

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 780 of 2008

Against the judgment of conviction, dated 08.05.2008 and order of sentenced dated 14.05.2008 passed by Shri N. K. Sharma, learned Additional Sessions Judge, Fast Track Court – I, Siwan in Sessions Trial No. 404 of 1996 arising out of Guthani P.S. Case No. 49 of 1995

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1. Ganpat Mallah, S/o Laxman Mallah
 2. Laxman Mallah, S/o Late Mahadeo Mallah
 3. Sagar Mallah, S/o Mahangu Mallah
 4. Ganesh Mallah, S/o Subhag Mallah

All are residents of village – Sohagra Ghat, P.S. – Guthani, Distt. - Siwan

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Mr, Basant Kumar Singh, Advocate
Mr. Rakesh Kumar Singh, Advocate
For the Respondent : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

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

Date: 06-04-2015

Under the judgment, dated 08.05.2008, passed, in Sessions Trial No. 404 of 1996, by learned Additional Sessions Judge, Fast Track Court No. 1, Siwan, the accused-appellants, namely, Ganpat Mallah, Laxman Mallah, Sagar Mallah and Ganesh Mallah, stand convicted under Sections 302 read with Section 34 as well as 323 read with Section 34 of the Indian Penal Code. Following their conviction under Section 302 read with Section 34 of the Indian Penal Code, the accused-appellants have been

sentenced to suffer imprisonment for life and, following their conviction under Section 323 read with Section 34 of the Indian Penal Code, the accused-appellants have been sentenced to undergo rigorous imprisonment for a period of one year. Both the sentences were directed to run concurrently.

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

(i) On 13.07.1995, at about 10.00 P.M., Jagdeo Mallah (since deceased), having had his dinner, was sitting with his family at his house. At that time, a *tati* (a structure made of straws), erected in front of the house of Birendra Mallah (informant) and adjacent to the house of Vishwanath Mallah, had fallen on the ground due to rain and thunder. On noticing that the *tati* had fallen on the ground, accused, Ganpat Mallah, under the impression that Vishwanath Mallah was the one, who had deliberately demolished the *tati*, started abusing Vishwanath Mallah. As Vishwanath Mallah told accused Ganpat Mallah not to abuse, for, the *tati* had fallen due to rain and thunder, an altercation ensued between Vishwant Mallah and accused Ganpat Mallah. Seeing the altercation between Vishwanath Mallah and accused Ganpat Mallah, Birendra Mallah (P.W. 6) intervened by saying that the said *tati* had fallen, because of rain and thunder. In the meanwhile, however, accused Ganpat Mallah began to assault Vishwanath Mallah by means of a *lathi*. Birendra Mallah, accompanied by his mother, Sahodari Devi, his father, Jagdeo

Mallah and his wife, Prabhawati Devi, rushed to save Vishwanath Mallah, but just then, accused, Laxman Mallah, Sagar Mallah, Sri Ram Mallah and Ganesh Mallah started assaulting, by means of *lathis*, not only Vishwanath Mallah, but Birendra Mallah, his father, Jagdeo Mallah (since deceased), Prabhawati Devi, wife of Birendra Mallah. On being assaulted by the accused, Vishwanath Mallah fell unconscious. Because of the injuries sustained by him, Jagdeo Mallah fell on the ground and succumbed to his injuries.

(ii) Having received information with regard to the occurrence, Officer-in-Charge, Guthni Police Station, made an entry, in this regard, in the station diary of the said Police Station, reached the place of occurrence on 14.07.1995 at 05.00 A.M. and recorded the statement of Birendra Mallah, as his *fardbeyan*, and treating the same as First Information Report, Guthni P.S. Case No. 49 of 1995 was registered, under Section 341/323/307/ 302/34 of the Indian Penal Code, against accused persons, Ganpat Mallah, Laxman Mallah, Mahadeo Mallah, Sagar Mallah, Mahangu Mallah, Sri Ram Mallah, Jagarnath Mallah, Ganesh Mallah, Suman Mallah.

(iii) During investigation, police visited the place, where the said dead body was found, held *inquest* over Jagdeo Mallah's dead body, which was also subjected to *post mortem* examination, all the surviving injured, namely, Vishwanath Mallah, Birendra Mallah and Prabhawati Devi, were medically examined and treated. On completion of investigation, *charge sheet* was laid, under Section 302 of the Indian Penal Code, against accused

Ganpat Mallah, under Section 323/34 of the Indian Penal Code against the accused persons, namely, Ganesh Mallah, Laxman Mallah, Sagar Mallah and Ganpat Mallah and, under Section 302/34 of the Indian Penal Code, against the accused persons, namely, Sagar Mallah, Laxman Mallah and Ganesh Mallah.

3. At the trial, when *charges*, under Sections 302 and 323 read with Section 34 of the Indian Penal Code, were framed against all the accused, a substantive charge under Section 302 of the Indian Penal Code was also framed against accused Ganpat Mallah. To the charges, so framed, all the accused pleaded not guilty.

4. In support of their case, prosecution examined as many as 6 (six) witnesses. 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 that of denial. No evidence has been adduced on behalf of the defence.

5. Having, however, arrived at the finding that accused-appellants aforementioned had been proved guilty of the *charges* under Sections 323 and 302 read with Section 34 of the Indian Penal Code, learned trial Court convicted them accordingly. Following their conviction, sentences have been passed against the convicts as mentioned above.

6. Aggrieved by their conviction and the sentences

passed against them, the convicts aforementioned have preferred this appeal.

7. We have heard Mr. Basant Kumar Singh, learned Counsel, appearing for the appellants, and Mr. Ajay Mishra, learned Additional Public Prosecution, appearing for the State.

8. While considering the present appeal, what needs to be borne in mind is that there was, admittedly, a land dispute between the parties concerned souring thereby their relationship. Both the parties, therefore, maintained inimical relation with each other. Enmity is a double-edged weapon, which cuts both the ways. While enmity may be a reason for committing an offence, such as, murder, enmity may also be a reason for either falsely implicating an enemy as an accused or roping in an enemy, who may be innocent, along with the guilty ones.

9. It is, therefore, incumbent, on the part of the Court, while dealing with such a case, as we have at hand, to be cautious, while appreciating evidence.

10. Coming to the merit of the present appeal, let us, first, take note of the evidence of Dr. U.S. Madhup (P.W. 1), who had, admittedly, on 14.07.1995, at 12.20 P.M., conducted *post mortem* examination, at Sadar Hospital, Siwan, on the dead body of Jagdeo Mallah and found following *ante mortem* injuries :

"On External Examination:

(i) One bruise 3" x 1" on the lower part of the left of chest.

(ii) One lacerated wound 1" x ¼" x



scalp deep on top of head.

(iii) One lacerated wound ½" x ¼" x skin deep on left eye brow.

On dissection:

Haematoma beneath the right side of scalp. Fracture of skull on the right side of head. Lacerated brain tissue on the right side of the head. The thoracic cavity contained blood. Right liver ruptured."

11. In the opinion of the doctor (P.W. 1), the cause of death was shock and hemorrhage resulting from the *ante mortem* injuries sustained by the said deceased, the injuries having been caused by hard and blunt substance. It is also in the evidence of the doctor (P.W. 1) that the injuries, sustained by the said deceased, were sufficient to cause the death in the ordinary course of nature.

12. Nothing could be elicited by the defence to show that 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 were incorrect. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence of the doctor (P.W. 1) and his opinion, as indicated above, clearly establishes the fact that Jagdeo Mallah had died, because of the injuries, which had been found by the doctor (P.W. 1) to have been sustained by the said deceased.

13. Keeping in view the medical evidence on record,

as noted above, let us, now, turn to the evidence of the informant, Birendra Mallah (P.W. 6). According to this witness's evidence, on the day of the occurrence, at about 10.00 P.M., when he was present in his house, accused Ganpat Mallah began to assault Vishwanath Mallah by means of a *lathi* and when his father, Jagdeo Mallah, went to save Vishwanath Mallah, accused Ganpat Mallah assaulted Jagdeo Mallah, too, by means of *lathi*, Jagdeo Mallah fell down and died. It is also in the evidence of P.W. 6 that accused Laxman Mallah, Ganesh Mallah and Sagar Mallah had also assaulted his father, Jagdeo Mallah, his mother, Sahodari Devi, and his wife, Prabhawati Devi, and fled away and that his mother and his wife were treated at the hospital.

14. On the heels of the evidence of P.W. 6 is the evidence of P.W. 5, Rajendra Mallah, whose evidence, we notice, is that on the day of occurrence, at about 10.00 P.M., when he was present in his courtyard, he heard *hulla* and when he went to his house, he saw accused Ganpat Mallah, Sagar Mallah, Sri Ram Mallah and Ganesh Mallah quarrelling because of the *tati*, which had fallen, and accused Ganpat Mallah was asking Vishwanath Mallah as to why he (Vishwanath Mallah) had demolished the *tati* and when Vishwanath Mallah replied by saying that *tati* had fallen, because of the wind, accused Ganpat Mallah and Laxman Mallah started assaulting Vishwanath Mallah, whereupon Birendra Mallah (P.W. 6), who was sleeping nearby, woke up and asked accused Laxman Mallah and Ganpat Mallah as to why they were assaulting

Vishwanath Mallah and, when, Birendra Mallah and his father, Jagdeo Mallah, went forwarded, accused Laxman Mallah and Ganpat Mallah assaulted Jagdeo Mallah, who died. It is in the evidence of PW 5 that when the informant's mother, Sahodari Devi, and his wife, Prabhawati Devi, reached the place of occurrence, they, too, were assaulted by the accused.

15. Before proceeding further, we may also take note of the evidence of P.W. 4 (Sahodari Devi), whose evidence is that, on the day of occurrence, at about 10.00 P.M., she was at her house and as the *tati* had fallen, accused Ganpat Mallah started quarrelling with Vishwanath Mallah accusing Vishwanath Mallah had demolished *tati* and while her husband, Jagdeo Mallah, was standing there, accused Ganpat Mallah assaulted her husband, who fell down and after her husband fell down, accused Ganpat Mallah gave further blows by means of *lathi* and, in consequence thereof, her husband died. It is also in the evidence of P.W. 4 that the accused assaulted her, her son, Birendra Mallah, and her daughter-in-law, Prabhawati Devi.

16. We may, at this stage, pause to point out that in his cross-examination, P.W. 6, who was treated as the informant of this case, has deposed that he had reported the occurrence to the Mukhiya, i.e., headman of his village, on the night of the occurrence, and, accompanied by the village Chowkidar, went, at about 11.00 P.M., to Guthani Police Station, where Daroga (i.e., a Police officer) and Constables were also present. It is in the

evidence of PW 6 that he orally reported to the police about the occurrence, but his statement was not recorded by the police and that the police came, on the following day, at 4 O'clock in the morning, to the place of occurrence and, then, recorded his (PW 6's) statement.

17. From the evidence, so given by P.W. 6 (Birendra Mallah), who has been treated as the informant, it becomes abundantly clear that pursuant to the information, which P.W. 6 had given orally to the Police Station, the police arrived at the place of occurrence and recorded the statement of P.W. 6 though it is this statement, which has been treated as the First Information Report, the fact remains that having already been informed about the occurrence, which involved commission of a *cognizable offence* of murder, when the police machinery moved into motion and police came to the place of occurrence, the information with regard to the occurrence, which had been given by PW 6 (Birendra Mallah), was the First Information Report.

18. It, therefore, clearly follows that it was in the course of investigation that the police actually arrived at the place of occurrence and recorded the statements of PW 6 and, hence, the contents of the said *fardbayan* could not have been treated as the First Information Report; rather, the said statement of PW 6 was a statement made during the investigation of the case and could not have, thus, been treated as the First Information Report.

19. In fact, the First Information Report would be the

statement, which PW 6 had given, on the very night of the occurrence, at Guthani Police Station, with regard to the occurrence.

20. What was, however, the said initial information, given to the police, remains unknown inasmuch as the Officer-in-Charge, Guthani Police Station, and/or the Investigating Officer have not been examined in the present case. This is a serious infirmity with which suffers the case of the prosecution.

21. Because of the fact that the *fardbeyan*, which has been proved as the First Information Report, is clearly a manipulated document, the evidence on record needs to be cautiously approached and closely scrutinized.

22. Reverting to the merit of the evidence, which have been given by P.Ws. 4, 5 and 6, we notice that though P.W. 6 has claimed that his father was assaulted by accused Ganapat Mallah by means of a *lathi* and his father fell down and died. He has, in his cross-examination, clearly deposed that when he reached the place of occurrence, his father had already died meaning thereby that PW 6 could not have seen the assault on his father.

23. Coming to the evidence of P.W. 5, we notice, as already indicated above, that though he has claimed that on hearing *hulla*, he went to his old house and saw a quarrel taking place there between accused, namely, Laxman Mallah and Ganesh Mallah, with Vishwanath Mallah and when P.W. 6 woke up, he (PW

6) asked as to why they had been quarreling with Vishwanath Mallah, both the accused, Laxman Mallah and Ganpat Mallah, assaulted Birendra Mallah (PW 6) and when Birendra Mallah's father, Jagdeo Mallah, went forward, accused Ganpat Mallah as well as Laxman Mallah assaulted Jagdeo Mallah by means of *lathis* till his death.

24. Notwithstanding what has been deposed in his examination-in-chief by P.W. 5, it is his evidence, in the cross-examination, that he heard *hulla* raised his old house and he went running alone to his old house and when he reached his old house, he found that his father was already lying dead and Birendra Mallah was standing there with injury on his death, which was bleeding, and his mother's finger had suffered fracture. The evidence, so given by P.W. 5, in his cross-examination, clearly shows that when he reached the place of occurrence, his father was already lying dead. The claim, therefore, of P.W. 5 that he had witnessed assault on his father at the hands of accused, Laxman Mallah and Ganpat Mallah, can not at all be believed.

25. When we turn to the evidence of P.W. 4, Sahodari Devi, who is claimed to be the widow of Jagdeo Mallah, we are surprised to note that her evidence has been recorded as wife of late Chandradeo Mallah. No explanation, in this regard, has been offered by the prosecution or is discernible from the material on record.

26. Be that as it may, her evidence is that she had

initially seen accused Ganpati Mallah giving blows by *lathi* on her husband, who fell down and died.

27. Excluding, however, P.W. 5 and P.W. 6, from the scene of occurrence, this witness (P.W. 4) has deposed, in her cross-examination, that she was the first one to reach her husband, who was the first to have been assaulted. She has further deposed, in her cross-examination, that when she reached the place of occurrence, the accused had been dragging Vishwanath Mallah to their house and her husband was lying died on the ground and, at the place of occurrence, there was pool of blood and that she had been given blows by *lathi* by others on her body and she sustained three blows of *lathi*, whereas her medical examination shows that on being examined the doctor, she was found to have sustained only two injuries, as follows:

- (i) *Swelling and tenderness on right hand*
- (ii) *Claim of pain on right shoulder"*

28. From the injuries sustained by PW 4, it is clear that she did not suffer any fracture of her finger contrary to what she has deposed. However, though P.Ws. 4, 5 and 6 have also deposed as eye-witnesses to the occurrence, surprisingly enough while P.W. 4 and P.W. 6 have attributed assault on Jagdeo Mallah at the hands of accused Ganpat Mallah alone, P.W. 5 claims that Jagdeo Mallah was assaulted by accused Laxman Mallah as well as accused Ganpat Mallah. If the evidence of P.Ws. 4 and 6 were true, the evidence of P.W. 5 has to be false and *vice versa*.

29. Because of the quality of the evidence, which has been adduced by the prosecution witnesses, coupled with the medical evidence on record, we are clearly of the view that in the facts and attending circumstances of the present case, it was the evidence of none of the three witnesses, P.W. 4, P.W. 5 and P.W. 6, which could have been safely relied upon and the conviction of the accused-appellants could not have been founded thereon.

30. Coupled with the above, what can also not be ignored is that Vishwanath Mallah was assaulted by the person with whom the altercation had taken place and he was one, who had been assaulted before even Jagdeo Mallah was assaulted by the accused. Noticeably, however, Vishwanath Mallah had not been examined as a witness and no explanation, in this regard, has been offered by the prosecution nor is there any explanation discernible, in this regard, from the materials on record.

31. Further-more, from a microscopic examination of P.W. 4, PW 5 and PW 6, it becomes clear that if these witnesses were deposing the truth, there ought to have been multiple injuries on the person of the deceased inasmuch as according to PW 4, Jagdeo Mallah had been given multiple blows by *lathis*. Belying, however, the description of the occurrence so given by these witnesses, the medical evidence on record shows that Jagdeo Mallah had sustained only three injuries.

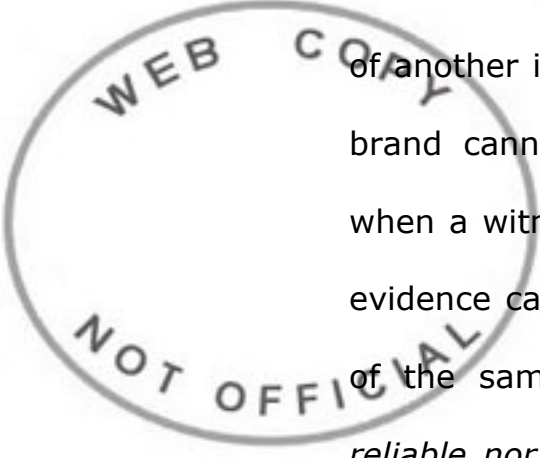
32. There is clearly, thus, a conflict between the eye-witnesses' account of the occurrence, on the one hand, and the

medical evidence available on record, on the other.

33. 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*.

34. 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.

35. 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.



36. 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.

37. 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 Supreme Court 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 stigmatizing it as unreliable.”

38. 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 made basis for holding them truthful witnesses, when their evidence is belied by the medical evidence on record unless their evidence is found to have been corroborated by credible independent evidence, direct or circumstantial.

39. In the backdrop of what have been discussed and pointed out above, we are firmly of the view that the prosecution had failed, in the present case, to bring home the charges against the accused-appellants beyond reasonable doubt and that the accused-appellants were entitled to be accorded benefit of doubt.

40. In the result, and for the reasons discussed above, these appeals stand allowed. The impugned conviction of the accused-appellants and the sentences passed against them by the judgment and order, under appeal, shall accordingly stand set aside. All the accused-appellants are held not guilty of the offences, which they were charged with, and they are acquitted of the same under benefit of doubt.

41. As the accused-appellant, Ganpat Mallah, is in jail custody, he is directed to be set at liberty forthwith unless he is required to be detained in connection with any other case. As far as the remaining accused-appellants are concerned, they are already on bail. Their bail bonds are, therefore, cancelled and their sureties

shall stand discharged.

42. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

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