

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.753 of 2010

Arising out of P.S. Case No.-45 Year-1998 Thana-Hilsa District-NALANDA (BIHARSHARIF)

Matuka Yadav, Son of Late Rajendra Prasad, Resident of Village- Bechu Bigha,
P.S-Hilsa, District- Nalanda.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellant : Shri Arjun Prasad Singh, Advocate
Shri Prem Nath Singh, Advocate
For the State : Susri Shashi Bala Verma, APP
For the Informant : Shri Rajesh Kumar, Advocate

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 09-07-2015

Solitary appellant Matuka Yadav was put on trial by the learned Ist Additional Sessions Judge, Hilsa (Nalanda) in S.T. No. 170/1999 after being charged with committing offences under Sections 386 and 302 of the Indian Penal Code. The appellant had also been charged under Section 27 of the Arms Act and he was held guilty of committing the offences, he had been charged with by judgment dated 17.05.2010. After hearing the appellant under Section 235 Cr.P.C., the learned trial judge directed him to suffer rigorous imprisonment for seven years under Section 386 IPC, rigorous imprisonment for life under Section 302 IPC and rigorous imprisonment for five years under Section 27 of the Arms Act. It

was directed that the sentences were to run concurrently. The appellant has preferred the present appeal to set up a challenge to the correctness of the findings of his guilt and appropriateness of the order of sentence passed upon him.

2. As per the prosecution story contained in Ext.2, the *fardbeyan* of the deceased Ravindra Prasad himself, the appellant had approached him while he was sitting at a particular place with a request to pay some *chanda* (monetary contribution) for celebrating Saraswati Puja. The deceased declined on the ground that he was short of money on that occasion and no sooner the appellant had heard these words falling from the mouth of the deceased, he pulled out a pistol and fired a shot hitting the deceased in his belly. The deceased stated that he fell down on the ground and he was brought to Hilsa hospital for treatment where he was hospitalized and had given his *fardbeyan* (Ext.2).

3. PW9 S.I. Ram Ekbal Singh was the officer-in-charge of Hilsa police station and on receiving the information about the incident, he went into the hospital to record Ext.2, the *fardbeyan* of the deceased. He drew up the First Information Report on that basis and investigated the case himself.

It appears that Ravindra Prasad the informant and injured was referred to Patna Medical College & Hospital, Patna

for treatment and he was operated upon for the correction of the injury that had been caused to him and he died on 01.02.1998, the incident having taken place on 30th of January, 1998. PW9 S.I. Ram Ekbal Singh after closing the investigation sent the appellant up for his trial and that ended into the impugned judgment.

4. Shri Arjun Prasad Singh, the learned counsel appearing on behalf of the appellant took us through the evidence of witnesses and submitted that none of the witnesses was an eye witness to the occurrence and further that the statement of the deceased does not rank as dying declaration and even if it is treated as such, there are many defects which render the document doubtful.

5. Susri Shashi Bala Verma, the learned counsel appearing on behalf of the State has resisted the submissions of the learned counsel for the appellant and has submitted that the deceased had given his statement consciously and was in good state of health and there is no challenge to that particular fact. Submission was that the dying declaration in itself was sufficient to uphold the conviction of the appellant.

6. Out of ten witnesses examined so far by the prosecution, PWs. 5 and 6 were formal in character and P.W.10 Dr. Arvind Kumar Singh had held post-mortem examination on the

dead of Ravindra Prasad. PW9, we have just noted, had investigated the case. Raja Gope (PW1), Awadh Kumar (PW2), Raman Gope (PW3), Arvind Kumar (PW4) and Ramashish Prasad (PW7) who happened to be the father of the deceased also had given eye witness account to the occurrence. PW8, S.I. Prabhu Nath Singh had taken over the investigation from PW9 and had merely submitted charge sheet in the case.

7. After being taken through the evidence of witnesses, we find that in spite of having claimed that they were eye witnesses, the witnesses do not appear having seen the occurrence. Raja Gope (PW1) was the father-in-law of the deceased and he does not appear having any reason to come from his village to the house of the deceased and what he appeared telling to the court was that while he was roaming around with his *samdhi* PW7 Ramashish Prasad, he saw the occurrence. While considering the evidence of PW7 Ramashish Prasad, we found him stating that he was not present at his house rather he was irrigating his wheat field and thus, the evidences of PWs. 1 and 7 regarding the reason of their presence on or about the place of occurrence make their presence doubtful. Moreover, the defence had pursued Raja Gope (PW1) as to why he was there at the house of the deceased and he stated that it was a casual visit by him to the house



of the informant. We may not disbelieve the cause as there may not be any particular reason for a father to visit his daughter, but because his evidence on other matters appear not acceptable so we have chosen not to place reliance upon it. The other reasons on which the evidence of Raja Gope (PW1) has to be discarded was that he stated that besides his *samdhi* PW7 Ramashish Prasad, being at his house, other brothers of the deceased were in the fields irrigating the wheat crop. It is true that Arvind Kumar (PW4) who happened to be the brother of the deceased had stated that he was coming from his wheat field after irrigating it when he saw the occurrence being committed. But his evidence in paragraph-8 at page 31 of the paper book renders him not an eye witness. Arvind Kumar (PW4) stated that when he first saw the accused persons, he was at a distance of 10-15 *dhurs* from them and he further said that he saw many persons surrounding the deceased. Thus, what appears is that the evidence of PW4 was contrary to the evidence of other witnesses and probably he had not seen the occurrence. As regards Awadh Kumar (PW2), he, in his examination-in-chief, appears supporting the incident as an eye witness but during cross-examination he stated in paragraph-4 that he had received the information about Ravindra Prasad being shot while he was at his village. Awadh Kumar (PW2) had stated that the deceased was his



Mamera (maternal) brother and that amply indicates that he was not the resident of the same village and if he had received the information about the incident then he could not be naturally an eye witness to the occurrence. Raman Gope (PW3) had also claimed himself as an eye witness in his examination-in-chief but, during his cross-examination in paragraph-7, the witness stated that he heard the sound of gun shot and at that time he was sitting at his *darwaza* for an hour. Thus, these lines of evidence of PW3 in paragraph-7 render him not an eye witness. Thus, the finding recorded by us that the witnesses, claiming themselves to be eye witnesses, do not appear to have seen the occurrence is borne out from the above evidences of the witnesses.

8. In spite of the complete lack of evidence from any person who could have seen the occurrence, what we find is that the very *fardbeyan* of the deceased was a statement made by a dead person as regards the cause of his death. It was admissible under Section 32(1) of the Evidence Act. When we pointed out this to the learned counsel appearing for the appellant, he firstly resisted our observation by pointing out that we should not use the *fardbeyan* of Ravindra Prasad as dying declaration because the law prohibits it due to the same being not recorded by a Magistrate we brought into the notice of the learned counsel *AIR 1983 SC 164*



Ramawati Devi v. State of Bihar. In that case also the submission was made that because the dying declaration had not been recorded by a Magistrate as such, that piece of evidence should be discarded and the appellant be acquitted. The Supreme Court repelled the submission by observing that there was no requirement of law that dying declaration must necessarily be made to a Magistrate. What evidentiary or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. While making the above observation, the Supreme Court was distinguishing their earlier decisions in *Keshav Ganga Ram Navge v. State of Maharashtra*, AIR 1971 SC 953 and *K. Ramachandra Reddy v. Public Prosecutor*, AIR 1976 SC 1994. While repelling the submission to distinguish the two judgments just noticed, the Supreme Court was observing as under in paragraph-7 of the report.

"7. In our opinion neither of these two decisions relied on by the appellant is of any assistance in the facts and circumstances of this case. These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible under Section 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no



requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. In the instant case, the dying declaration has been properly proved. It is significant to note that in the course of cross-examination of the witness proving the dying declaration, no questions were put as to the state of health of the deceased and no suggestion was made that the deceased was not in a fit state of health to make any such statement. The doctor's evidence also clearly indicates that it was possible for the deceased to make the statement attributed to her in the dying declaration in which her thumb impression had also been affixed."

9. Thus, it is now a settled principle of law that statement even recorded by a police officer could be treated as dying declaration if it discloses the cause of death of the deceased. Here in the present case PW9 SI Ram Ekbal Singh has stated that he went to Hilsa hospital and recorded the statement of Ravindra Prasad the deceased. The very evidence of PW9 indicates that the deceased was in a fit state of mind to make the statement and that appears more prominently clear from the fact that after the *fardbeyan* of the deceased had been reduced into writing by PW9, Ravindra Prasad had signed in full and had also put the date under it on which he had signed the document. Signing the document in full and specially putting the date under it to us appears indicative of the fact that the deceased was in a fit state of health and was quite conscious and alert in his mind. He was disclosing the necessary details of the manner of occurrence and the reason as to



why the shot had been fired at him. It is true that there is no signature of the doctor or a certificate obtained from him, but again the law does not require that the doctor must certify about the mental state of the deceased. The courts in a particular case may consider the question of the deceased being in a conscious and fit state of mental health by considering the attending circumstances of recording of the dying declaration. We have found out a couple of such circumstances and we have pointed out just now that after having given the statement the deceased was signing in full and was putting the date under his signature. Someone could put his signature but unless he had been mentally alert and conscious, it would have been very difficult for a man to put the date under his signature while he was so seriously injured like the deceased was. That particular aspect of the record of Ext.2 convinces us that Ravindra Prasad was quite conscious and had very consciously given the statement disclosing the true manner of occurrence. Moreover, during cross-examination of PW9, the defence did not challenge that the deceased was not in a fit state of mind and that he was unconscious. It is true that the doctor who had treated Ravindra Prasad in Hilsa hospital had not been examined but in absence of any effort by the defence to challenge the mental fitness of the deceased, we cannot import any fact into the record which

could not be there. We believe that the defence was very well conscious of the fact that the deceased was quite conscious and mentally fit to give the statement.

10. Once it is found by the Court that the deceased was mentally fit and had in such mental fitness given the statement which was disclosing the cause as regards his death then the Court is always inclined to accept such a statement as admissible under Section 32 (1) of the Evidence Act. We attach that much of importance and credibility to the document Ext.2 and we accept it as a validly and properly recorded statement. We have already noted that PW9 the investigating officer had very well stated that he had recorded the document after going into Hilsa hospital. Not only that PW9 had also stated that after he had recorded the *fardbeyan* (Ext.2), he had also recorded the further statement which further assures us about the mental fitness of the deceased. Once the dying declaration is held appropriately recorded then it could be sufficient evidence to convict the appellant. In view of our finding we uphold the conviction of the appellant and the finding of the learned trial judge that the appellant had fired a shot and caused injury to the deceased.

11. The appellant had been convicted under Section 386 of the Indian Penal Code. We have some doubt as regards the

proof of that charge and one under Section 386 IPC.

Section 386 punishes extortion which offence has been defined by Section 383 of the Indian Penal Code and on consideration of that definition contained in Section 386 of the Indian Penal Code. It appears to us from Section 383 IPC is that if someone is put in fear of any injury by a person or to any other and thereby dishonestly is induced by the person putting him into fear to deliver any property or valuable security, etc. commits extortion. The facts of the case indicate that the appellant had approached the deceased with a demand of paying up some *chanda* so that he could celebrate Saraswati Puja. The deceased had refused and thereafter the appellant had brandished his weapon and had fired a shot. Thus, the first ingredient of putting the deceased into fear of hurt does not appear established by the facts of the case. There was no fear of injury given to the deceased prior to he was asked to pay up any amount. In fact there was no fear ever held out to the deceased. The deceased had refused and then only the shot had been fired and, as such, there was no voluntary delivery of any property or anything. Thus, all ingredients of Section 383 of the Indian Penal Code appear not established by the evidence on record. We, as such, do not have any hesitation in holding that the finding of the learned trial judge that the appellant had committed

an offence under Section 386 of the Indian Penal Code is not sustainable in the face of the evidence available on record. We, as such, set aside the conviction of the appellant under Section 386 of the Indian Penal Code.

The appellant had used a weapon lawful or unlawful whatever be its nature, for quite some unlawful a purpose of killing a man. In that view of the evidence, as appears from the dying declaration, the conviction of the appellant under Section 27 of the Arms Act also is left undisturbed.

12. However, a serious question was raised by the learned counsel appearing for the appellant before us as regards the conviction of the appellant under Section 302 of the Indian Penal Code. It was contended that the facts disclosed may not constitute an offence under Section 302 of the Indian Penal Code rather the act may fall within the category of Section 304 of the Indian Penal Code. We have considered the submission with all seriousness it deserved and we find that the dominant intention of the appellant was to extract some contribution so as to enabling him to celebrate Saraswati Puja. The appellant was not having an intention of killing the deceased from the very beginning. He, all on a sudden, after being refused his request had brandished the weapon and had fired the shot. The intent may not be lacking but the knowledge



could be attributable to the appellant that by employing a pistol to fire the shot in order to causing an injury the effect also could be death. As such, the appellant could be presume to have very well known the consequence of his act of firing a shot targeting the deceased. What we further find is that the doctor who had held post-mortem examination on the dead body, that is, PW10 did not find any internal damage to any vital organ of the deceased. It was a mere stitch of 1/2" on the stomach and the dissection part of the post-mortem report does not indicate that any particular internal organ was hit or injured. Thus, also the effect which was caused by the shot fired by the appellant appears not as serious as in the ordinary course of nature could have caused death of the deceased. The deceased was dying on the fourth day of the incident. The reason which was given by PW10 Dr. Arvind Kumar Singh was not any particular injury on account of which the death had been caused rather the injury which had been caused by the shot had caused infection internally into the body of the deceased which had caused his death. Thus also, we find that the cause of death was not the result of the shot which had not caused damage to some vital organs hastening his death or causing his death. In the above views of the evidence, we are of the view that it was rightly contended by the learned counsel appearing for the appellant that



the case may not fall within the purview of Section 302 of the Indian Penal Code. We are also of the view that the fact of the case and the evidence of the doctor do indicate that it could be an offence under Section 304 Part II of the Indian Penal Code. Accordingly, we modify the conviction of the appellant and hold him guilty of committing the offence under Section 304 Part II of the Indian Penal Code by setting aside his conviction under Section 302 of the Indian Penal Code.

13. This brings us to decide as to what sentence could be appropriate under the facts and circumstances of the case. It is true that no vital organ was damaged and the shot does not appear really causing the death on account of damaging any vital organ and as we have just noted, the doctor had opined that the internal infection which had resulted on account of either the injury or the surgery or the both, had caused the death of the deceased. We have already noted that the dominant intention of the appellant was not to kill the deceased. It was merely to extract some contribution from him to celebrate Saraswati Puja. Considering the attending circumstances of the case, we find that the sentence appropriate under the circumstances could be that of period already suffered by the appellant. He was taken into custody on 18.02.1998 and was bailed out on 06.04.1999 and thereafter, he

was again taken into custody on 17.05.2010 whence he is continuously in custody. The total period suffered by him till date comes somewhere around 6½ years. We sentence the appellant to the period already undergone by him. We do not disturb the order of sentence passed upon him under Section 27 of the Arms Act and the direction of the learned trial judge all the sentences, are to run concurrently. The appellant has served out the sentence and, as such, he must be released from custody forthwith, if not wanted in any other case.

14. The appeal is dismissed with the above modification in the judgment of conviction and order of sentence.

(Dharnidhar Jha, J.)

(Ahsanuddin Amanullah, J.)

Anand Kr./Sanjay/AFR

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