

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1293 of 2007

Arising Out of PS.Case No. -0 Year- null Thana -null District- MADHUBANI

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Domi Sah son of Late Jageshwar Sah, resident of village- Amauna Bishanpur, P.S.
Uda Kishanganj, Madhepura

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Yogesh Chandra Verma Sr. Advocate
M/s Shekhar Kumar Singh,
Pankaj Kumar Jha &
Priyanka Singh

For the State Mr. Satya Narayan Prasad

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**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

and

HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 17-04-2015

The sole appellant was tried and convicted under section 302/149 of the Indian Penal Code and sentenced to undergo R.I. for life by a judgment dated 12.09.2007 and order of conviction dated 14.09.2007 passed by the Additional Sessions Judge, FTC-2, Madhepura in S. T. No. 53/1988.

Four accused persons were tried by the learned trial court. Two of them were acquitted, whereas the appellant and one Bhagwat Sharma were convicted. Bhagwat Sharma filed Cr. Appeal No. 1355 of 2007. During the pendency of the appeal, he died and his appeal stood abated.

The case of the prosecution as unfolded in the Fardbayan lodged by P.W.1 (the informant) giving rise to Uda Kishanganj P.S. Case No. 197/86, in brief, is that in the intervening night of 14/15th December, 1986, his father, namely Mahabir Pandit (deceased) after taking meal slept on the Darwaza of the house whereas the informant slept in a room inside Aangan with other family members. On hearing cry of his father, the informant came out of his Aangan only to encounter two accused persons (not the appellant), who threatened him to stay back in the Aangan. The informant retreated and went on other side of the house and raised alarm and thereafter returned to the *Darwaza* (outer portion of the house). While on way to Darwaza, he saw the appellant along with one Bhagwat Sharma escaping from the scene of occurrence. Bhagwat Sharma was seen holding a **Garansa** (heavy sharp-cutting weapon). His deceased father was found lying on a cot in a pool of blood. He narrated the assault made by the accused persons before him and others who had assembled. The appellant had inflicted **Garansa** blow on his head, whereas another accused persons inflicted **Garansa** blow on the back of shoulder and one of the accused had assaulted him in his abdomen with a knife. The informant tied the wounded abdomen by clothes to prevent further bleeding. The accident occurred as informant's father had deposed in favour of one Habib Saheb with

whom the accused persons were on inimical terms. The injured was carried to Uda Kishanganj hospital for treatment. The officer-in-charge of the Uda Kishanganj police station was informed of the incident who arrived and recorded the statements of the informant, which set the criminal law in motion. The injured was carried to the district hospital at Madhepura in the morning hours of 15.12.1986. Considering the critical physical condition of the injured, a Judicial Magistrate (PW 3) was summoned and the dying declaration (Ext. 2) was recorded on 16.12.1986. After few days the injured was referred to Darbhanga for better treatment. Few days thereafter, on 27th December, 1986, he died of the injuries. Accordingly, section 302 IPC was added. The dead body of the deceased was dispatched for the post mortem examination and report. P.W.4 conducted the post mortem examination on the cadaver on 28th December 1986.

On conclusion of the investigation, charge sheet was submitted in phases against six accused persons. On 25.09.2001, the accused Rajo Pandit died and proceeding against him was dropped. Due to non appearance of the accused Tej Naryan his case was separated. As such, only four were put on trial. The appellant abjured the guilt and claimed trial.

Two of the accused i.e. Arun Pandit and Awadh Paswan were acquitted whereas the appellant and Bhagwat

Sharma were convicted as already noticed hereinabove. Bhagwat Sharma died and his appeal abated. As such, the case of the appellant Domi Sah is with us. Aggrieved thereby, the appellant has filed the present.

Heard Mr. Yogesh Chandra Verma learned counsel for the appellant and Mr. Satya Narayan Prasad learned APP for the State.

In order to prove the case beyond all reasonable doubts, the prosecution examined altogether four witnesses. P.W.1 Kailash Pandit is the eldest son of the deceased who lodged the Fardbayan. P.W. 2 Subodh Pandit is another son of the deceased and brother of the informant who has partly supported the prosecution case. The prosecution got him declared hostile. P.W. 3 Sri M.J. Islam is the Judicial Magistrate who was deputed to record the dying declaration (Ext. 2) of the victim. P.W. 4 is Dr. Akhauri Rabindra Kishore who conducted the post mortem examination on the dead body/cadaver and prepared the post mortem report (Ext.2). Ext. 1 is the signature of the informant on the Fardbayan, whereas Exts. 1/1 and 1/2 are the signatures of the two witnesses namely Laxman Pandit and Nunulal in whose presence the Fardbayan was recorded.

We would first examine the evidence of the doctor. The doctor P.W. 4) in his deposition has stated that on 28.12.1986 at 11

a.m. he conducted the post mortem examination on the dead body of a Hindu male aged 60 years duly identified by the constable 427 Jamadar Singh and found the following ante mortem injuries on the person of the deceased:-

1. One 3"inch long partially holed wound was present over right side of head. The underline soft tissues were found infected and infiltrated with blood. On removal of the soft tissues right side of frontal bone was found cut. On removal of the skull cap Dura matter and some portion of brain corresponding to the injury in the brain and bone was found cut. A small infected haematoma was present over the cut surface of the brain.

2. One incised wound 5"x 1 1/2"x 2/ 1/2" was present over back of right shoulder. The underline muscles and right scapula was found cut and fracture.

3. One linier healed scar with marking of the stitches present over middle of abdomen suggesting surgical wound."

All the above injuries were found ante mortem and

dangerous to life in ordinary course of nature. Injury no.1 and 2 were caused by a heavy sharp-cutting object, whereas injury no.3 was caused by the surgery during the process of operation. The death, in the opinion of the doctor, was due to contusion, haemorrhage, septicaemia and shock. The time elapsed since death was within 24 to 30 hours. He proved the post mortem report prepared in his handwriting which was wrongly marked as Ext. 2 but later rectified by the court as Ext. 3. On perusal of the evidence of the doctor two things become apparent. The death of the deceased was homicidal and the deceased had received three injuries; two of them were caused by heavy sharp-cutting weapons, whereas one embedded in the abdomen of the deceased was caused by sharp pointed weapon like Churra.

P.W.1 is the informant and son of the deceased. In his deposition he has supported the prosecution case as spelt out in the Fardbayan. On hearing yelling/groaning of his father at the dead of night he woke up and rushed towards the Darwaza, where he was sitting. But as he tried to come out from his Aangan, two of the accused intervened and issued threats to retreat from the Aangan. The informant thereafter went to the rear part of the house and raised alarm which attracted the witnesses. He then came to the Darwaza and found his father lying in a pool of blood on a cot.

The wounds were bleeding. He had received injuries on his head, back of his shoulder and abdomen. When queried, he disclosed the name of Domi Sah (the appellant) as the person who had inflicted **Garansa** blow on his head and one Bhagwat Sharma who assaulted him with **Garansa** on the shoulder. He also disclosed name of another accused Rajo Pandit (since deceased) who struck **Churra** blow in his abdomen. Two other accused persons were said to have held his hands and legs. Soon thereafter he was carried to Khaksi village from there to Uda Kishanganj hospital on a hired jeep. The officer-in-charge of the Uda Kishanganj police station on receiving information of the incident came to the hospital and recorded the Fardbayan of the informant Kailash Paswan (P.W.1) in presence of the two witnesses, namely Laxmi Pandit and Nunolal. After some time, the injured was referred to the sadar hospital Madhepura for treatment. While being treated at Madhepura, the statement of his father was recorded by the Magistrate. He was further referred to Darbhanga Medical College and Hospital for specialized treatment. At Darbhanga his father died after 2/3 days.

Subodh Pandit (PW 2) is another son of the deceased. In his examination-in-chief, this witness has stated that in the intervening night of 14.12.1986 and 15.12.1986, he was sleeping

on a **Machan** (a raised thatched structure overlooking the crops) close to his Darwaza. His father was sleeping alone on the Bungalow/Darwaza. He heard the yelling/groaning of his father. He woke up and saw the accused Bhagwat Sharma and Tej Narain Singh escaping from the Darwaza, whereas another co accused Awadh Paswan was keeping a vigil on him. After the retreat of the assailants he went up to his father who was precariously injured. He had sustained injuries on his head, shoulder and abdomen and was bleeding therefrom. Other family members also arrived including the informant. He along with others carried the injured to the Uda Kishanganj hospital, where practically no treatment was given to him. Nobody could know the names of the assailants. He too stated that finally his father was referred to Darbhanga Medical College and Hospital for treatment. He along with P.W. 1 accompanied the father to the Darbhanga, where he remained under treatment for two days and thereafter died. The statement of PW 1 was recorded at the hospital itself by the officer-in-charge of the Uda Kishanganj police station. On an application filed by the prosecution, this witness was declared hostile and cross-examined

PW 3 is Sri M.J. Islam who was deputed to record the statement of Mahibir Pandit (the deceased). He went to the hospital to record the statement of the injured. Before taking his

statement/dying declaration, the in-charge Medical Officer examined and certified the mental and physical fitness of the injured and thereafter his statement was recorded by him. He proved the statement/dying declaration of Mahabir Pandit (deceased) which has been marked as Ext. 2.

On the strength of the prosecution evidence, Mr. Sataya Narayan Prasad, learned APP submits that the prosecution case as set out in the FIR that it is the appellant who along with others killed the deceased stands fully corroborated by the dying declaration of the deceased duly recorded by the Judicial Magistrate under section 164 Cr. P.C.

On the other hand, learned counsel appearing for the defence submits that there is no direct evidence of the commission of occurrence. He submits that it was a dark night and in fact no one had seen the occurrence apart from the deceased himself. He submits that the statement of the informant has not been corroborated by any other witness and in fact has been contradicted by own brother P.W. 2. His evidence has not been corroborated from the evidence of any other witness. He submits that after the occurrence, a large number of persons gathered/assembled, but the prosecution did not examine any of them and not even the wife of the deceased. He further submits

that the dying declaration of the deceased should be scrutinized with complete circumspection. In support of his defence, he has placed reliance on a decision reported in **AIR 1976 SC page 1994 (K.R. Reddy vs. Public Prosecutor)**. Relying on another Supreme Court judgment reported in **AIR 1958 SC page 22 (Khushal Rao vs. State of Bombay)**, he next submits that the Magistrate recording dying declaration has not recorded his satisfaction that the victim was in a position to make a dying declaration. He further submits that none of the doctors who had earlier attended to the deceased was examined as witness in the trial. He submits that even the doctor's certificate certifying that the deceased was in a position to make a dying declaration has also not been brought on record.

In the backdrop of the rival submissions of the parties we, would now examine whether the prosecution has succeeded in bringing home the charge under sections 302/34 IPC against the appellant. It is relevant to mention here that out of four appellants put on trial, two of them i.e. Arun Pandit and Awadh Paswan were acquitted by the trial court. It would be further relevant to notice that Arun Pandit was also named by the deceased in his dying declaration recorded by the Magistrate as well as in his revelations of names of the accused to PW 1. In

view of the submissions of the parties, before this Court, it becomes necessary to examine whether the dying declaration of the deceased can be said to be of completely aboveboard; as well as reliability of evidence of P.W.1.

The evidentiary value of the dying declaration has time and again fallen for consideration before this Court in a number of cases. In the case of **Chandra Narain Yadav vs. Shibjee Yadav [(1999 6 SCC 63)]** upon which the learned APP heavily relied upon, the Hon'ble Apex Court observed that the conviction can be based solely on dying declaration if it is true and voluntary. He further submits that the Apex Court in the aforesaid case, observed that the dying declaration recorded by the Magistrate in presence of doctor who opined that the deceased was in a fit condition to make the statement has to be given due credence unless and until the same is contradicted by other circumstances.

There cannot be any dispute with respect to proposition of law canvassed by learned APP that if the dying declaration is true and voluntary, the same alone can be the basis for conviction and Mr. Yogesh Chandra Verma, learned counsel for the defence rightly has no reservation as to the law on the issue. However, he submits that since the dying declaration is not made on oath and that the defence did not get an opportunity of cross-examination

the same should be scrutinized cautiously. He submits that besides a certificate of the doctor certifying that the deceased was in a fit mental condition to make a dying declaration, certification of the court with respect to such statement given in a fit mental condition would also be an essential requirement. In support of his submissions, he refers to a decision rendered in the case of **Krishna Chandra vs. State (1996 (2) Cri. L.J. 1507)**. We find that the Hon'ble Apex Court in the case of **Kushal Rao** (supra) after reviewing the relevant provisions of the Evidence and the Criminal Procedure Code has laid down guidelines underlying the laws relating to dying declarations which is quoted hereinbelow:-

“...If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from

such other infirmities as may be disclosed in evidence in that case.”

In the case of **K.R. Reddy** (supra) the Hon’ble Apex Court after reviewing the principles laid in **AIR 1958 SC 22** sounded a note of caution while fastening conviction on the basis of the dying declaration. On circumspections of the judgment of the Hon’ble Apex Court, the following principles of law emerge vis-à-vis dying declarations:-

(i) The conviction can be sustained on the basis of the dying declaration if its being truthful and free of doubt and no corroboration/corroborative evidence may be required in such a case.

(ii) as the dying declaration is not on oath and other side does not get an opportunity of cross-examination, the same has to be put to minute scrutiny and to be dealt with due circumspection.

(iii) Besides certificate(s) of the doctor the certification of the Magistrate recording the dying declaration that the deceased is in sound mental condition to make such statement is

imperative.

In the instant case, we find that the deceased Mahabir Pandit was grievously injured in the intervening night of 15/16 December, 1986. After the assault, he was taken to the local hospital from where he was taken to Madhepura hospital and then to Darbhanga. The certificate of the doctor who examined him is on record certifying that the deceased was in position to make statements. We further find that though the Magistrate recording the dying declaration of Mahabir Pandit has stated that the doctor had certified that he was in a fit condition to make statement, he did not record his own satisfaction as to whether the victim was in a fit state of mind and his capacity to make statement correctly has not been inspired by the shock and injuries. Learned counsel for the defence has rightly relied upon the Apex Court judgment rendered in **1996 Cri L.J. 1507** wherein necessity of such certification from a Magistrate recording the dying declaration was emphasized as a necessary requirement. Furthermore, the dying declaration is not in 'questions and answers forms/series' nor the same is in any local dialect which would have lent due credence to the same. Besides this, the learned counsel for the defence has set out the following circumstance which also infracts the credibility of the statement

of the injured and as to whether it was not a tutored one.

It would appear from the evidence of the prosecution witnesses itself that it was a dark night and there was no means of identification. Moreover, PW 1 in the FIR has stated that as soon as he reached near the deceased, he narrated the manner of occurrence and gave out the names of the assailants/appellant with specific overt act. However, PW 1, in paragraph 2 of his examination-in-chief, stated that on query his father disclosed the names of the assailants/appellant. Soon thereafter he states that his father was not fully conscious and was in semi conscious position which puts a question mark on sanctity of revelations of nerves by the deceased. Furthermore, the case of PW 1 that his father revealed the name of the assailant(s) while on death bed is not supported by his own brother PW 2, who in his evidence has stated that on hearing hulla made by his father, he rushed towards the door of the house. He found his father in an injured condition and that lady inmates of the house had already arrived by then. PW 2 stated that PW 1 and others arrived at the place of occurrence only after he had arrived. He stated that his father did not name any of the assailants. Moreover, DW 1, full brother and DW 2 brother-in-law of the deceased too stated that the deceased did not reveal the name of the accused(s) to any of the family

members, though the evidence of PW 2, DW 1 and DW 2, who are own relatives of the deceased contradicts the statement of PW 1 that his father revealed the name of the accused.

We find from the evidence of P.W. 1 and PW2 that a large number of witnesses had assembled but none of them supported the version of P.W.1. He also stated that just after the occurrence, a large number of persons gathered near his father but none of the witnesses/persons so named in the FIR nor even the wife of the deceased has been examined, for which no explanation has been given. Furthermore, the deceased had animosity with lots of people in the village. He had also deposed in a case in favour of one Md. Habib Saheb. As such, there is reasonable suspicion and ample chance of the deceased being tutored by PW 1 and Habib Saheb to whose house he was taken after being injured. In view of totality of the circumstances, we are of the considered view that the dying declaration of the deceased is not free from doubts and is also not recorded fully in conformity with the guidelines laid down by the Hon'ble Apex Court. As such, we are of the considered view that the sole appellant at least is entitled to benefit of doubt.

In the result, the appeal succeeds. The impugned judgment dated 12.09.2007 and order of conviction dated 14.09.2007 passed

by the Additional Sessions Judge, FTC-2, Madhepura are set aside.

The appellant is said to be on bail, he is discharged form the liability of bail bonds, if not wanted in any other case.

(Samarendra Pratap Singh, J)

(Kishore Kumar Mandal, J)

HR/-

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