

Court No. - 12

Case :- CRIMINAL REVISION No. - 448 of 2008

Revisionist :- Uma Dutt Dubey

Opposite Party :- State of U.P.

Counsel for Revisionist :- Sharad Pathak

Counsel for Opposite Party :- G.A,Dinesh Pratap Singh, I B Singh, Ishan Baghel,M.B. Singh,Nisar Ahmed

Hon'ble Rajeev Singh,J.

1. Heard Sri Gaurav Shukla, Advocate, holding brief of Sri Sharad Pathak, learned counsel for the applicant, Sri D.P. Singh, learned counsel for the complainant and learned A.G.A. for the State.

2. The present criminal revision is filed against the judgment and order dated 5.6.2008 passed by Additional Sessions Judge/ F.T.C., Room No.11, Pratapgarh in Session Trial No.322 of 2000 acquitting the respondent no.2 to 5 and may further be pleased to convict the respondents 2 to 5 under Section 328/34 and 302/34 I.P.C. and sentenced them for imprisonment for life.

3. On 4.9.2018, order was passed by this Court for summoning the lower court record within a period of three months and further directed for listing of the case for admission, thereafter, on 12.10.2012, office as well State counsel were directed to enquire whether any State Appeal is filed against the judgment in question or not. Office submitted a report dated 9.4.2013 & 31.3.2023 that no any State Appeal has been preferred against the judgment in question.

4. Learned counsel for the revisionist has submitted that learned court below committed error in disbelieving the dying

declaration of the deceased Rakesh Kumar Dubey and such credible dying declaration recorded by the police officer in presence of two witnesses cannot be ignored. He further submitted that prosecution placed ample credible evidence before the trial court but the trial court disbelieved all the evidences.

5. Learned counsel for the revisionist has submitted that on the written complaint of Umadutt Dubey (father of the deceased), dated 23.6.1999, F.I.R. of the case in question was lodged on 24.6.1999 at 1:30 A.M. with the allegation that deceased died on 23.6.1999 at 10:00 P.M. He next submitted that in the dying declaration, deceased stated that Mahendra Pratap Singh, elder brother of Daddan Singh S/o Indrasen Singh, R/o Mawaiya Baba Peeparpur came alongwith three other persons at his house No.130-A near Supply Office, Pratapgarh and thereafter, deceased provided tea to them but in a cup of tea, forcibly poison was put and that tea was administered in mouth of deceased, after sometime his condition was being deteriorated then Arvind Kumar Shukla, shifted him to District Hospital, Pratapgarh, but he died. He next submitted that informant drew attention of the authority by mentioning in the F.I.R. that Daddan Singh, Narendra Singh, Azad Singh, Subhash Singh, Om Prakash Singh were inimical with him and in this series, few days ago, his grandson was beaten by them and also informed that alleged dying declaration was recorded in the presence of Vimal Pandey, Rakesh Gupta, Chhedi Khan, Arvind Shukla and others. Thereafter, inquest of the body of deceased was conducted on 24.6.1999 at 8:00 A.M. at Mortuary of District Hospital, Pratapgarh and the post-mortem of the body of the deceased was conducted, cause of death could not be ascertained, hence, *visra* was preserved.

6. Learned counsel for the revisionist submitted that Parcha no.1 was prepared by the Investigating Officer on 24.6.1999 by recording the statement of the informant under Section 161 Cr.P.C. prepared a site plan mentioning the alleged dying declaration recorded by Mr. Hemant Bhusan Singh, Sub Inspector Gunda Daman Dal, Pratapgarh, recording of the statement of witnesses of inquest, statement of subscriber of the F.I.R. was not recorded by the Investigating Officer. Parcha No.2 was prepared on 26.9.1999 by copying the observation in the post mortem report by taking it on record. Parcha No.3 & 4 were prepared on 4.7.1999 and 25.7.1999 with the observation that investigation is going on. Parcha No.5 was prepared on 1.8.1999, in which, statement of Sub Inspector, Mr. Hemant Bhushan Singh was recorded, who allegedly recorded the dying declaration. Parcha No.6 was prepared on 5.8.1999 by recording the contents of the affidavits given by Jagdish Shukla, S/o Shyam Sunder Shukla. Parcha No.7 was prepared on 14.8.1999. Parcha No.8 & 9 were prepared on 2.9.1999 and 9.9.1999 respectively. Thereafter, Parcha No.10 was prepared 10.9.1999 with the conclusion that charge-sheet is prepared against four accused persons for the offences under Section 328/302 I.P.C. On the basis of collected evidences, charge-sheet was prepared on 10.9.1999 against four persons, namely Krishna Pratap Singh, Azad Singh, Rakesh Singh and Om Prakash (private respondent), cognizance was taken by the learned court below, case was committed to the Court of Sessions and charges were framed.

7. Prosecution relied on 9 witnesses and certain documentary evidences, which are follows:

P.W.1 - Shyam Sunder Dubey, P.W.2 - Rakesh Kumar Gupta, P.W.3 - Umadutt Dubey, P.W.4 - Jagdish Prasad Shukla, P.W.5 - Gopal Krishna Tripathi (the then S.H.O.), P.W.6 - Hemant Bhushan Singh, Sub Inspector, P.W.7 - Jitendra Singh, Sub Inspector, P.W.8 - O.P. Rai (the then S.H.O.), and P.W.9 - Dr. Vimlendu Shekhar. Prosecution also relied on documentary evidences, written statement alongwith the affidavit of Shyam Sunder Dubey as Exhibit Ka-1 & Ka-2, written complaint of informant (Uma Dutt Dubey) as Exhibit Ka.3, written submission and affidavit of Jagdish as Exhibit Ka-4 & Ka-5), site plan as Exhibit Ka-6, Dying Declaration as Exhibit Ka-7, inquest report as Exhibit Ka-8, Seal Sample as Exhibit Ka-9, Police form as Exhibit Ka-10, Photograph as Exhibit Ka-11, Letter of R.I. as Exhibit Ka-12, charge sheet as Exhibit Ka-14, chick F.I.R. as Exhibit Ka-15, Post Mortem Report as Exhibit Ka-16 and F.S.L. report as Exhibit Ka-17.

8. Learned counsel for the revisionist submitted that informant, Umadutt Dubey, P.W.3 deposed before the trial court that deceased was his son and was running a spare part shop at Pratapgarh and on 23.6.1999, he received information about death of his son on phone, then he came to Pratapgarh and after collecting, the information, F.I.R. was lodged by him, he proved the F.I.R. and identified his signatures and also stated that one police officer has recorded dying declaration of his son, thereafter it came into his knowledge that private respondent/accused persons had administered poison to his son.

9. P.W.1, Shyam Sunder Dubey, who is elder brother of the deceased deposed that accused persons were having inimical relations due to property dispute, as his younger brother was

running a shop of motor parts at Pratapgarh and residing at House No.30, Vivek Nagar, near supply officer and he reached Pratapgarh on the same day and in place of going back to his native place, he stayed at Pratapgarh, at the same time, about 6:30 P.M., Jagdish Shukla, co-villager came to his resident at Pratapgarh and inform that due to non availability of conveyance, he will also stay with him, then he told to his younger brother (deceased) to arrange tea for him, in the meantime, he is coming back after taking vegetable, after 10-15 minutes, he came back and when he entered into house, he saw Daddan Singh @ Rakesh, Krishna Pratap Singh @ Guddu, Azad Singh and Omprakash Singh were coming out from his house, then P.W. 4, Jagdish Shukla and his brother informed him that accused persons administered some article with water to Rakesh Dubey, then he tried to chase the accused persons but they went away, thereafter, with the help of neighbours, he brought his brother to District Hospital, but in the meantime, his brother died at 10:00 P.M.

10. P.W.2, Rakesh Kumar Gupta stated that about 3 to 4 years ago, Rakesh Dubey was admitted to the hospital, he did not go to the hospital as being a neighbour, he came to the house of the informant where his signature was taken by Sub Inspector on a blank paper and he never made any statement to any authority.

11. P.W.4, Jagdish Prasad, in his deposition, stated that he is resident of neighboring village of the deceased and on the date of incident, he came to Pratapgarh for purchasing medicine and after purchasing medicine, due to bad weather, he came back to the shop of the deceased, where deceased and his brother Shyam Sunder met him, they came to the house at Vivek Nagar

and Shyam Sunder went for purchasing vegetable, after some time, door was knocked, Rakesh Dubey opened the door, then all the accused persons entered into the house and requested to bring tea, in the meantime, they started conversation, and asked reason why he stayed, then he informed that weather is not good and bus is also not available, then he went in a room and Rakesh brought some tea, about 6:45 p.m. and his tea was given in a room and the accused persons and deceased started taking tea in another room, at the same time, accused persons asked water from Rakesh (deceased), he gave water twice to the accused persons, suddenly he heard some loud noise, then went in the said room and saw that forcibly accused persons tried to administer something to Rakesh Dubey and due to fear, he did not cry, at the same time, Shyam Sunder Dubey was seen, then he cried, then accused persons ran away.

12. P.W.6 - Hemant Bhushan Singh in his deposition stated that on his wireless set, it was reported that one person in the hospital in critical condition wants to inform something to police, then he reached to the hospital and found that said person was under treatment of Dr. Vimlendu Shekhar and he made his statement to him which was scribed by him and he was not in a position to make signature.

13. Learned counsel for the revisionist has submitted that learned court below rejected the dying declaration, which was recorded by the Sub Inspector in presence of Rakesh Gupta and Vimal Pandey. He also submitted that dying declaration was duly proved by the Sub Inspector, Mr. Hemant Bhushan Singh, as Rakesh Gupta became hostile in his deposition by saying that neither he went to hospital nor any dying declaration of deceased was recorded by P.W. 6 but, merely on the basis of

hostile witness, the credibility of dying declaration cannot be doubted. He also submitted that the testimony of P.W.4 - Jagdish Prasad, as an eye witness, was also ignored, therefore, criminal revision is liable to be admitted and it is to be decided on merit.

14. Learned counsel for the private respondent vehemently opposed the prayer of the applicant and submitted that it is admitted case of the prosecution that F.I.R. in question was lodged by Umadutt Dubey (father of the deceased), who is not an eye witness, at the time of alleged incident, he was in Sultanpur and he received an information at 10:00 P.M. through telephone then he came to Pratapgarh and met to his son Shyam Sunder Dubey, P.W.2 and Jagdish Prasad P.W.4 (eye witnesses) and on their narration, he lodged F.I.R. but in the F.I.R. nothing is whispered that P.W.2- Shyam Sunder, P.W.4 - Jagdish Prasad informed him the manner of incident, therefore, learned court below has rightly rejected the testimony of aforesaid alleged eye witnesses. He also submitted that Hemant Bhushan Singh, Sub Inspector was not posted in the concerned police station and in case, he has recorded the dying declaration, then same was never entered or reported in any G.D. of the Police Station. He next submitted that Sub Inspector, Hemant Bhushan Singh - P.W.6 also deposed that he interrogated Dr. Vimendra Shekhar but his signature was not taken on the alleged dying declaration. He also submits that Vimal Pandey was not produced before the trial court, who was one of the witness of the alleged dying declaration and Rakesh Gupta (P.W.4), another witness of dying declaration has categorically denied the fact related to dying declaration, which was allegedly recorded before him, as he stated that on a blank sheet his signature was taken by the police at the house of

deceased being a neighbour. He also submitted that prosecution is not placed the bed head ticket that whether Rakesh Dubey (deceased) was in a position to speak when he was brought to the Hospital, as the bed head ticket reports of the doctor prepared in the District Hospital was also not brought on record by the prosecution, Dr. Vimlendu Shekhar, in his deposition, has also stated that in absence of bed head ticket he was not in a position to say whether Rakesh Dubey was in a position to speak at the time of admission or not. He also submitted that no other statement of Rakesh Dubey (deceased) was recorded by the Investigating Officer and in case, any officer recorded the statement of patient then he ought to have taken signature of the doctor or medical staff and he stated that in the said dying declaration his signature does not find place. In such circumstances, learned court below has rightly rejected the credibility of alleged dying declaration, and criminal revision is liable to be rejected at the admission stage as well as on merit.

15. As in the recent judgment of Hon'ble Apex Court in the case of **Irfan @ Naka Vs. State of U.P. in Criminal Appeal No. 825/826 of 2022**, it is observed that it is the duty of prosecution to establish the charge beyond reasonable doubt and the benefit of doubt must always go in favour of the accused and it is also the duty of the prosecution to prove that dying declaration was given voluntarily and the victim was in a fit state of mind. The relevant paras of the aforesaid judgment are as under:-

60. Since time immemorial, despite a general consensus of presuming that the dying declaration is true, they have not been stricto-sensu accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once

done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit.

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

65. In Sujit Biswas v. State of Assam reported in (2013) 12 SCC 406, this Court, while examining the distinction between "proof beyond reasonable doubt" and "suspicion" in para 13 has held as under:

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved".

In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

66. It may be true as said by this Court, speaking through Justice Krishna Iyer in Dharm Das Wadhvani v. State of Uttar Pradesh reported in (1974) 4 SCC 267, that the rule of benefit of reasonable doubt does not imply a 35 frail willow bending to every whiff of hesitancy. Judges are made of

sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct. Even applying this principle, we have a doubt as regards the complicity of the appellant-convict in the crime.

16. Considering the submissions of learned counsel for the parties, going through the contents of the revision as well as order of the court below, as per the prosecution case, something was administered by the accused persons in the mouth of Rakesh Dubey (deceased) by glass, as the P.W.4 Jagdish Prasad was present at the time of incident but in the site plan neither any glass was recovered from spot nor any vomit or residue was taken into custody for sending F.S.L. regarding the examination of contents as well as finger prints on glass, therefore, the story of putting any poisonous article in the mouth of Rakesh Dubey (deceased) by the accused persons by glass is not corroborating. As it is also admitted case of the prosecution that F.I.R. of case in question was lodged by Umadutt Dubey (P.W.3) after reaching to the Hospital and gathering the information from Shyam Sunder Dubey (P.W.2) and Jagdish Prasad (P.W.4), eye witnesses, but in the F.I.R., he has not mentioned that narration, which was gathered from them and the name of subscriber of the F.I.R. is also not mentioned, as there is a contradiction in the deposition of P.W.4 and P.W.5 as well as P.W.1, as P.W.6, Sub Inspector, Hemant Bhushan Singh, gathered one information, which was passed through control room on R.T. set that a person who is in serious condition in Hospital wants to say something to police, then he reached in the hospital and recorded his statement and also interacted with doctor but he did not make any request for recording dying declaration to doctors and in the alleged dying declaration signature of the doctor or any nursing staff was also

not obtained, as the signature of two persons, Rakesh Gupta and Vimal Pandey are being shown but Vimal Pandey was not produced before the trial court and Rakesh Gupta was produced as P.W.2, who categorically denied the deposition of Sub Inspector Hemant Bhusan Singh and also denied the veracity of the alleged dying declaration and Dr. Vimlendu Shekhar (P.W.9), in his deposition, has categorically stated that no dying declaration was recorded by any police official in his presence and no bed head ticket was available on the record, therefore, he was not in a position to explain this fact that whether patient was in position to speak or not, therefore, learned court below has rightly disbelieved the dying declaration and appreciated the prosecution evidences.

17. Therefore, the present criminal revision is dismissed.

18. Office is directed to return the lower court record to the trial court, forthwith.

Order Date :- 03.11.2023

Gaurav/-