

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.183 of 1993

(AGAINST THE JUDGMENT OF CONVICTION, DATED, 8TH APRIL, 1993, AND THE ORDER OF SENTENCE, DATED, 15TH APRIL, 1993, PASSED BY SHRI JALESHWAR RAM, 1ST ADDITIONAL SESSIONS JUDGE, EAST CHAMPARAN, MOTIHARI, IN SESSIONS TRIAL NO. 17/6 OF 1983, ARISING OUT OF PIPRA POLICE STATION CASE NO. 2(6) OF 1979, CORRESPONDING TO G.R.NO.525 OF 1979).

1. Lutan Parit, S/o. Kailas Parit,
 2. Sree Parit, S/o. Shankar Parit,
 3. Krishna Singh, S/o. late Ramanand Singh,
 4. Parau Parit, S/o. Shankar Parit, All of village- Parsurampur.
 5. Lalbabu Singh, S/o. late Shiva Nand Singh of village- Kuarpur.
 6. Chandradeo Tiwary, S/o. late Vidya Tiwary of village- Passurampur.
 7. Dubey Singh, S/o. late Jagat Singh, of village- Passurampur.
- All are of P.S. Pipra, District- East Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : None

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

Mr. Prabhat Kumar, 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: 28-04-2015

By the judgment, dated 08.04.1993, passed, in Sessions Trial No. 17/6 of 1983, by learned 1st Additional Sessions Judge, East Champaran, Motihari, the accused, Lutan Parit, Sree Parit, Krishna Singh, Parau Parit, Lalbabu Singh, Chandradeo Tiwary and Dubey Singh, stand convicted under Section 302 read with Section 34 of the Indian Penal Code. In consequence of their conviction, accused, Lutan Parit, Sree

Parit, Krishna Singh, Parau Parit, Lalbabu Singh, Chandradeo Tiwary and Dubey Singh, stand, under the order, dated 15.04.1993, 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 31.05.1979, at about 2.00 O'clock at night, when Lochan Pandit (since deceased) was asleep in a room situated near the door of the house of his neighbour, Jogendra Tiwary, accused Lutan Pandit, along with accused, Sree Parit, Krishna Singh, Parau Parit, Lalbabu Singh, Chandradeo Tiwary, Sita Hazra, Kirani Singh and Dubey Singh, came armed with *lathis* and *bhalas* (a sharp edged weapon) and began to assault Lochan Pandit by means of *lathis*. Though Lochan Pandit resisted the assault on him, the accused continued with the assault.

(ii) On hearing his father's cry, as a result of assault on him as described hereinabove, when Subhash Pandit (PW 2) moved forward to save his father, accused Lutan Pandit rushed towards Subhash Pandit (PW 2) with *bhala* and told him (PW 2) to run away from there or else, he would be killed. On the threat so received, PW 2 came running to his courtyard and started screaming for help, whereupon his co-villagers, namely, Asharfi Singh (PW 4), Ram Ekbal Tiwary (PW 5) and others

came and the accused fled away. However, in the focus of torch light, not only PW 4 and PW 5, but even PW 2 recognized the assailants.

(iii) The reason for the assault, which so took place on Lochan Pandit, was that accused were members of CPM, whereas Lochan Pandit belonged to CPI and though the accused had been requesting Lochan Pandit to become a member of the CPM, Lochan Pandit did not accept their proposal and, hence, they had become inimical and assaulted Lochan Pandit.

(iv) After the accused had taken to their heels, injured Lochan Pandit was carried to Sadar Hospital, Motihari, where the injured was admitted and treated. While the injured was lying under treatment as mentioned hereinbefore, his statement was recorded by Shri N.N. Singh, Assistant Sub-Inspector of Police, Motihari Police Station, on 02.06.1979, at 7.30 AM, as the said injured person's *fardbeyan* (Ext-3).

(v) Treating the said *fardbeyan* as the First Information Report, Pipra Police Station Case No. 2(6) of 1979, under Sections 147/148/450/325/323 of the Indian Penal Code, was registered against the accused persons, namely, Lutan Parit, Sree Parit, Krishna Singh, Parau Parit, Lalbabu Singh, Chandradeo Tiwary and Dubey Singh, Sita Hazra and Kirani Singh.

(vi) During investigation, as injured Lochan Pandit succumbed to his injuries, on 03.06.1979, at about 10.10 PM, Section 302 of the Indian Penal Code was added to the case aforementioned.

3. Inquest was held over Lochan Pandit's dead body, which was also subjected to *post mortem* examination, and, on completion of investigation, *charge sheet* was laid, under Sections 147/148/149/452/324/323/325/302 of the Indian Penal Code, against nine accused aforementioned.

4. At the trial, a charge, under Section 147 of the Indian Penal Code, was framed against accused Sri Parit, Parau Parit, Chandradeo Tewary, Sita Hazra, Krishna Singh, Lal Babu Singh and Kirani Singh. This apart, a charge, under Sections 302 read with Section 149 of the Indian Penal Code, was framed against all the 9 (nine) accused persons aforementioned. A substantive charge, under Section 302 read with Section 34 of the Indian Penal Code, was further framed against all the 9 (nine) accused persons aforementioned. All the accused pleaded not guilty to their respective charges.

5. In support of their case, prosecution examined altogether 7 (seven) witnesses. All the accused were, then, examined under Section 313(1)(b) of the Code of Criminal Procedure and, in their examinations aforementioned, they 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. No evidence was adduced by the defence.

6. Having, however, found accused, Lutan Parit, Sree Parit, Krishna Singh, Parau Parit, Lalbabu Singh, Chandradeo Tiwary and Dubey Singh, guilty of the offence under Section 302 read with Section 34 of the Indian Penal Code, learned trial Court convicted all of them accordingly and passed sentence against them as mentioned above. Having found accused Sita Hazra and accused Kirani Singh not guilty of the offences charged with, the learned trial Court acquitted them accordingly.

7. Aggrieved by their conviction and the sentence passed against them, all the convicted persons have preferred this appeal.

8. We have heard Mr. Prabhat 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, we may point out that according to the evidence of Dr. Bikramaditya Gupta (PW 1), who had, on 04.06.1979, at about 3.30 PM, admittedly, conducted *post mortem* examination on Lochan Pandit's dead body, he found following *ante mortem*

injuries:

"(i) Multiple bruises all over the body both upper limbs, both lower limbs, front and back of the chest varying from 2" x 1" to 4" x 1" and underneath haemotoma all over injured area.

(ii) Healing wound 2" x 1/2" left side of the head.

(iii) Healing wound 1" x 1/2" on the forearm near elbow.

(iv) Healing wound 1" x 1" on the dorsum of right hand.

(v) Healing wound 1/4" x 1/4" on the left forearm in the upperpart.

(vi) Healing wound 3/4" x 3/4" on the right side of chest near nipple.

(vii) Healing wound 1/2" x 1/2" on the top on right middle finger.

(viii) Healing wound 3/4" x 1" on the base of middle finger.

(ix) Healing wound 1/2" x 1/2" on the left leg above ankle.

(x) Healing wound 2" x 4" x 1" on the right leg on the front."

10. On Dissection, the doctor (PW 1) found as follows:

"Blood vessels of the lungs contained haemotoma at many places and also intestinal part and muscularly also contained haemotoma."

11. In the opinion of the doctor (PW 1), death was the result of pulmonary embolism caused by multiple injuries, which the said deceased had sustained.

12. In his cross-examination, the doctor (PW 1) has clarified that injury Nos. III, V and VII to X were not on vital parts of the body, there was no internal fracture found in the dead body, but the injury Nos. I, II and VI were individually sufficient to cause death in the ordinary course of nature, whereas injury Nos. III, V, VII to IX were not individually sufficient to cause death in ordinary course of nature.

13. The question, however, remains: whether the accused-appellants were the ones, who had caused death of Lochan Pandit?

14. Bearing in mind the question posed above, when we come to the evidence on record, what attracts our attention, most prominently, is that it is Subhash Pandit (PW 2) who is the most important witness in the sense that he was the first one, according to the prosecution, who had reached the place of occurrence, where his father was assaulted, while he was asleep.

15. We may hasten to point out that though the involvement of the accused-appellants has been in dispute at the trial, there has been no dispute that deceased Lochan Pandit had been assaulted, while he was sleeping near the door

of Jogendra Tiwary's house.

16. Coming to the evidence of PW 2, we notice that according to him (PW 2), he woke up on hearing his father's cries that some persons were assaulting him. It is in the evidence of PW 2 that he came with *bhala* (spear) and saw that about 12 to 14 persons were assaulting his father and, from amongst the assailants, accused Lootan Pandit came running towards him (PW 2) with a *bhala* and told him to run away from there or else, he would kill. According to the evidence of PW 2, he got intimidated by the threat so given and he, therefore, came to his courtyard and started screaming and, then, on hearing the alarm raised by him (PW 2), his neighbours, namely, Ram Ekbal Tiwary (PW 5), Asharfi Singh (PW 4), Paspas Tiwary (PW 7) and others came there with torch lights and, in the focus of the torch lights of his neighbours, he (PW 2) recognized accused Lootan Pandit, Parau Pandit, Sri Pandit, Dubey Singh, Chandradeo Tiwary, Krishna Singh and Babu Singh. It is also in the evidence of PW 2 that on witnessing their co-villagers coming, all the assailants took to their heels, whereupon his father, who had been seriously injured, told him (PW 2) that Lootan Pandit, Parau Pandit, Sri Pandit, dubey Singh, Chandradeo Tiwary, Krishna Singh, Lalbabu Singh and others had assaulted him (Lochan Pandit).

17. It is the further evidence of PW 2 that after

disclosing the name of his assailants, injured Lochan Pandit fell unconscious and, then, he was brought to hospital, where he died on 03.06.1979 at 10.10 PM.

18. Broadly in tune with the evidence of PW 2, his neighbours, namely, Asharfi Singh (PW 4), Ram Ekbal Tiwary (PW 5), have deposed that they woke up at about 4 O'clock at night on hearing Subhash Pandit (PW 2) and his mother screaming for help and when they came rushing to the house of Subhash Pandit (PW 2) with torch lights, they found, in the focus of their torch lights, that the accused aforementioned had been assaulting Lochan Pandit, but noticing their co-villagers coming, all the assailants took to their heels.

19. From the evidence depicted, it transpires that as far as PWs. 4 and 5 are concerned, they came to the place of occurrence on the alarm raised by Subhash Pandit (PW 2) and his mother.

20. What is, now, important to note is that PW 2 has admitted, in his cross-examination, that he had stated before the police that after the accused had fled away, he raised *hulla* and, then, Ram Ekbal Tiwary (PW 5) and Asharfi Singh (PW 4) came with torch lights.

21. Thus, the previous statement of PW 2 shows that PWs 4 and 5 arrived at the scene of the occurrence after

the accused had already fled away.

22. However, if the evidence, which has, now, surfaced on record, is considered in the light of the evidence given by PW 2 in his examination-in-chief, we would notice that it is the specific evidence of PW 2 that it was in the focus of the torch light that he had recognized the assailants. Whose torch light PW 2 has deposed about, the answer to this question is not very far to seek.

23. It is worth noticing that it is not the evidence of PW 2 that the accused were carrying any torch light nor is it in the evidence of PW 2 that he (PW 2) had carried any torch light to the place of occurrence. In fact, the evidence is that the torch lights were brought by PW 2's neighbours, namely, PW 4 (Asharfi Singh) and PW 5 (Ram Ekbal Tiwary).

24. Therefore, the evidence of PW 2, now given at the trial, that he had recognized the assailants in the focus of the torch light would mean that according to him (PW 2), he (PW 2) had recognized the assailants in the focus of the torch lights, which the neighbours of PW 2 carried to the place of occurrence; whereas neighbours of PW 2 had arrived at the place of occurrence, according to PW 2's previous statement, after the assailants had already left.

25. Necessarily, therefore, neither the



neighbours of PW 2 could have seen the assailants nor could have PW 2 seen the assailants in the focus of any torch light, when not torch light was available with him. It is, in this regard, necessary to bear in mind that it is not the evidence of PW 2 that he had recognized the assailants, because they belong to the same village as PW 2 or that he recognized the assailants by their voices.

26. Situated thus, we have absolutely no hesitation in holding that the evidence, given by PW 2, could not have been safely believed in or relied upon and when PW 2 cannot be safely believed, the question of believing PW 4 and PW 5, as having recognized the assailants, does not arise at all, when, in the light of the previous statement of PW 2, they had, admittedly, come to the place of occurrence after the assailants had already fled away.

27. Coming to the *fardbeyan*, which has been recorded by PW 2 on 2nd July, 1979, while the injured was lying, at Sadar Hospital, Motihari, on being admitted there, it is note worthy that the evidence of the Police Officer (PW 3) does not disclose as to what information had been received by him, which brought him to the hospital and made him record the statement of the said injured inasmuch as PW 3 has merely deposed that on receiving information, he went to Sadar Hospital, Motihari, at 7.30 AM, and recorded the *fardbeyan* of

Lochan Pandit.

28. Clearly, therefore, the initial information, which had been received by the police, at Motihari Police Station, has been withheld by the prosecution.

29. Sadly enough, the learned trial Court has made no effort to bring on record as to what information was received by PW 3, which brought him to the hospital and made him record the statement of Lochan Pandit. In fact, what transpires from the record is that the learned trial Judge has recorded the evidence mechanically without making any endeavour to make the evidence intelligible.

ROLE OF TRIAL JUDGE

30. The learned trial Judge has remained a mute spectator and a mere recording machine and showed no participation as a trial Judge in the trial inasmuch as no query is found to have been made by the learned trial Judge from the witnesses examined as to how the police had arrived at the hospital or who had informed the police about the fact that injured Lochan Pandit stood admitted in the hospital and/or what information had made the police visit the hospital.

31. With regard to the above, it needs to be noted that the manner in which the prosecution has been conducted and the manner in which the learned trial Court has dealt with the case are wholly unsatisfactory. In a case as

serious as the present one, it was the duty of the prosecution to bring on record every material fact so that the learned trial Court could have reached a finding based on consideration of all the relevant facts.

32. Coupled with the above, the learned trial Judge, to our dismay, appears to have been merely recording the evidence without being aware of the duty, which a trial Judge is required to discharge, and the role, which a trial Judge is required to perform inasmuch as the learned trial Judge has not, in the present case, exercised its powers under Section 311 of the Code of Criminal Procedure, which mandates the Courts to call or recall or examine a witness if the witness's evidence appears to the Court essential to a just decision of the case.

33. No wonder, therefore, that even Section 165 of the Evidence Act recognizes court's power to put any questions to any witness, at any time, which appears to the Judge as necessary for just decision of the case or in order to discover or obtain proof of relevant facts.

34. We may pause here to point put that a trial Judge is not merely a recording machine of evidence given by the witnesses nor can he be a silent spectator to the evidence produced by the parties. Though a trial Judge must not drop the mantle of a Judge and assume the role of a prosecutor or a



defence counsel, the fact remains that his duty is to reach the truth and Section 165 of the Evidence Act gives the Judge adequate power and authority to put any question to any witness at any time — be it during the course of examination-in-chief or cross-examination or at the end of any such examination or re-examination, which, to the Judge, appears to be necessary to a just decision of the case and in order to discover or obtain proof of relevant fact.

35. Though a Judge must not usurp the function of a counsel, he needs to participate, in the trial, in such a manner as would ensure that the evidence, adduced by the parties, is legal and such evidence becomes clear, complete and intelligible. A Judge, who, while presiding over a trial, merely records evidence without caring to conduct examination of the witnesses in order to ensure that evidence on record becomes intelligible, must be held to have not performed his duty as warranted by law. A Judge is not merely an observer. It is his duty to explore, within permissible limits, the truth.

36. If, therefore, a Judge finds that the examination of a witness is not being conducted in such a way as to unfold complete truth, it is not only right for the Judge, but his duty it is to intervene and put such questions as may be warranted and permissible within the ambit of Section 165 of the Evidence Act.

37. A Judge cannot behave like a passive agent, when a case is tried before him. He has the power and also the duty to question the witnesses in order to elicit relevant materials.

38. A case cannot be allowed to suffer for failure of any of the parties to elicit relevant materials from a witness. It is to discover the truth and bring, on record, the relevant facts that a Judge has been vested with the power to put questions under Section 165 of the Evidence Act. It is with this object in view that the Judge has been vested with the power to call any witness or recall any witness at any time *suo motu* or at the instance of any of the parties if it becomes necessary to a just decision of the case.

39. If the prosecution omits to bring out any relevant fact or the defence elicits from a witness, in the cross-examination, a statement, which is obscure or incomplete, the defence does not acquire (the Judge must bear in mind) a vested right in such limited cross-examination. It is the duty of the Judge to remove such obscurity or incompleteness by putting appropriate question.

40. In fact, emphasizing what role a Judge should play in a trial, the Supreme Court, in **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble [MANU/SC/0677/2003 : (2003) 7 SCC 749]**, observed:

"34. The courts exist for doing

justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. ***The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial, i.e., to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility, i.e., to render justice in a case where the role of the prosecuting agency itself is put in issue.***

(Emphasis is supplied)

41. From the position of law laid down, in **Shakila Abdul Gafar Khan** (supra), it becomes transparent that a Court is not a tape-recorder, which has to merely record evidence. Far from this, when the Court's object is to do justice, it cannot overlook the necessity to reach the truth. Hence, while a Court cannot assume the role of a party to a case, it nevertheless has the duty to remove vagueness or obscurity from a witness's evidence so that the evidence becomes intelligible to a Court of law.

42. No wonder, therefore, that the Supreme Court, in **Jamatraj Kewalji Govani v. State of Maharashtra [MANU/SC/0063/1967 : AIR 1968 SC 178]**, observed that these two sections, (i.e., Section 311 of the Code of Criminal

Procedure and Section 165 of the Evidence Act) confer jurisdiction on the judge to act in aid of justice. Dealing With the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was), speaking for a three-Judge Bench of the Supreme Court, in **Jamatraj Kewalji Govani** (supra), observed as follows:

“It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new Evidence is needed by it for a just decision of the case.”

43. The observations, made by O. Chinappa Reddy, J. in **Ram Chander v. State of Haryana**, reported in **MANU/SC/ 0206/1981 : (AIR 1981 SC 1036)**, are also to the same effect as the observations in **Jamatraj Kewalji Govani** (supra).

44. However, as already pointed out earlier, the wider the power, more cautious has to be its exercise. The



power, under Section 311 of the Code of Criminal Procedure, cannot, therefore, be unanalyzed, uncontrolled or arbitrary. Section 311 of the Code of Criminal Procedure is neither limited by any particular stage of a criminal proceeding nor is it conditioned by any specific circumstance. The principle, underlying Section 311 of the Code of Criminal Procedure, is that the evidence, to be obtained, shall appear to the court essential to a just decision of the case.

45. It is for the reason, as indicated above, that in **Mohanlal Shamji Soni v. Union of India**, reported in **MANU/SC/0318/1991 : (1991) Supp (1) SCC 271**], the Supreme Court has held that the aid of Section 311 of the Code of Criminal Procedure should be invoked only with the object of discovering relevant facts or obtaining proof of relevant facts in order to render a just decision in a given case.

46. It is incumbent, on the part of the court, to take care to ensure that while exercising its powers under Section 311, Code of Criminal Procedure, it does not allow a lacuna, left by the prosecution or by the defence, to be fulfilled nor shall the exercise of power put the accused to disadvantage or cause prejudice to him or give an unfair advantage to the prosecution. Section 311 of the Code of Criminal Procedure can also not be utilized in such a way that it changes the nature of the case of either of the parties.



47. Coupled with what have been indicated above, what can also not be ignored and must not be ignored is the fact that though the occurrence had taken place on 31.05.1979, at about 2.00 AM, and the injured was admitted on 31.05.1979 itself, his statement or *fardebayan* was recorded as late as on 02.06.1979 at 7.30 AM. For the delay, which has so crept in recording the statement of Lochan Pandit (since deceased) as his *fardebayan*, has not been explained by the prosecution nor is there any explanation discernible, in this regard, from the evidence on record. There was, thus, sufficient time and opportunity for the injured and the witnesses to hold mutual consultation and, then, lodge the *fardebayan* with police. The belated *fardebayan* in respect of the present case cannot be ignored.

48. In the backdrop of what have been indicated above, it is highly unsafe to rely on the contents of the so called First Information Report, which records the names of the assailants mentioned by injured Lochan Pandit.

49. Moreover, we notice that PW 2 has deposed that after his neighbours arrived, he, along with his neighbours, went to the place, where his father was lying injured, and his father, before falling unconscious, told him the names of the assailants.

50. Surprisingly enough, however, the

neighbours of PW 2, namely, Asharfi Singh (PW 4) and Ram Ekbal Tiwary (PW 5) have, nowhere, deposed that injured Lochan Pandit, before falling unconscious, had made any statement naming his assailants or reported to them (PW 2, PW 3 and PW 4) the names of the assailants.

51. In the face of what have been indicated above, the evidence, given by PW 2, that his father had mentioned the names of the assailants cannot be believed at all.

52. Coupled with the above, the evidence of PW 2 shows that his father, Lochan Pandit, fell unconscious at the very place of occurrence. Did injured Lochan Pandit had regained his senses at any time after he was brought to the hospital? The evidence on record give no affirmative answer. This inference gets reinforced when we notice that in the light of the evidence of PW 2, his father, Lochan Pandit, had fallen unconscious at the very place of occurrence and there is no evidence on record to show that at any time thereafter, the injured had regained his senses.

53. So situated, it becomes abundantly clear that the *fardbeyan* of the said injured, recorded by PW 3 (Investigating Officer), which, in law, is nothing, but *dying declaration* of the said injured, cannot be safely relied upon.

54. 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.

55. At any rate, in the light of the nature of the evidence on record, the prosecution could not have been held, and ought not to be held, to have proved their case beyond reasonable doubt against the accused appellants. Consequently, the accused- appellants deserve to be accorded, at least, benefit of doubt.

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

57. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellants and the sentences 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.

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

59. Let the *Amicus Curiae* be paid a fee of

Rs.5,000/-.

60. 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.)

(Vikash Jain, J.)

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