

CASE NO.:
Appeal (crl.) 432-433 of 2005

PETITIONER:
Kapildeo Mandal & Ors

RESPONDENT:
State of Bihar

DATE OF JUDGMENT: 29/11/2007

BENCH:
P.P. NAOLEKAR & D.K. JAIN

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NOS.432-433 OF 2005

P.P. NAOLEKAR, J.

1. These appeals are directed against the judgment and order dated 16th April, 2004 of the High Court of Judicature at Patna passed in Criminal Appeal Nos. 646 of 1987 and 32 of 1988, whereby the appeals of the appellants were dismissed by the High Court and their conviction and sentence was maintained.

2. Criminal Appeal No. 432 of 2005 by special leave was filed by accused No. 1 Kapildeo Mandal (A-1) and accused No. 5 Milan Mandal (A-5), whereas Criminal Appeal No. 433 of 2005 by special leave was filed by accused No. 2 Dip Narain Mandal (A-2), accused No. 3 Subhit Mandal (A-3) and accused No. 4 Pratap Mandal (A-4). After the case was reserved for judgment by this Court, it was informed by the Registry of this Court that A-3 Subhit Mandal S/o Chedi Mandal, fell seriously ill and was sent for treatment to Jawaharlal Nehru Medical College and Hospital, Bhagalpur, and during the course of treatment he died on 6th February, 2007. The appeal filed by A-3 is, therefore, rendered infructuous.

3. All the accused persons were convicted by the 3rd Additional Sessions Judge, Bhagalpur in Sessions Trial No. 34 of 1983 under Sections 302 read with Section 149, IPC and sentenced for imprisonment for life for having committed the offence of murder of deceased Sitaram Mandal. The accused were also convicted under Sections 452 and 148, IPC. A-1 and A-4 were further convicted under Section 323, IPC. Two appeals preferred by the accused against their conviction and sentence were dismissed by the High Court and thus they are before us by special leave.

4. The incident took place in the night between 14th & 15th July, 1979. As per the prosecution case as reported in the FIR by PW-9 Ramanand Mandal, at about 11.00 p.m. he woke up after hearing the sound of barking dogs. A lantern was burning in the verandah of his house. He saw persons, namely, A-1 and his younger brother A-5 entering from the inner courtyard from the roof of his house. One of them went to the

southern side and opened the window from that side. A-2 and A-4 entered the house along with some other persons. One person opened the main door on the eastern side. A-3 and 5-6 other persons entered from that door. A-3 was carrying gun, whereas A-1, A-2 and A-5 were carrying country-made pistols. Other persons were carrying swords and lathis. They assaulted the inmate of the house. A-2 fired at Sitaram Mandal as a result of which he was badly injured. A-3 Subhit Mandal ordered to kill PW-9 Ramanand Mandal, upon which A-1 fired upon PW-9. A-1 assaulted PW-9 with the butt of a country-made pistol on the head. One of the miscreants sprinkled kerosene oil of two bottles upon the body of PW-6 Brahmadeo Mandal and made search of a match-box to set fire upon his body. PW-5 Mahesh Mandal was assaulted with a lathi. While leaving, the miscreants took away some articles from the house. On hearing a hue and cry, some villagers reached the spot. The occurrence and the assault was due to a land dispute between the parties. In the incident, because of the assault made, Sitaram Mandal died.

5. The prosecution examined PW-1 Madan Mandal who is not an eye-witness. He reached the place of incident after the incident was over. He stated that when he reached the place of incident PW-9 Ramanand Mandal informed him that the accused appellants were the persons involved in the assault made on the deceased Sitaram Mandal and him. He admitted that all this happened because of a land dispute between the family of Ramanand and family of accused Dip Narain Mandal. His statement was recorded by the police after two days of the incident. PW-2 Jiten Rabidas also reached the spot after the occurrence. He stated that when he enquired from PW-9 Ramanand Mandal, his brother and female members about the incident, they told that they did not identify any person. They told him that after committing dacoity dacoits fled away. PW-3 Adhiklal Mandal also reached the spot after the incident happened. He admitted that there was enmity between the two families since before the occurrence as they were litigating. PW-4 Tej Narayan Mandal reached the place of incident afterwards. He stated that he was informed of the names of the accused appellants. He is a relation of the complainant party. PW-5 Mahesh Mandal is one of the sons of the deceased. He deposed that he saw the incident in the flash of a torch-light. Besides the torch light, a lantern was also burning in the verandah. He identified the accused appellants and stated that Subhit Mandal (A-3) was armed with a double barrel gun and Dip Narain Mandal (A-2) with a country-made pistol. A-3 shot with a double barrel gun at his father Sitaram Mandal. A-2 also fired with the pistol at his father. Pratap Mandal (A-4) hit him on the head with a knife. He saw the miscreants injuring Ramanand Mandal (PW-9). Thereafter, after collecting ornaments and clothes, they fled away. As per this witness, the deceased Sitaram Mandal had received firearm injury and he received injury by a knife. His statement was recorded after four days of the incident and he admitted that before giving statement to the police he took advice from the family members about the occurrence and then made a statement to the police. The witness stated that Subhit Mandal (A-3)

put the gun on the chest of his father and fired at him and Dip Narain Mandal (A-2) put the pistol near the mouth of his father and fired with the pistol. The witness admitted that there was a litigation between the families. The witness also stated that he did not give the torch to the S.I. of Police nor did he produce that torch in the court. PW-6 Brahmadeo Mandal, another son of the deceased, identified the accused appellants to be the miscreants. He stated that Subhit Mandal (A-3) was armed with a double barrel gun; A-1, A-2 and A-5 were armed with pistols and A-4 was armed with a knife and a lathi. A-5 poured kerosene oil on his body and asked for a match-box. It was stated by this witness that the properties, ornaments, clothes, etc. were looted and taken away by the miscreants. He saw that his uncle Ramanand had sustained injury. This witness admitted in cross-examination that he did not see who assaulted his father Sitaram Mandal. The witness admitted that there was a land dispute between the accused persons and the complainant party. PW-7 Bimla Devi is wife of PW-9 Ramanand Mandal. She identified the accused persons in the light of a lantern. She admitted that the accused persons whom she had identified had covered their faces with gamochha but they had not tied turbans. PW-9 Ramanand Mandal identified all the accused persons and stated that A-3 was armed with a gun, and A-1, A-2 and A-5 were armed with country-made pistols. A-2 shot at the deceased. A-3 ordered A-1 to assault him and A-1 shot at him which missed.

6. CW-2 Shreedhar Choubey is the Investigating Officer who recorded the statements of the witnesses examined by the prosecution. He stated that none of the witnesses produced any blood-stained clothes before him. PW-5 Mahesh Mandal, son of the deceased, had not given any list of articles stolen from his house: Neither PW-6 Brahmadeo Mandal told him that A-1 took away ornaments and clothes. The pouring of kerosene oil on Brahmadeo was not told to him by PW-7 Bimla Devi nor did she tell him about the assault made on her. PW-7 did not inform him that she identified the accused persons in the light of a lantern. During the investigation, he did not find any empty cartridges, burnt cotton, burnt papers, wads or pellets inside the house or in the outer verandah.

7. CW-1 Dr. Ambroj Kumar Choudhury stated that on 16th July, 1979 he conducted post-mortem examination on the body of Sitaram Mandal and found the following ante-mortem injuries :

(i) Abraison 2" x 1" on just below the left eye.

(ii) One stitched wound on frontal bone. On cutting the stitches the dimension of the wound was found to be 1" x 1" x bone deep. The margins were lacerated. On dissection underlying tissues were infiltrated with blood and blot clots. On further dissection fracture of frontal bone was detected.

(iii) One stitched wound just below the left ear. On cutting the stitches the dimension of the wound was found to be 1" x 1" x bone deep. The margins were lacerated and the laceration of external pine of left ear.

(iv) One stitched wound on the left side chin. On cutting the stitches the dimension of the wound was found to be 1" x = " x deep to the mouth cavity. On further dissection the laceration of muscle and fracture of the left ramus of mandible was detected.

(v) One stitched wound on the right side of the chest in between 10th and 12th ribs. On cutting the stitches the dimension of the wound was found to be = " x < " x deep upto abdominal cavity. The wound was incised and penetrating, the weapon after passing through the skin, intercostal muscle adjoining nerve vessel entered into the right lobe of the liver via right side of the diaphragm, right side of the peritoneal cavity was filled with blood and the blood clots.

According to the doctor, injuries Nos. (i) and (iii) were simple and injuries Nos. (ii), (iv) and (v) were grievous in nature. As per the doctor's evidence, injuries Nos. (i) to (iv) were caused by hard blunt weapon and injury No. (v) was caused by sharp penetrating weapon. As per the doctor's evidence, the death occurred due to shock and haemorrhage on account of the said injuries. In the cross-examination, the doctor admitted that he did not find any indication of any firearm injury on the person of the deceased.

8. From the evidence of the witnesses examined by the prosecution, it is clear that there was animosity between the side of the complainant and the accused persons. There was a litigation between the parties and they did not have good relations. The witnesses Mahesh Mandal (PW-5), Brahmadeo Mandal (PW-6), Bimla Devi (PW-7) (wife of the informant) and the informant Ramanand Mandal (PW-9), are closely related to the deceased. At the same time, their presence in the house where the incident took place at 11.00 o'clock at night cannot be doubted. Other witnesses who were examined by the prosecution had reached the spot after the incident had already taken place and they were not the eye-witnesses to the incident. Now it is well settled by series of decisions of this Court that while appreciating the evidence of the witnesses related to the deceased, having strained relations with the accused party, their evidence cannot be discarded solely on that basis, but the court is required to carefully scrutinize it and find out if there is scope for taking view whereby the court can reach to the conclusion that it is a case of false implication. The credibility of a witness cannot be judged merely on the basis of his close relation with the deceased and as such cannot be a ground to discard his testimony, if it otherwise inspires confidence and, particularly so, when it is corroborated by the evidence of independent and injured witnesses. Speaking for a 5-Judge Bench in a celebrated judgment, viz., *Masalti and Ors. v. The State of Uttar Pradesh*, AIR 1965 SC 202 (in para 14), P.B. Gajendragadkar, C.J. said:

"\005 There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence.

Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is a partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

In Nallabothu Venkaiah v. State of A.P., (2002) 7 SCC 117 (in para 13), this Court held :

"\005 The test, in such circumstances, as correctly adopted by the trial court, is that if the witnesses are interested, the same must be scrutinized with due care and caution in the light of the medical evidence and other surrounding circumstances. Animosity is double-edged sword and it can cut both sides. It can be a ground for false implication. It can also be a ground for assault. \005"

In Ramanand Yadav v. Prabhunath Jha and Ors., (2003) 12 SCC 606 (in para 15), this Court held :-

"\005 But at the same time if the relatives or interested witnesses are examined, the court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence is biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused, foundation for the same has to be laid. \005".

In State of Himachal Pradesh v. Mast Ram, AIR 2004 SC 5056 (in para 11), this Court said :-

"\005 The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. \005. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not the requirement of Law. \005".

9. In the present case, we find from the evidence of the witnesses examined by the prosecution as already noticed that the witnesses are related and

their relations were strained with the appellants on account of the litigation. The incident happened at 11.00 o'clock in the night. The witnesses have stated that they have seen the incident and recognised the appellants either in the torch-light or in the lantern-light which was burning at their house. It has come in evidence of the witnesses as well as the Investigating Officer that neither the torch or the lantern was seized by the I.O. during the course of investigation nor was it produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torch-light or in the lantern-light. One of the witnesses Jiten Rabidas (PW-2), who is related to the deceased and reached the place of occurrence immediately after the incident of dacoity, said that when he made enquiries from Ramanand Mandal (PW-9), who lodged the FIR, his brother, and other female members, they specifically told him that they did not identify the persons who had committed the dacoity in the house. Family members told that after committing dacoity, they fled away. PW-7 Bimla Devi, wife of Ramanand Mandal, has stated that the persons who had committed dacoity at their residence had tied gamochha on their faces. All the eye-witnesses have categorically stated that guns and country-made pistols were used by the accused-appellants in commission of the crime. Shreedhar Choubey (CW-2), who was Investigating Officer, has deposed that he did not find any empty cartridge, burnt cotton, burnt paper, pellets inside the house or in the outer verandah and so long he was investigating the case, no bullets or pellets were received at the police station from the hospital. Therefore, it is clear that he has not seized any pellets, cartridges or bullets from the place of incident. There is no evidence on record that either the gun or the country-made pistols were recovered from the accused-appellants by the I.O. The statement of Dr. A.K. Choudhury (CW-1) indicates that the doctor did not find any pellet or cartridge from the body of the deceased in post-mortem. That apart, it is the case of the prosecution that Ramanand Mandal (PW-9) received injury on the head. He was examined by the doctor but no medical evidence was produced by the prosecution to prove the injury on the person of PW-9.

10. On the face of the evidence led by the prosecution, the medical evidence of the injuries sustained by the deceased in this case assumes significant importance. All the eye-witnesses have categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence given by Dr. A.K. Choudhury (CW-1) specifically indicates that no firearm injuries were found on the person of the deceased. The doctor has stated: "I did not find any indication of any firearm injury on the person of the deceased. No pellets, bullets or any cartridge were found by me in any of the wounds found by me."

11. It is now well settled by series of decisions of this Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witness has to get primacy as medical evidence is basically opinionative. [See *Mange v. State of Haryana* (1979) 4 SCC 349

(conviction based on sole testimony of eye-witness); State of U.P. v. Krishna Gopal and Anr., (1988) 4 SCC 302 (in para 24); and Ramanand Yadav v. Prabhu Nath Jha and Ors., (2003) 12 SCC 606 (in para 17)]. But when the court finds inconsistency in the evidence given by the eye-witnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in different perspective by the courts. In Mohinder Singh v. The State, (1950) SCR 821 (at page 828), this Court said :-

"\005 In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle. Indeed, it seems more likely that they were caused by a rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun and, in his examination, it was definitely put to him that he was armed with the gun P.16. It is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or by a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a firearm being used at such a close range as is suggested in the evidence. \005."

In Mani Ram and Ors. v. State of U.P., 1994 Supp(2) SCC 289 (in para 9), this Court held:

"\005 It is well settled by long series of decisions of this Court that where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case. \005".

In another case of Thaman Kumar v. State of Union Territory of Chandigarh, AIR 2003 SC 3975 (in para 16), this Court held :

"The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the

injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

12. In the present case, the medical evidence is to the effect that there were no firearm injuries on the body of the deceased, whereas the eye-witnesses' version is that the accused-appellants were carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution, by the court and will have priority over the ocular version and can be used to repel the testimony of the eye-witnesses as it goes to the root of the matter having an effect to repel conclusively the eye-witnesses' version to be true. The medical evidence when specifically rules out the injury claimed to have been inflicted as per the eye-witnesses' version, then the court can draw adverse inference to the effect that the prosecution version as being put forth before the court, is not trustworthy. In the present case, the medical evidence completely rules out the prosecution version of the injuries being caused by firearms, coupled with the fact that no evidence has been produced by the prosecution of any pellet or bullet being recovered from the place of incident or from the body of the deceased in post-mortem. In the light of the fact that there was a previous enmity between the parties and the eye-witnesses examined are related to the deceased and are interested witnesses; and that in absence of the lantern or the torch, in the light of which the incident was said to have been witnessed, the prosecution case as placed before the court is full of doubts, and as such the accused-appellants are entitled for benefit of doubt.

13. For the aforesaid reasons, the appeals are allowed. The judgment of the High Court and that of the trial court are set aside. The accused-appellants are directed to be set at liberty if they are not required in any other case.