

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.81 of 2015**

Arising Out of PS. Case No.-152 Year-2012 Thana- CHAKIA District- East Champaran

Lalan Mahto, son of Laxman Mahto, resident of village-Ramkaranpakri, Post-Chakiya, P.S. Chakiya, District-East Champaran, Motihari.

... .. Appellant.

Versus

The State of Bihar

... .. Respondent.

Appearance :

For the Appellant : Ms. Archana Palkar Khopde, Amicus Curiae.
For the State : Mr. Abhimanyu Sharma, A.P.P.

**CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
and
HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE A. M. BADAR)**

Date : 12-05-2022

By this Jail appeal, appellant/convicted accused Lalan Mahto is challenging the Judgment and Order dated 20.10.2014 and 22.10.2014 respectively passed by the learned 2nd Additional Sessions Judge, East Champaran, Motihari, in Sessions Trial No.48/02 of 2013/013, thereby convicting him of the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life with a direction to pay fine of Rs.10,000/- and in default to undergo rigorous imprisonment for three months. For the sake of convenience, the appellant shall be referred to as “an accused”.

2. Facts in brief leading to the prosecution of the



accused projected from the police report can be summarized thus:

(a). First Informant Laxman Mahto along with his family comprising of his two sons, namely, Lalan Mahto (the accused), Vinod Mahto (since deceased) and other family members used to reside at village-Ramkaran Pakri in East Champaran district of State of Bihar. At about 10.00 P.M. of 14.05.2012, there was quarrel between accused Lalan Mahto and his brother Vinod Mahto (since deceased) at their house, in presence of their father Laxman Mahto. During the course of that quarrel, Lalan Mahto whipped out the knife and gave blow thereof on the chest of his brother Vinod Mahto. Vinod Mahto died on the spot itself. Thereafter, at about 01.00 A.M. of 15.05.2012, first informant/P.W.3 Laxman Mahto lodged report (Ext.1) with Police Station-Chakiya. Accordingly, Crime No.152 of 2012 for the offence punishable under Section 302 of the Indian Penal Code came to be registered against the accused Lalan Mahto and wheels of investigation were set in motion.

(b). During the course of investigation, P.W.6 Md. Salim Khan, the Investigating Officer visited the spot of the incident and inspected it. He recorded statement of witnesses. The dead body was sent for autopsy and P.W.5 Dr. Ravindra



Kumar Verma conducted post-mortem examination on dead body on 15.05.2012. Statement of witnesses came to be recorded and on completion of investigation, the accused came to be chargesheeted.

(c). The learned trial court had framed the charge for the offence punishable under Section 302 of the Indian Penal Code against the accused. The accused pleaded not guilty and claimed trial.

(d). In order to bring home the guilt to the accused, the prosecution has examined in all six witnesses. One set of witnesses is inmates of house of the first informant Laxman Mahto whereas another set of witnesses examined by the prosecution comprises of official witnesses. P.W.1 Shanti Devi is mother whereas P.W.2 Sanjay Mahto is brother of the deceased Vinod Mahto and accused Lalan Mahto. P.W.3 Laxman Mahto, the first informant, is their father. P.W.4 Sunita Devi is widow of deceased Vinod Mahto. P.W.5 Dr. Ravindra Kumar Verma is the Medical Officer of Motihari Sadar Hospital, who conducted post-mortem examination on the dead body of Vinod Mahto. P.W.6 Md. Salim Khan, Sub Inspector, is the Investigating Officer of the subject crime.

(e). Defence of the accused was that of total denial.



However, he did not enter in the defence.

(f). After hearing the parties, the learned trial court by the impugned Judgment and Order came to the conclusion that evidence of P.W.3 Laxman Mahto is acceptable being corroborated by his F.I.R. as well as his statement recorded by the police under Section 161 of the Code of Criminal Procedure. His version is further corroborated by the medical evidence and the evidence of the Investigating Officer. The learned trial court further recorded that the accused had confessed his guilt as seen from his confessional statement (Ext.4) recorded by the police and these facts show that the accused committed the murder of deceased Vinod Mahto due to domestic dispute. That is how, with this reasoning, the learned trial court was pleased to convict the accused of the offence punishable under Section 302 of the Indian Penal Code and to sentence him to suffer life imprisonment.

3. We heard Ms. Archana Palkar Khopde, the learned Advocate appointed to espouse the cause of the appellant in this Jail appeal. By taking us through the record and proceedings, she vehemently argued that the learned trial court has committed serious error of law by exhibiting the confessional statement (Ext.4) of the accused recorded by the Police Officer and held it



to be admissible in evidence ignoring the mandate of Sections 24 and 25 of the Evidence Act. She further argued that inadmissible confessional statement (Ext.4) was taken as foundation for basing conviction for the capital offence and this approach of the learned trial court deserves to be depreciated and resultantly accused deserves acquittal. The learned appointed Advocate appearing for the appellant drew our attention to the provision of Section 162 of the Code of Criminal Procedure and argued that use of statement of witnesses examined by the police under Section 161 of the Code of Criminal Procedure is very limited. She further argued that Section 162 of the Code of Criminal Procedure is very clear on this aspect and the learned trial court ought not to have used police statement of P.W.3 Laxman Mahto for corroborating his version and for basing the conviction for the offence punishable under Section 302 of the Indian Penal Code. Ms. Archana Palkar Khopde, the learned appointed Advocate, further argued that prosecution has not declared P.W.3 Laxman Mahto hostile and he was not cross-examined by the prosecutor. Therefore, as this witness had given complete go by to his version in the chief examination and had candidly admitted in the cross-examination that he was not present on the scene of the occurrence at the



time of the incident, his evidence ought not to have been relied by the learned trial court for recording conviction. It is further argued that the learned trial court has erroneously relied on the version of hostile witnesses without examining whether their evidence is truthful and is being corroborated by other evidence on record. Without undertaking scrutiny of evidence of hostile witnesses, the learned trial court by adopting perverse approach has held the accused guilty of the serious offence. Hence, according to the learned appointed Advocate, impugned Judgment is totally perverse and illegal.

4. As against this, the learned A.P.P. supported the impugned Judgment and Order by contending that evidence of the Investigating Officer and the Autopsy Surgeon is in consonance with the prosecution case and, therefore, the appeal deserves to be dismissed.

5. We have carefully considered the submissions so advanced and we have also perused the records and proceedings.

6. According to the prosecution case, the incident of murder of Vinod Mahto took place in his house shared by his brother Lalan Mahto (the accused) as well as their father/P.W.3 Laxman Mahto. As such inmates of the house of the deceased



Vinod Mahto are natural witnesses to the incident which took place at about 10.00 P.M. of 14.05.2012. The prosecution has, therefore, examined parents of the accused and the deceased so also widow of the deceased in order to rest its case. Unfortunately for prosecution, P.W.1 Shanti Devi (mother), P.W.2 Sanjay Mahto (brother) and P.W.4 Sunita Devi (widow of the deceased) turned hostile to the prosecution and these witnesses are cross-examined at length by the prosecutor. These witnesses have failed to depose in favour of the prosecution. So far as P.W.3 Laxman Mahto is concerned, though he toed the line of prosecution in his chief examination, he completely abundant it during the course of his cross-examination. In cross-examination, he claimed that he had not seen the incident of murder of his son by another son and surprisingly the prosecutor had not declared him hostile and conducted his cross-examination. At this juncture, it is apposite to quote that in the matter of **Rameshbhai Mohanbhai Koli Vs. State of Gujarath reported in 2010 ALL MR (Cri) 3868 (S.C)**, the Hon'ble Supreme Court in paragraphs-8 to 10 has held thus :-

“8. It is well settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record



altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. (Vide **Bhagwan Singh Vs. The State of Haryana AIR 1976 SC 202. Rabindra Kumar Dey Vs. State of Orissa, AIR 1977 SC 170' Syad Akbar Vs. State of Karnataka, AIR 1979, SC 1848 and Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh AIR 1991 SC 1853**).

9. In **State of U.P Vs. Ramesh Prasad Misra and Anr. AIR 1996, SC 2766**, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in **Balu Sonba Shinde Vs. State of Maharashtra (2002) 7 SCC 543 : (2002 ALL MR (Cri) 2280 (S.C.); Gagan Kanojia and Anr. Vs. State of Punjab (2006) 13SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. Vs. State of U.P A.I.R 2006 SC 951 ; (2006 ALL MR (Cr) 1172 (S.C.); Suresh Narayan Shukla Vs. Daroga Singh and Ors., AIR 2008 SC 320; (2008 ALL MR (Cri) 267(S.C) and Subbu Singh Vs. State (2009) 6 SCC 462; (2009 ALL MR (Cri) 3797 (S.C))**.

10. In **C. Muniappan and Ors V/s. State of Tamil Nadu, JT 2010(9) SC 95** this Court, after considering all the earlier decisions on this point, summarised the law applicable to the case of hostile witnesses as under :-

70.1 The evidence of a hostile witness cannot be discarded as a whole and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence”.



Thus, it is clear that evidence of the hostile witnesses is required to be scrutinized closely in order to find out which part thereof is trustworthy and dependable. Similarly, as a rule of prudence the court must search for other evidence for gaining corroboration to such admissible evidence of the hostile witnesses. Let us now see whether any part of evidence of hostile witnesses in this case can be used by the prosecution for establishing the charge levelled against the accused.

7. P.W.1 Shanti Devi, who happens to be mother of deceased and accused, in her chief examination has candidly stated that she has no information about the incident in question. She denied that she had stated to police that she saw her son Lalan committing murder of her another son Vinod. She was not confronted with her police statement by the learned A.P.P. However, the contradiction in her police statement was not got proved by the Investigating Officer Md. Salim Khan (P.W.6). Thus, there is nothing in evidence of P.W.1 Shanti Devi, which may further the prosecution case.

8. Similar is the evidence of P.W.2 Sanjay Mahto, brother of the deceased and the accused. He has stated that he has no information about the incident. He denied to have stated to the police that he had witnessed the incident, during the



course of his cross-examination by the learned prosecutor. This witness was also not confronted with the police statement nor the contradiction from his former police statement was got proved through the Investigating Officer. Suffice to state that the evidence of this witness is of no assistance to the prosecution case.

9. P.W.4 Sunita Devi is widow of deceased Vinod Mahto. She has stated that at the time of the incident, she was at Muzaffarpur and she had not seen the incident. She denied to have stated to the police that she had seen commission of murder of her husband by the accused. She was also not confronted with her police statement nor the contradictions from her police statement was got proved by the Investigating Officer. Thus, evidence of this widow is also of no assistance to the prosecution in establishing its case of commission of murder by the accused. Moreover, at this juncture, it is necessary to state that even if it is assumed that the contradictions in version of this hostile witness were got proved through the evidence of the Investigating Officer by the prosecutor then also such duly proved contradictions cannot be translated into substantive evidence before the court. Such duly proved contradictions make substantive evidence of such hostile witness doubtful.



10. P.W.3 Laxman Mahto is the first informant. He is father of the deceased and the accused. In his chief examination, this witness rendered testimony in line with the prosecution case by stating that at about 10.00 P.M. of 14.05.2012, there was quarrel between his sons Lalan and Vinod and during the course of that quarrel, Lalan gave a blow of knife on the chest of Vinod and Vinod died. He proved his F.I.R. lodged with promptitude, which is at Ext.1. However, he abundant his version in his cross-examination by stating that on the date of the incident, he had gone to Muzaffarpur and had returned to his house at about 00.15 A.M. in the midnight. He further stated that he got knowledge about the incident from the villagers and therefore, he lodged the F.I.R. He admitted in the cross-examination that he had not seen any body giving blow of the knife to Vinod. After this cross-examination by the defence, the learned Prosecutor has not chosen to declare this witness as hostile for conducting his cross-examination. Thus, we are bound to accept evidence of this witness as it is, from the record. Perusal of evidence of this witness goes to show that this witness is totally unreliable witness and his evidence deserves to be rejected. His version in the chief examination is totally contradictory from his version found in the cross-examination



and it is not possible to come to the conclusion as to which of his version is truthful. Anyhow, evidence of this witness suffers from serious infirmity making his version highly doubtful. It cannot be said with conviction that he was in fact an eye witness to the incident of murder of his son Vinod and reasonable doubt lurks in the judicial mind from the testimony of this witness, as to whether he had really seen the incident and was really present in his house at the time of the incident. Unfortunately, the learned trial court has placed reliance on version of this witness found in the chief examination by making use of statement of this witness recorded by police under Section 161 of the Code of Criminal Procedure, which was absolutely not permissible. Statement recorded by police under Section 161 of the Code of Criminal Procedure cannot be used for corroborating version of prosecution witnesses. On this aspect provisions of Section 162 of the Code of Criminal Procedure is very clear and sub Section (1) thereof needs reproduction and it is read thus:

“162. Statements to police not to be signed: Use of statements in evidence.- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when



such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.”

Thus, it is clear that the learned trial court has committed serious error of law while using the police statement of P.W.3 Laxman Mahto as corroborative piece of evidence. Similarly, the F.I.R. can be used, no doubt, for the purpose of corroborating the testimony of the first informant but the same cannot be treated as a piece of substantive evidence. When substantive evidence coming from the mouth of P.W.3 Laxman Mahto is giving two inferences to the effect that he may or he may not be an eye witness to the crime in question, the F.I.R. ought not to have been used by the learned trial court for accepting that version of this unreliable witness which is supporting the prosecution case. Thus, for these reasons, evidence of P.W.3 Laxman Mahto cannot be accepted for holding that the charge for the offence punishable under Section 302 of the Indian Penal Code is proved by the prosecution.



11. Evidence of Autopsy Surgeon P.W.5 Dr. Ravindra Kumar Verma shows that Vinod died due to hemorrhage and shock as a result of piercing of heart by the sharp cutting object. For want of substantive evidence on this aspect, this wound cannot be attributed to the accused. Therefore, evidence of P.W.5 Dr. Ravindra Kumar Verma can be accepted only to hold that the prosecution has proved the fact that Vinod died homicidal death.

12. Evidence of Investigating Officer P.W.6 Md. Salim Khan only explains the line of investigation conducted by him. From his evidence, the learned trial court had exhibited confessional statement of the accused by marking it as Ext.4 and treated it as a proved document. P.W.6 Md. Salim Khan had deposed that confession of the accused was recorded by P.S.I. Vinay Mishra. The learned trial court committed grave error of law by allowing the prosecution to prove confessional statement of the accused recorded by some Police Officer named Vinay Mishra through evidence of P.W.6 Md. Salim Khan. It is obvious that the learned trial court was completely oblivious of legislative mandate as envisaged by Section 25 of the Indian Evidence Act, 1872, which reads thus:

“25. Confession to police officer not to be proved.-No confession made to a police officer,



shall be proved as against a person accused of any offence.”

This provision of the Evidence Act is for safeguarding the interest of the accused and for fair trial. It ensures that accused is not subjected to any inducement, threat, coercion or force to make confession to police. The settled principle of law that statement made by an accused before the Police Officer which amounts to confession is barred by Section 25 of the Indian Evidence Act had gone unnoticed by the learned trial court while recording conviction for the offence punishable under Section 302 of the Indian Penal Code against the accused. By placing explicit reliance on such confessional statement allegedly made by the accused to P.S.I. Vinay Mishra, unfortunately the conviction came to be recorded by the learned trial court.

13. We found that the learned trial court had recorded strange finding that neither the accused nor P.W.3 Laxman Mahto, who happens to be father, had explained the injury found on the dead body of Vinod and they had not explained as to how Vinod died and who had killed the deceased. This observations were made by the learned trial court to convict the accused for the offence punishable under Section 302 of the Indian Penal Code. We failed to understand as to how non-explanation of



injuries on person of the deceased Vinod Mahto by P.W.3 Laxman Mahto can be made a basis for convicting the accused for the offence punishable under Section 302 of the Indian Penal Code. It is for the prosecution to prove its case beyond all reasonable doubts and if prosecution witnesses fail to prove the injuries on the deceased, the accused cannot be made liable for the murder of the deceased. Even for invoking provisions of Section 106 of the Indian Evidence Act, the prosecution is bound to discharge the initial burden of establishing prima facie the guilt of the accused beyond all reasonable doubts. Provisions of Section 106 of the Indian Evidence Act cannot be invoked unless the initial burden of the prosecution is discharged by the prosecution by adducing clear and cogent evidence. In the case in hand, despite fact that no such evidence is adduced by the prosecution, the learned trial court based the conviction for the offence punishable under Section 302 of the Indian Penal Code by holding that neither P.W.3 Laxman Mahto nor the accused explained the injury on the deceased and they failed to point out as to who killed the deceased. This totally illegal and perverse approach adopted by the learned trial court deserves to be depreciated.

14. In the result, we are unable to uphold the



impugned Judgment and Order of conviction and resultant sentence recorded by the learned trial court. The prosecution has utterly failed to prove the charge for the offence punishable under Section 302 of the Indian Penal Code levelled against the accused.

15. For the reasons stated in the foregoing paragraphs, the accused is certainly entitled for benefit of doubt and, therefore, the following orders:

(I). The appeal is allowed.

(II). The impugned Judgment and Order of conviction of the appellant/accused of the offence punishable under Section 302 of the Indian Penal Code and resultant sentence imposed on him by the learned 2nd Additional Sessions Judge, East Champaran, Motihari, in Sessions Trial No.48/02 of 2013/013 dated 20.10.2014 and 22.10.2014 is quashed and set aside.

(III). The appellant/accused is acquitted of the offence alleged against him. He be set at liberty forthwith, if not required in any other case.

16. We record our appreciation for strenuous efforts taken by Ms. Archana Palkar Khopde, the learned Advocate appointed to represent the appellant at the cost of the State, in assisting us for arriving at the correct conclusion in the matter.



We quantify the fees payable to her at Rs.5000/- and direct the High Court Legal Services Authority to pay the said amount to Ms. Archana Palkar Khopde, the learned appointed Advocate.

(A. M. Badar, J)

(Sunil Kumar Panwar, J)

P.S./-

AFR/NAFR	AFR
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