

Criminal Appeal (DB) No 347 of 1992

Against the judgment of conviction and order of sentence dated 26.08.1992 passed by Shri P N Yadav, Additional Sessions Judge VIII, Patna in Sessions Trial No 237 of 1986.

Shiv Kumar, son of Ramu Raj, resident of Bank Main Colony, Chitragupta Nagar, Police Station – Kankerbagh, District - Patna

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

With

Criminal Appeal (DB) No 397 of 1992

Ganesh Upadhyay, son of late Ram Vilas Upadhyay, resident of Mohalla – Bankmen’s Colony, PO – Chitraguptanagar, PS – Kankarbagh, Town and District - Patna

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

Appearance :

For the Appellant : Mr Rakesh Kr Sinha, Advocate

For the State : Mr Ajay Mishra, APP

**CORAM: HON’BLE MR JUSTICE NAVANITI PRASAD SINGH
And
HON’BLE JUSTICE SMT ANJANA MISHRA**

ORAL JUDGMENT

(Per: HON’BLE MR JUSTICE NAVANITI PRASAD SINGH)

These two appeals arise from the judgment of

conviction and order of sentence dated 26th of August, 1992 as passed by the Additional Sessions Judge VIII, Patna in Sessions Trial No 237 of 1986 whereby the two appellants of the two appeals have been convicted for offence under Sections 302/34 of Indian Penal Code (IPC) and sentenced to rigorous imprisonment for life.

2 Let it be noted that when the appeal was called for For Hearing, learned counsel appeared in relation to Criminal Appeal No 347 of 1992 and no one appeared for appellant Ganesh Upadhyay, the appellant in Criminal Appeal No 397 of 1992. In view of the order that we propose to pass, it is not necessary for us to appoint any amicus curiae in respect of the second appellant that is Ganesh Upadhyay for we are of the view that both the appellants have been wrongly convicted and the appeals are to be allowed.

3 We have heard the learned counsel for the appellant and Shri Ajay Mishra, learned Additional Public Prosecutor (APP) at length and perused the records.

4 Learned counsel for the appellant submits that the appellants have been convicted solely on the basis of the dying declaration as recorded by PW 8 Ajay Kumar Singh, the Assistant Sub Inspector (ASI) of Police who had gone to the



Patna Medical College and Hospital (PMCH). He further submitted that this dying declaration has absolutely no corroboration in any respect. This dying declaration, according to the learned counsel for the appellant, cannot be accepted because at the time when it is said to have been given and recorded, the deceased was in no condition to make such a statement much less such a lengthy statement. On the other hand, learned APP submits that if we read the dying declaration alongwith the evidence of PW 8, the ASI who recorded it in the PMCH, the dying declaration having been recorded in presence of the Registrar (Surgery), PMCH, Dr Narendra Kumar Singh (PW 5), it would be apparent that the deceased, at the time when the statement was recorded, was in a position to make the statement. In the dying declaration, the deceased had clearly named both the appellants. He had clearly stated that appellant Ganesh Upadhyay was the person who had shot him in the abdomen. Thus, the trial Court did not err in convicting the appellants.

5 Having perused the records, we have no option but to agree with the submission as made by the learned counsel for the appellant and we are unable to accept the submission of the learned APP for the reasons hereunder noted.

6 It appears that on 15.08.1983 at about 3 pm near



Apsara Cinema which is situated at North Gandhi Maidan, Patna, the deceased Umesh Prasad Singh @ Mukaria was allegedly shot by appellant Ganesh Upadhyay who was accompanied by appellant Shiv Kumar. Various people had seen the incident. In a critical condition, the victim Umesh Prasad Singh was rushed to the Surgical Ward of PMCH as he had a bullet wound in his abdomen. Before he could be operated, police was informed and, accordingly allegedly, the dying declaration was recorded by PW 8, the ASI Ajay Kumar Singh of the Gandhi Maidan Police Station (PS) which was duly witnessed by Dr Narendra Kumar Singh, Registrar (Surgical), PMCH who is PW 5 and was also certified by Dr Anil Kumar Singh, Junior House Surgeon of Professor K K Sinha's Surgical Unit, PMCH who has not been examined. The patient died allegedly immediately thereafter in the PMCH. Inquest report was prepared the same day and post mortem was performed the next day. After investigation, police submitted a chargesheet against the two appellants of the two appeals and upon case being committed to Court of Session, charges were framed and the appellants were tried and convicted. Hence, the appeal.

7 In course of trial, the prosecution examined nine witnesses. The first four witnesses that is PW 1 Satya Narain

Saw, PW 2 Ram Bahadur Keshri, PW 3 Ram Kumar Sah and PW 4 Kapil Prasad were all shopkeepers/vendors near the Apsara Cinema where the incident took place. They were all declared hostile because they refused to support the prosecution story of having seen the occurrence and having identified the appellants. Thus, even though they may have disclosed in their statement to the police any fact including identifying the appellants, the evidence we have in Court is not of identifying the appellants in any manner. We may note here that the second doctor Dr A K Singh, who has signed on the dying declaration, has not been examined. The Investigating Officer (IO) also has not been examined. PWs 7 and 9 are Advocate Clerks and formal in nature. It is surprising how they were permitted to adduce evidence of facts to which they were not even privy. PW 6 is Dr R P Srivastava who has proved the post mortem report. There is not much controversy in that regard except that it shows that a singular bullet was fired in the abdomen of the deceased from close range. That leaves us with only two witnesses that is PW 5 Dr Narendra Kumar Singh who was the Registrar (Surgical) of PMCH and PW 8 Ajay Kumar Singh, ASI of Gandhi Maidan PS who recorded the dying declaration. First we may deal with the evidence of Dr Narendra Kumar Singh (PW 5). He was present

when the patient was brought in to the Surgical Ward. He admits that the statement was recorded by the police in his presence. He was questioned as to what and how much time it would take to record the statement. He was not sure. He was then asked as to various stages of consciousness of a patient and particularly whether the patient was brought in a stuporous condition or not and what that condition is. His reply was that it is a condition where though the patient is alive, there is hardly any recordable pulse or blood pressure and he would be in no position to speak or respond. He was then asked what the condition of the patient was. He candidly replied that he could only say that after seeing the PMCH's records. These would be very material. We then have the ASI who recorded the dying declaration. He states that on having been informed from the PMCH about the patient being brought there and it being a police case, he rushed to the PMCH's Surgical Ward where finding the patient in a condition to make the statement, he informed the doctors and in presence of the doctors, he recorded the statement and read over and explained to him, the same finding it correct, the patient put his thumb impression. The two doctors endorsed the recording of the statement. Immediately thereafter, the patient died. He was clearly suggested that patient was in no condition to speak when

he was brought in the PMCH which he denies. This is the only evidence implicating the appellants.

8 After the prosecution evidence closed, the defence moved an application to the Sessions Court for summoning from the PMCH's Surgical Ward, the bed head ticket of the deceased. DW 1 is a staff of PMCH who, upon Court's summon, produced the bed head ticket which is marked as Exhibit A. A bare reference to the bed head ticket demolishes the entire prosecution case. As noted above, the dying declaration clearly states that the dying declaration was recorded at 3.45 pm on 15.08.1983. The bed head ticket would show that the patient was brought into the Surgical Ward at 3.15 pm. The bed head ticket was prepared by none else but Dr Narendra Kumar Singh (PW 5) himself. It clearly mentions that when the patient was brought and admitted, the patient was conscious but stuporous. There was no pulse felt or any recordable blood pressure. His intestine was protruding. The umbilicus was not visible. The bed head ticket would show that at 3.45 pm, the patient was seen deteriorating fast and at 4.15 pm, he was declared dead. From this, it is evident that when the patient was brought in the Surgical Ward, in view of the evidence of PW 5 the doctor himself, he was not in a position to speak much less respond. He was in stuporous

condition with no pulse or recordable blood pressure. If that be so then how at all such a lengthy dying declaration could be recorded. We are unable to place any reliance on the dying declaration and if this piece of evidence is taken out of consideration then there is not an iota of evidence against the appellants much less credible evidence.

9 That being so, we have no option but to hold that there is no evidence at all against the appellants for having committed the offence with which they were charged.

10 In the result, the judgment of conviction and order of sentence are set aside. The appeals are allowed.

(Navaniti Prasad Singh, J)

**Patna High Court,
The 16th of January, 2015,
NAFR, M E Haque/-**

(Anjana Mishra, J)

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