

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.31 of 2010

(AGAINST THE JUDGMENT OF CONVICTION DATED 14.10.2009 AND ORDER OF SENTENCE, DATED 16.10.2009, PASSED BY SHRI JITENDRA MOHAN SHARMA, SESSIONS JUDGE, SARAN, CHAPRA, IN SESSIONS TRIAL NO. 520 OF 2008, ARISING OUT OF DIGHWARA POLICE STATION CASE NO.34 OF 2008.)

=====

Mohan Kumar Mahto, son of late Kishun Mahto, resident of Village- Sitalpur Basti Jalal, Police Station-Dighwara, District-Saran at Chapra.

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellant : Mr. Harsh Singh, Advocate

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

Mr. Rajesh Ranjan, Advocate, as 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: 20-07-2015

By the judgment, dated 14.10.2009, passed, in Sessions Trial No. 520 of 2008, by learned Sessions Judge, Saran, Chapra, the accused-appellant, Mohan Kumar Mahto, stands convicted under Section 302 of the Indian Penal Code. In consequence of his conviction, the accused-appellant stands, under the order, dated 16.10.2009, sentenced to suffer imprisonment for life and fine of Rs. 5,000/- and, in default of payment of fine, further undergo rigorous imprisonment for a period of one year.

2. The case of the prosecution, as unfolded by

the First Information Report, may, in brief, be described as under:

(i) On 20.03.2008, at about 06:00 PM, Saraswati Kunwar @ Shiv Rati Kunwar (since deceased) told her son, Akhilesh Mahto (PW 4), to buy and bring salt from a nearby shop, PW 4 went accordingly to the grocery shop of his co-villager, Jai Shankar Kumar (PW 6), and asked him to give salt. Before PW 6 could give salt to PW 4, accused Mohan Kumar Mahto told PW 4 to bring cigarette from another shop. PW 4 refused to bring the cigarette by telling the accused that he (PW 4) had come to the shop to purchase salt .

(ii) On the refusal of PW 4 to bring cigarette, the accused became angry and started slapping and not only gave fist blows on PW 4, but also threw him to the ground. PW 4 got up and rushed to his home.

(iii) The accused went, following PW 4, to the house of PW 4, and, on entering into his house, the accused started slapping and giving fist blows on PW 4. The accused also dashed the head of PW 4 against a wall and injured him.

(iv) When Saraswati Kunwar came forward to save her son (PW 4), the accused left PW 4 and threw Saraswati Kunwar to the ground and, then, put one of his legs on her neck and stood up on her neck. As a result of the pressure put on the neck of Saraswati Kunwar, her thyroid

bone suffered fracture and she (Saraswati Kunwar) died.

(v) On hearing *hulla*, PW 3, sister-in-law of the deceased, came running to the house of Saraswati Kunwar and noticed the accused standing with his leg on the neck of Saraswati Kunwar. As PW 3 entered the house, the accused fled away.

(vi) Despite the fact that the co-villagers of the accused chased him for a couple of miles, the accused succeeded in fleeing away.

(vii) The Investigating Officer (PW 7), who was on patrolling duty, heard the news that somebody had been murdered at village Basti Jalal. The Investigating Officer (PW 7) went accordingly to the house of the deceased, where he recorded the statement of PW 4 in the form of the latter's *fardbeyan*. Inquest was held over the said dead body. Later on, treating the said *fardbeyan* as the First Information Report, Dighwara Police Station Case No.34 of 2008, under Section 302 of the Indian Penal Code, was registered, against accused Mohan Kumar Mahto. The dead body was also subjected to *post mortem* examination, which revealed that Saraswati Kunwar had died, because of asphyxia following throttling.

(viii) On completion of investigation, a *charge sheet* was laid, under Section 302 of the Indian Penal Code, against the accused-appellant.

3. At the trial, when a charge, under Section 302 of the Indian Penal Code, was framed against the accused-appellant, Mohan Kumar Mahto, he pleaded not guilty thereto.

4. In support of their case, prosecution examined altogether 9 (nine witnesses). The accused was, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, and in his examination aforementioned, 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 the family members of the deceased, including PW 1, PW 2, PW 3 and PW 5 (being brothers-in-law and sister-in-law), were unhappy with the deceased, who had an immoral character and had given birth to her youngest son two years after the death of her husband and they are the persons, who stand to gain, from the death of Saraswati Kunwar, since Saraswati Kunwar was a widow. The accused has, therefore, been falsely implicated by PW 1, PW 2, PW 3 and PW 5. The defence, too, adduced evidence by examining two witnesses.

5. 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.

6. Aggrieved by his conviction and the sentence,

which has been passed against him, the accused, as a convict, has preferred this appeal.

7. We have heard Mr. Harsh Singh, learned Counsel, appearing for the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing on behalf of the State. We have heard also Mr. Rajesh Ranjan, learned counsel, appearing as *Amicus Curiae*.

8. While considering the present appeal, let us, first, refer to, and deal with, the evidence of the doctor (PW 8), who had, admittedly, performed, *post mortem* examination on Saraswati Kunwar's dead body, on 21.03.2008, at 10:30 AM. According to the evidence of this witness, on conducting *post mortem* examination, he found, on Saraswati Kunwar's dead body, following *ante mortem* injuries: -

"External injury :

(a) abrasion on both side on neck in front of and below thyroid prominence of the neck with nail mark 1/2" x 1/2".

(b) redness around the neck, froth coming out with blood stain.

On dissection: Fracture of multiple tracheal rings. All viscera intact and congested. Stomach empty, bladder uterus normal."

9. In the opinion of the doctor, the cause of death was asphyxia due to throttling.

10. Neither the findings of the doctor nor his

opinion with regard to cause of 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 8).

11. Situated thus, it becomes clear that Saraswati Kunwar's death was *homicidal* in nature.

12. The question, however, remains: whether the accused-appellant was the one, who has caused the death of Saraswati Kunwar, and thereby committed the offence of *murder* punishable under Section 302 of the Indian Penal Code?

13. Considering the fact that it is evidence of PW 4, which forms pivot around which revolves the case of the prosecution, let us, now, take into consideration the evidence of PW 4. According to the evidence of this witness, on the day of the occurrence, at about 06:00 PM, his mother gave him money and sent him to the shop of PW 6 for purchasing salt and when he (PW 4) reached the shop of PW 6, accused asked him (PW 4) to bring cigarette from another shop, which he (PW 4) declined. It is in the evidence of PW 4 that on his refusal to bring cigarette, the accused started kicking and punching him and threw him near a tree. It is also in the evidence of PW 4 that he got up and went to his house, but accused Mohan Kumar Mahto followed him and entered into his house and,

upon so entering into the house, started beating him (PW 4) and also dashed his head against the wall and when his mother came to save him, the accused pushed her away and when his mother fell down, the accused started pressing her neck by means of one of his feet, his mother screamed and died.

14. It is the further evidence of PW 4 that when the accused was pressing the neck of his mother, Saraswati Kunwar, by means of his foot, PW 3 came there, but the accused pushed PW 3 aside and ran away.

15. Close on the heels of the evidence of PW 4, the evidence of PW 3 is that on the day of occurrence, in the evening, she heard *hulla* from the house of Saraswati Kunwar and, on entering into Saraswati Kunwar's house, she found the accused pressing Saraswati Kunwar's neck by means of his foot and, then, accused fled away; but before the accused left, Saraswati Kunwar had already died.

16. In her cross-examination, PW 3, however, admits that she has stated before the police that when she entered into the house, accused came running out and fled away and at that time, Saraswati Kunwar was lying dead on the ground and it was her nephew, PW 4, who told her that accused Mohan Kumar Mahto, i.e., the accused, had killed Saraswati Kunwar.

17. Situated thus, it becomes abundantly clear



that the previous statement of PW 3 belies her assertion, at the trial, that she had seen the accused putting her foot on the neck of Saraswati Kunwar and pressing her neck. The previous statement of PW 3, also belies the evidence PW 4 that while the accused-appellant was in the act of pressing the neck of Saraswati Kunwar by means of his foot, PW 3 came to the place of occurrence, the accused pushed PW 4 aside and run away.

18. At yet another place, PW 3 has deposed, in her evidence, that *hulla* was raised by PW 4 by saying that accused Mohan Kumar Mahto had killed his mother by pressing her neck and, on hearing *hulla*, so raised, that she went to the house of Saraswati Kunwar and at that point of time, she was the lone one present in the house. It is also in the evidence of PW 3 that when she came out of her house, it had become slightly dark and when she entered the house of Saraswati Kunwar, her three children were there and accused Mohan Kumar Mahto, i.e., the accused, was running away.

19. It is the further evidence of PW 3 that the accused was chased by her neighbours, Prabhudayal and Santosh Baba to a distance of about one *Kosh* (i.e., about 3.2 kms.), but the accused succeeded in fleeing away.

20. From a close scrutiny of the evidence given by PW 3, it becomes clearly noticeable that her evidence is full



of inconsistencies and contradictions inasmuch as she has deposed that the *hulla* raised by PW 4 was to the effect that his mother has been killed by the accused by pressing her neck meaning thereby that Saraswati Kunwar had already died, when *hulla* was raised by PW 4 attracting the attention of PW 3. This, in turn, gives the impression that PW 3 was not an eyewitness to the occurrence. This apart, PW 3 had stated before the police that on reaching the house of Saraswati Kunwar, she had seen the accused running away meaning thereby that she could not have seen the accused pressing the neck of Saraswati Kunwar by means of his foot.

21. From what have been pointed out above, it becomes clear that even the evidence of PW 4 cannot be implicitly relied upon inasmuch as it is his assertion that PW 3 came forward to save his mother, i.e., Saraswati Kunwar, but the accused pushed PW 3 aside and fled away, we notice from the previous statement of PW 3 recorded by the police that when she entered into the house, the accused was seen running away.

22. Coupled with the above, the evidence of the doctor (PW 9), who examined PW 4, on the very day of the occurrence, is that he found one lacerated wound on the right side of the head 1"x 1/2" x 1/4". Had the evidence of PW 4 been true that he had been slapped, pushed and kicked not



only at the shop of PW 6, but also when the accused came to the house of PW 4 and, however, that his head has been dashed against the wall by the accused, yet PW 4 has been found to have suffered only one lacerated wound on his head. The medical evidence on record, thus, belies substantially the evidence of PW 4 and PW 4 cannot, therefore, be readily believed. This also reinforces our impression that PW 4 is not a witness, who can be implicitly relied upon, and even if his evidence is not rejected outright as wholly unreliable, his evidence would, at best, fall in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

23. What have been observed above brings us to the question as to whether the remaining evidence on record can be held to be so reliable that the same lend credible corroboration to the evidence of PW 4?

24. The question posed above takes us to the evidence of PW 1, who has, we find, deposed that on the day of occurrence, at about 6 o'clock in the evening, when he was returning after answering nature's call, he saw the accused rushing out of the house of Saraswati Kunwar and running away and, on running forward, he saw Saraswati Kunwar lying dead. In his cross-examination, PW 1 has clarified that he was accompanied by PW 5; whereas the evidence of PW 5 is that on the day of occurrence, at about 06:00 PM, while he was

returning from the market, he saw the accused fleeing away from the house of Saraswati Kunwar and he came to know that Saraswati Kunwar had died.

25. Situated thus, it becomes abundantly clear that though PW 1 claims that he was with PW 5, when he (PW 5) saw the accused-appellant rushing out of the house of Saraswati Kunwar and running away, PW 5 belies the evidence of PW 1 by deposing that he (PW 5) was coming alone from the market and not with PW 1, when he saw the accused fleeing away from the house of Saraswati Kunwar.

26. The evidence of PW 1 and PW 5 being wholly contradictory to each other, one cannot, but hold that their evidence is mutually destructive and no reliance can be placed on the evidence of either of them.

27. The above discussion of the evidence leaves us with the evidence of PW 5, whose evidence is to the effect that on the day of the occurrence, at about 6 o'clock in the evening, he was present at his shop, where many other customers were also present, and PW 4 came there to purchase salt and, having purchased salt, PW 4 went away with the salt and it was thereafter that Mohan Kumar Mahto, i.e., the accused-appellant, came there and asked him about a cigarette and he (PW 6) told the accused that there was no cigarette at the shop. PW 6 was declared hostile and though he

was cross-examined by the prosecution, nothing could, however, be elicited from the cross-examination of PW 6 to show that any occurrence of assault on PW 4 had taken place at the shop of PW 6.

28. We may point out that with the help of cross-examination of PW 6 and the examination of the Investigating Officer, though the prosecution has elicited that PW 6 had stated, in his previous statement made to the police, that PW 4 had come to his shop and purchased salt and that the accused had asked him (PW 4) to bring cigarette and as PW 4 was going away after taking salt, the accused slapped PW 4, there is nothing on record to show that the previous statement, so given by PW 6, was true. This apart and more importantly, the previous statement of PW 6 recorded under Section 161 of the Code of Criminal Procedure is not substantive evidence and can be used only for the purpose of contradiction. Hence, the previous statement of PW 6 could not have been treated as substantive evidence.

29. Situated thus, it becomes abundantly clear that though the previous statement of PW 6 proves that his evidence, given in the Court, was contradictory to what he had stated before the police during investigation, this does not, we may hasten to add, necessarily imply that what he had stated before the police during investigation was the truth inasmuch

as the previous statement can only be used for contracting the evidence of PW 6 and not for corroborating him. It is also not permissible, as indicated above, to use the previous statement of PW 6 as substantive evidence.

30. What crystallizes from the above discussion is that the evidence of PW 4 is the evidence of the sole eyewitness and no credible corroboration is rendered by the remaining evidence on record and so far as PW 4 is concerned, we have already held that because of the infirmities with which his evidence suffer from, he cannot be treated to be a wholly reliable witness and even if his evidence is not rejected outright, his evidence would fall, at the most, in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

31. 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.

32. 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.

33. 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."

34. What emerges from the above discussions is that the evidence adduced by the prosecution is admixture of half-truth and untruth and since the truth, if any, is so inextricably mixed with falsehood that it has become impossible to disengage the falsehood, the benefit of such a poor quality of evidence must go to the accused-appellant and the accused-appellant ought to have, therefore, been accorded, at least, benefit of doubt.

35. 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 have been held, to have proved their case beyond reasonable doubt against the accused appellant. Consequently, the accused-appellant deserves to be accorded, at least, benefit of doubt.

36. 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.

37. As the accused-appellant, namely, accused Mohan Kumar Mahto, is in custody, he is directed to be released forthwith if not required to be detained in connection with any other case.

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

39. 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.)

A.F.R.
Pawan/-

U		T	
---	--	---	--