regards involvement of the accused-appellant and in such circumstances, the accused-appellant was entitled to benefit of doubt.

25. At any rate, none of the witnesses, namely, PW 5 and PW 8, can be regarded as witnesses, who can be

treated as *wholly reliable witnesses* and even if their evidence are not rejected outright as evidence of *wholly unreliable* witnesses, their evidence will, at best, fall in the category of those witnesses, who are neither *wholly reliable* nor *wholly unreliable*.

26. 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.

27. The evidence of PW 5 and PW 8, 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.

28. 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.

29. 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."

30. Situated thus, it becomes clear that merely because PW 5 and PW 8 have given evidence accusing the present appellant and his father, Baleshwar Choudhary, as assailants of Ram Sagar Choudhary, 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.

31. What crystallizes from the above discussion is that none of the incriminating circumstances, which the learned trial Court has relied upon, could be proved legally and convincingly. In the face of such a state of evidence on record, the accused-appellant ought to have been acquitted.

32. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offence, which he stands convicted of, and he is hereby acquitted of the same.

33. Since the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall remain discharged.

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

35. 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.)

(Nilu Agrawal, J.)

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