

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.962 of 2009

(Against the judgment of conviction, dated, 5th August, 2009, and the order of sentence, dated, 11th August, 2009, passed by Shri Pandey Anil Kumar, 2nd Additional Sessions Judge , Bhagalpur, in Sessions Trial No.244 of 2000, arising out of Sabour (Lodipur) P.S. Case No. 269 of 1998)

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1. Bhika Mandal @ Vikko Mandal @ Bhikho Mandal @ Ambika Mandal son of Bhunchun Mandal @ Chunchun Mandal.

2. Ramdas Mandal, son of Harchi Mandal.

Both are residents of village Jagarnathpur Goharia, P.S. Lodipur, District Bhagalpur
.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : None

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

Mr. Amish Kumar, learned Counsel as *Amicus Curiae*

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

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

Date: 02-07-2015

Under the judgment, dated 05.08.2009, passed, in Sessions Trial No. 244 of 2000, by learned 2nd Additional Sessions Judge, Bhagalpur, the accused-appellants, namely, Bhikho Mandal and Ram Das Mandal, stand convicted under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959. In consequence of their conviction under Section 302 read with Section 34 of the Indian Penal Code, the accused-appellants stand, under the order, dated 11.08.2009, sentenced to suffer imprisonment for life and

pay fine of Rs.5000/- each and, in default of payment of fine, suffer three months simple imprisonment. Following their conviction under Section 27 of the Arms Act, 1959, the accused-appellants aforementioned have been sentenced, under the order, dated 11.08.2009 aforementioned, to suffer three years rigorous imprisonment and pay fine of Rs.1000/- each and, in default of payment of fine, undergo simple imprisonment for a period of one month. Both the sentences have been directed to run concurrently.

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

(i) On 16.11.1998, at about 11 O'clock at night, while Bhumi Mandal (since deceased) was sleeping by the side of the field of one Amya Babu keeping a watch against possible theft of paddy crops not only from the land of Amya Babu, but also from the land of adjoining persons, accused Miki Mandal and accused Ram Das Mandal, on being exhorted by accused Munnilal Mandal, fired at Bhumi Mandal. The bullet, so fired, hit Bhumi Mandal on his left rib and crossed through left side of his back.

(ii) As injured Bhumi Mandal cried out of pain, many of his co-villagers arrived there and carried him to Jawaharlal Nehru College and Hospital, Bhagalpur. On the way to the hospital, the injured (Bhumi Mandal) revealed the names of

accused Miki Mandal and accused Ram Das Mandal as persons, who had shot him.

(iii) On 16.11.1998, at about 12.30 A.M. itself, Fakruddin Ahmad, the Officer-in-Charge (PW 12), who became the Investigating Officer of the case, recorded the statement of injured Bhumi Mandal, as his *fardbayan*, at village Machhipur Chowk, and, treating the same as First Information Report, Sabour (Lodipur) Police Station Case No. 269 of 1998 was registered, under Sections 324 and 307 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against the accused persons aforementioned.

(iv) While receiving treatment at Jawaharlal Nehru Medical College and Hospital, Bhagalpur, injured Bhumi Mandal succumbed to his injuries and Section 302 of the Indian Penal Code was added to the case aforementioned.

(v) Inquest was held over Bhumi Mandal's dead body and the *post mortem* examination, conducted on the said dead body, revealed that Bhumi Mandal had died, because of bullet injury sustained by him on his abdomen.

(vi) On completion of investigation, a *charge sheet* was laid, under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against three accused persons, namely, Bhika Mandal @ Vikko Mandal @ Bhikho Mandal @ Ambika, Ram Das Mandal and Munnilal Mandal.

3. At the trial, charges, under Section 302 read with Section 34 of the Indian Penal Code and Section 27 of the Arms Act, 1959, were framed against accused Ambika Mandal @ Bhiko Mandal, Ram Das Mandal and Munnilal Mandal. To the charges so framed, all the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 13 (thirteen) witnesses including the doctor (PW 13), who had, admittedly conducted *post mortem* examination. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein the accused 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.

5. Having, however, found the accused guilty of the offences, which they stood charged with, learned trial Court convicted them accordingly and passed sentences against them, as mentioned above.

6. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, as convicts, have preferred this appeal.

7. 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.

8. Considering the nature of the evidence, which has

been adduced by the prosecution, it is apposite to refer to, and deal with, first, the medical evidence on record. We may point out in this regard that Dr. Chandramauli Upadhyay (PW 11), who had examined injured Bhumi Mandal, on 16.11.1998 at 2.30 A.M., found as follows:-

"(i) Lacerated wound in the back in the upper part just left to the midline $\frac{1}{4}$ " x $\frac{1}{4}$ " probing not done. This is wound of entry having margin black.

(ii) Lacerated wound exterior abdominal wall in the left sub-coastal region 3" x 3". Omentum coming from the wound exteriorly."

9. The doctor (PW 11) has deposed, in his cross-examination, that *omentum* is a part of intestine, which came out and, in such case, the patient becomes senseless and, later on, dies.

10. From the evidence, which has been given by PW 11, it becomes clear that Bhumi Mandal had suffered two injuries — one on the back in the upper part just left to the mid-line and other one was on the abdominal wall in the left sub-coastal area with *omentum* coming out of the wound.

11. In no uncertain words, the doctor (P.W.11) has deposed that the *omentum* is a part of intestine and when it comes out, a person becomes senseless and, later on, dies.

12. Apart from the fact that a person with the injuries, as had been suffered on his abdomen by Bhumi Mandal, would become senseless and, ordinarily, die, the evidence of PW

11 clearly shows that Bhumi Mandal had sustained not only lacerated wound in the back at the upper part just left to the mid-line, but also an injury on his abdomen.

13. Bearing in mind what have been indicated above, we turn to the evidence of Dr. Sandip Prasad Lal (PW 13), who had conducted *post mortem* examination on the dead body of the deceased on 18.11.1998 at 2.00 PM and found as follows:-

"(i) One wound of entry with inverted margin which was blackened also measuring 1" x 1" present over left side of upper abdomen, 1" below of last rib of left side leading inside the abdomen. On dissection and projectile found to pierce muscle, soft tissue and comes out to exit wound with inverted margin measuring 1" x 1/2" situated over left side of mid back 2 2/1" lateral to midline. There was presence of blood clot in the upper abdominal cavity.

(ii) 3 stitched surgical incised wound of 2", 3" and 5" long was present over left side of abdomen. Wound of 5" length had a drainage tube also. All the wounds were bandaged. On the section small intestine found anatomized at 3 places".

14. This witness (PW 13) has deposed that injury No. (i) was *ante mortem* and caused by fire-arms and in respect of injury No. (ii), detailed opinion should be obtained from surgeon, who had operated the deceased.

15. As far as the cause of death is concerned, the doctor (PW 13) has opined that it was because of haemorrhage and shock resulting from the injuries sustained by the said deceased that the death was caused. In his cross-examination,

the doctor (PW 13) has conceded that he could not give any opinion with regard to injury No. (ii), which had been sustained by the said deceased.

16. Keeping in view the medical evidence on record showing that the said deceased had sustained two bullet injuries, as have been described above, let us, now, turn to the other evidence on record.

17. We may have to point out that according to the evidence of Dulli Mandal (PW 8), on hearing *hulla*, he went to the eastern corner of the orchard, where he found Bhumi Mandal lying injured on being shot by the fire-arm, but Bhumi Mandal was alive. It is the evidence of PW 8 that Tarani Mandal (PW 1) and Munnial Mandal (not examined) were tying gamacha (country-towel) on the wound and, then, he (PW 8) returned home and, having made arrangement of money, he took Bhumi Mandal to hospital. It is also in the evidence of PW 8 that at Machhipur Chowk, injured Bhumi Mandal told them that Miki Mandal and Ram Das Mandal had shot him. It is the further evidence of PW 8 that Bhumi Mandal died in the hospital two days after the occurrence.

18. Close on the heels of the evidence of PW 8, Bina Devi @ Binwa Devi (PW 9), who is the widow of the deceased, has deposed that on hearing the sound of firing, when she sent to her husband, she found her husband lying injured

and when she met her husband at Mayaganj hospital, her husband told her that Ram Das and Bhiku had fired at him.

19. Lending some support to the evidence of PW 8 and 9, Karoo Mandal (PW 10) has deposed that when he went to the place of occurrence, he found Bhumi Mandal lying unconscious and, then, he took him to Machhipur and in the meantime, Bhumi Mandal regained consciousness and told him that Bhiko and Ramdas Mandal had fired at him. It is also in the evidence of PW 10 that Bhumi Mandal died after two days of the occurrence.

20. As far as the Investigating officer (PW 12) is concerned, his evidence is that on 16.11.1998 at about 12.30 P.M., he recorded the statement of injured Bhumi Mandal at village Machhipur Chowk, the statement being Exhibit 5, which has been treated as First Information Report. However, since Bhumi Mandal died, the contents of Exhibit 5, which disclosed the cause of his death, have been treated as the *dying declaration* of Bhumi Mandal

21. While considering the evidence, which we have reproduced above, what attracts our attention is that though the Investigating Officer claims Exhibit 5 to be the statement of injured Bhumi Mandal recorded by him (PW 12) at village Machhipur Chowk, none of the witnesses, including the widow of the deceased, has deposed that any statement of Bhumi Mandal

was recorded by the police at village Machhipur Chowk.

22. Clearly, therefore, the evidence of the Investigating Officer (PW 12) stands belied by the remaining evidence on record.

23. In short, thus, the contents of Exhibit 5, which have been relied upon as the *dying declaration* of the deceased, could not have been relied upon and, ought not to have been treated, as the *dying declaration* of the said deceased.

24. In other words, no reliance could have been placed on the contents of Exhibit 5, which is claimed to be the statement of injured Bhumi Mandal revealing the cause of his death.

25. Coupled with the above, what is impossible to ignore is that PW 9, who is the widow of the deceased, has deposed that it was Tarani Mandal (PW 1), Bal Kishore Mandal (PW 2), Rahim Mandal (PW 3), Jai Ram Mandal (Pw 4), Paro Mandal (PW 5) and Sukhdeo Mandal (PW 6), who had taken her husband, in injured condition, for treatment. None of these witnesses, who had, admittedly, carried the injured to the hospital, has deposed that Bhumi Mandal had made any statement after he had suffered fire-arm injuries. This apart, the evidence of PW 9 excludes the presence of PW 8 and PW 10 as the persons, who had carried the said injured to the hospital and, hence, the question of the injured having been made any

statement in the presence of PW 8 and PW 10 declaring that he had been shot at by the two accused aforementioned cannot arise. Consequently, the evidence of PW 8 and PW 10, too, cannot be held to be trustworthy and reliable.

26. Reverting to the evidence of PW 9, the widow of the deceased, 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.

27. It is the claim of PW 9 that her husband disclosed the names of the appellants as persons, who had shot at him. In the light of what have been discussed above, rejecting the evidence of PW 8 and PW 10, who have claimed that injured Bhumi Mandal had told them that Bhiko and Ramdas Mandal had fired bullet at him, there remains no reliable and trustworthy evidence on record showing that while undergoing treatment at the hospital, injured Bhumi Mandal had regained senses and was in a position to speak. Neither any oral nor medical evidence exists on record supporting the evidence of PW 9, thus, exists.

28. In the circumstances indicated above, we find it frightfully difficult and too hazardous to place implicit reliance on the sole testimony of PW 9 to found conviction of the accused-appellants.

29. Because of the nature of evidence, which is available on record, what ought to have been done by the learned trial Court, was to accord, the least, benefit of doubt to the accused persons inasmuch as we are clearly of the view that in the light of the evidence on record, which we have discussed above, it was too hazardous to convict the accused-appellants, particularly, when we find that the evidence, which the prosecution has adduced, is an admixture of half-truth and untruth and the truth, if any, is so inextricably mixed with the half-truth that it has become wholly impossible to disengage the truth from falsehood. The benefit of such a situation ought to have been given to the accused-appellants.

30. In the backdrop of what have been discussed and pointed 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 acquitted under benefit of doubt.

31. Because of what have been discussed and pointed out, this appeal needs to be allowed.

32. 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, under appeal, are hereby set aside. The accused-appellants, namely, Bhika Mandal @ Vikko Mandal @ Bhikho Mandal @ Ambika Mandal and Ramdas Mandal, are held not guilty of the offences, which they stood convicted of, and they are hereby acquitted of the same under benefit of doubt.

33. As the accused-appellants, namely, Bhika Mandal @ Vikko Mandal @ Bhikho Mandal @ Ambika Mandal and Ramdas Mandal, are in custody, they are directed to be released forthwith, if not required to be detained in connection with any other case.

34. Let the *Amicus Curiae* be paid a fee of Rs. 5000/-.

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.)

(Vikash Jain, J.)

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