CASE NO.:
Appeal (crl.) 879 of 2001

PETITIONER:
MATHURA YADAV @ MATHURA MAHATO & ORS.

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 23/07/2002

BENCH:
N.Santosh Hegde, D.M.Dharmadhikari.

JUDGMENT:

SANTOSH HEGDE,J.

The appellants, who were accused Nos.2 to 4, were charged for offence under Section 302 IPC by the First Additional Sessions Judge, Hazaribagh along with one Ishar Yadav, who was A-1 before the said court. The learned Sessions Judge after the trial on consideration of the evidence held that the prosecution had not established the charge against the first accused and acquitted him while he found the present appellants guilty of the charge punishable under Section 302 and sentenced them to undergo imprisonment for life.

Their appeal being unsuccessful before the High Court at Patna which found them guilty of the offence punishable under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life. Hence, the appellants have preferred this appeal.

Brief facts necessary for disposal of this appeal are as follows:

On 16.9.1990 at about 4 p.m. one Mahabir Mahto who was grazing cattle near his field was alleged to have been attacked by the appellants and their father, acquitted accused A-1, with axe and lathi. On hearing the cries of the deceased, this incident was noticed by PW-1 Madhwa Devi, daughter-in-law of the deceased, PW-2 Manwa Devi, wife of the deceased, PW-4 Bhiklal Mahto, son of the deceased and PW-5 Nirmal Prasad Yadav, nephew of the deceased. It is the prosecution case that the incident in question was partly noticed by Shital and Kishun who have not been examined in this case. It is also alleged that the deceased who was, at that point of time, alive, was carried by PWs. 4 and 5 to a place near Shiv Mandir in the village which is at a distance of about a kilometer and a half from the place of the incident but before any medical aid could be administered, the deceased is stated to have died.

The complaint about this incident was lodged on the

very same day by PW-4 before the Station House Officer, Muffasil Police Station Hazaribagh at about 10.30 p.m. which was registered by PW-6 Ram Sagar Singh for offence punishable under Section 302. It is the case of the prosecution that the said investigating officer visited the place of the incident on the next day i.e. 17.9.1990 at about 8 a.m. and conducted the inquest as also recorded the statement of the above-mentioned witnesses including the two witnesses who have not been examined in this case. It is on the basis of the said investigation that a charge-sheet was filed and the appellants have been convicted by the learned Sessions Judge and the High Court, as stated above.

Mr. Sushil Kumar, learned senior counsel appearing for the appellants, contended that it is extremely difficult to accept the case of the prosecution on the basis of the material-on-record. He primarily contended that the presence of the eye witnesses, that is, PWs. 1, 2, 4 and 5 at the place and time of the incident is highly doubtful. He submitted that the place of incident was far away from the place of residence of those witnesses. Even though the land belonged to the deceased, still it is improbable that these persons could have been present at the time of the incident. He supports his argument by pointing out the discrepancies in the evidence of PWs. 1 and 2 in relation to the nature of injuries found on the body of the deceased. He also points out from the evidence of PWs. 4 and 5 who carried the injured witness to a distance about a kilometer and a half that even though their clothes were profusely stained with the blood of the deceased, still the same weres not seized by the investigating officer which casts a serious doubt about their presence. He also contends that the non-examination of Shital and Kishun, though their statements were recorded by the investigating officer, is fatal to the prosecution case, inasmuch as independent witnesses who were available to the prosecution have not been produced before the court. In the absence of the evidence of such witnesses, the interested testimony of PWs. 1, 2, 4 and 5, according to the learned counsel, cannot be safely relied upon; more so in view of the contradictions and the lacunae pointed out hereinabove. He also pointed out from the evidence of PW-1 who had stated that PW-6 had visited the village at around 8 or 9 p.m. on the date of the incident itself and had taken the body of the deceased that night itself. From this part of the evidence of PW-1, it is pointed out that the Police had come to the village on the date of the incident before the alleged complaint was recorded at 10.30 p.m. on that day and on that night of the incident itself, the investigation had started. However, for reasons best known to him, PW-6 had stated before the court that the investigation started only the next day. In these circumstances, learned counsel contends that it is not safe to rely upon the evidence of the prosecution to base a conviction.

Mr. Saket Singh, learned counsel appearing for the State, very strenuously contended that the discrepancies pointed out by the learned counsel for the appellants are minor in nature and the mistakes on the part of the investigating officer in not recovering the blood stained clothes of PWs. 4 and 5 should not come in the way of accepting the rest of the prosecution evidence. He pointed out from the evidence of PW-6 that during the course of

investigation he had collected the blood stained mud and grass from the place of the incident which evidence corroborates the evidence of the eye-witnesses. In regard to the discrepancies in the starting of the investigation, the learned counsel contended that PWs. 1 and 2 being village ladies who had suffered a tragedy in their family must have been confused as to the timing of the arrival of the investigating officer. Therefore, no importance should be attached to the discrepancies in the evidence of the prosecution.

We notice that the courts below have implicitly accepted the evidence of PWs. 1, 2, 4 and 5 without properly considering the deficiencies and the contradictions in their evidence. Of course, in regard to the nature of the attack, the injuries suffered by the deceased and the individual overt act of the accused person, there is a possibility of some discrepancy which should not in the normal course affect the prosecution case. But, in our opinion, some of the omissions and discrepancies in the evidence of the eye-witnesses and rest of the prosecution case are glaring. For example, PW-4 who is the complainant and who claims to have witnessed the incident of attack, had not stated in his complaint that the accused had used the sticks. According to his complaint, only 'dangi' was used. It is only in his oral evidence, after having noticed the nature of injury, the use of stick is brought in. Like the discrepancies in the evidence of PWs.1 and 2, we would not have attached much significance to this fact but for the other omissions in the prosecution case. Take for example the fact that the defence has seriously disputed the presence of Pws.1, 2, 4 and 5 at the place of the incident and even though there were two independent eye-witnesses, they were not examined by the prosecution but their statements had been recorded. It so happens that these are the only two other eye-witnesses who are not related to the deceased who according to the prosecution had witnessed the incident. The High Court, in our opinion, very lightly discarded this argument of non-examination holding that these witnesses had come subsequent to the attack. Here, we differ from the High Court because from the evidence of the prosecution, it is clear that they had arrived at the place of the incident immediately after the attack took place. Assuming that these witnesses had not seen the entire attack, they would have certainly corroborated the testimony of the eye-witnesses at least to the extent of their presence which is now being seriously disputed in such a situation, there being no such corroboration from independent sources, we find it rather difficult to accept the evidence of PWs 1, 2, 4 and 5. Next, we notice that there is a serious discrepancy in the prosecution case as to the time when the investigation of the case started. It is seen from the record that PW-4 had lodged the complaint at about 10.30 p.m. at the Police Station. But PW-1 says that PW-6 came to the place of the incident at about 8 or 9 that evening itself and held the inquest and thereafter took the body of the deceased away for post mortem. In the background of the deficiency in the prosecution case, the evidence of PW-6 in this regard does not inspire confidence. There is also no material to show at what time the FIR reached the jurisdictional Magistrate. In this regard, it is not so simple to reject the evidence of PW-1 by holding that there was some confusion in the mind of PW-1 as to the time of arrival of PW-6 because apart from saying that PW-6 came to the village on the date of

the incident at about 8-9 p.m., she also says that PW-6 took away the body of the deceased that night itself. This contradiction fully supports the case of the defence as to the coming into existence of the complaint of PW-4 which must be taken note of by us. It is also relevant to notice the fact that the seizure of the blood-stained mud and grass is not established beyond reasonable doubt and there has been no recovery of any weapon from the accused. Even the motive suggested is very weak and stale.

In the above doubtful circumstances, we consider it unsafe to place reliance on the evidence produced by the prosecution to hold the appellants guilty for offence charged against them.

For the reasons stated above, this appeal is allowed, the conviction and sentence imposed on the appellants by the Sessions Court as affirmed by the High Court is hereby set aside. The appellants are directed to be released forthwith, if not required in any other case.

JUDIS