

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.572 of 2015

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(AGAINST THE JUDGMENT AND ORDER OF ACQUITTAL,
DATED 11TH JUNE, 2015, PASSED BY SHRI MD. AJAZUDDIN,
3rd ADDITIONAL SESSIONS JUDGE, PURNEA, IN SESSIONS
CASE NO. 97/193 OF 2014, ARISING OUT OF SADAR POLICE
STATION CASE NO.359 OF 2009.

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1. Arun Kumar, son of Sri Mohan Lal Sharaf, Resident of Ram Raj
Chowk, Gulabbagh, P.S.- Sadar, Dist. Purnia

.... Appellant

Versus

1. The State of Bihar
2. Ramesh Agrawal, Son of Late Nanhku Ram @ Nand Kishore
Agrawal, Resident of Gulabbagh Sardar Tola, P.S.- Sadar, District-
Purnia

.... Respondents

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Appearance :

For the Appellant : Mr. Kumar Praveen, Advocate

For the Respondents : Mr. Ajay Mishra, APP

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

CAV JUDGMENT

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI
SHARAN SINGH**

Date: 24-11-2015

The present appeal has been preferred by the informant (PW 5)
under the proviso to Section 372 of the Code of Criminal Procedure,
1973, being aggrieved by the judgment and order, dated 11.06.2015
passed in Sessions Case No. 97/193 of 2014, whereby the learned

Additional District & Sessions Judge-III, Purnea, has recorded acquittal of respondent No.2, who was charged of the offences punishable under Sections 328 and 302 of the Indian Penal Code.

2. The prosecution's case, as disclosed in the *fardbeyan* of the informant recorded, on 15.10.2009, leading to registration of Sadar P.S. Case No. 359 of 2009, is thus:

- (i) On 14.10.2009 at about 4.00 PM, the informant was informed on his Mobile phone that his brother, Vishnu Kumar (the deceased), was unwell and vomiting. The deceased was, at the relevant point of time, said to be at his coal shop at Purnea. Upon reaching, the deceased is said to have told the informant that respondent No.2, who was also engaged in coal business, had administered poison to him. The deceased was, immediately, taken to a private hospital, where he remained under treatment for some time, but he died in the night, while undergoing treatment. The dead body was, thereafter, brought to the house, whereafter the informant gave a statement to the Sub-Inspector of Police, Sadar Police Station at 07.30 AM on 15.10.2009, which is the basis of institution of the *First Information Report*, naming respondent No.2 as an

accused.

(ii) The police upon, completion of investigation, submitted *charge sheet* for the offences punishable under Sections 328 and 302 of the Indian Penal Code against respondent No.2; on the basis of which, the learned Chief Judicial Magistrate, Purnea, took cognizance of the said offences by order, dated 16.01.2014. Later on, the case was committed to the Court of Sessions leading to institution of Sessions Case No. 97 of 2014.

(iii) The charges, under Sections 302 and 328 of the Indian Penal Code were framed on 14.04.2014, which were read over and explained to respondent No.2. Since he pleaded not guilty thereto, the trial commenced against him. Upon closing of prosecution's evidence, statement of respondent No.2 was recorded under Section 313 of the Code of Criminal Procedure, wherein he completely denied his involvement and claimed to be innocent.

3. In course of trial, ten (10) witnesses, for the prosecution, were examined and certain documents were exhibited.

4. The informant, i.e., the brother of the deceased, who was



examined as PW 5, while reiterating his statement, which he had made in the *fardbeyan*, deposed at the trial that when he reached the shop of his brother, upon getting the information that his brother was unwell and vomiting, the deceased told him that he would not survive. Upon being asked by the informant as to why he was saying so, the deceased is said to have told the informant that '*probably*' the respondent No.2 had administered to him poison and, therefore, his condition had deteriorated. He stated, at the trial, that after the death of his brother in hospital, dead body was brought home and, thereafter, he informed the police. In his evidence at the trial, the informant further stated that the Police Officer had come in the night and, again, in the morning at 07.00 AM on 15.10.2009, when his statement was recorded by the Police.

5. PW 3 (Dilip Kumar Saraf) is the brother of the informant and the deceased. He is said to have come to Purnea upon receiving information about the occurrence at about 07.30 PM on 14.10.2009, when the deceased was undergoing treatment. He took the death certificate issued by Hope Hospital, Purnea, wherein it was mentioned thus, "*suspected case of Sulphos poisoning C.R. failure*", (Exhibit-1).

6. PWs 1, 2 and 3, namely, Jitendra Paswan, Farmuz Ali and Dilip Kumar Saraf respectively have been declared to hostile to the prosecution case.

7. PW 4 (Sharmishtha Devi) is the wife of the deceased. She,



in her evidence, has said that when she reached her husband's coal shop, upon receiving information about the deteriorating condition of health of her husband (the deceased), the deceased had told her that respondent No.2 had administered to him poison. According to her, firstly, the deceased was taken to Dr. O.P. Sah, who advised her to take him to Hope Hospital. She further stated that after the deceased told her about the occurrence, he became unconscious and did not regain his senses thereafter. The treatment, according to her, continued for two hours at Hope Hospital and the police were informed about the occurrence from the Hope Hospital itself. She has further deposed that the police did not arrive at the house in the evening, rather, they came in the morning. It further appears that in her evidence, she said that the deceased did not tell her how respondent No.2 had administered to him poison.

8. PW 7 (Krishna Mohan Prasad), the Investigating Officer of the case, in his evidence stated that upon being asked by SHO, Sadar, he had gone to record the *fardbeyan* of the informant at 07.30 AM on 15.10.2009. He stated, in his cross-examination, that the informant or his family members had not given any information as regards the occurrence and the police, upon getting information from unknown sources, had reached the house of the deceased, whereafter the *fardbeyan* was recorded. It further transpires that the Investigating Officer did not ask for any paper of medical treatment of the deceased and reference for



treatment of deceased in Hope Hospital by Dr. O.P. Sah, who is said to have told the police that the deceased was brought to senses by him and, in course of medical examination, the deceased had told him that his friend had administered to him sulphos, but he (the deceased) did not mention the name of his friend. The Investigating Officer further stated that no paper was shown or given to him as to what treatment was provided to the deceased at Hope Hospital nor did he enquire from the management of the hospital as to why they did not inform the police.

9. The Medical Officer (PW 8), who conducted the *post mortem examination* of the deceased, had proved the *post mortem* report from which it transpires that the *viscera* was preserved for biochemical examination. Curiously, in his *post mortem* report, he did not mention as upon whose instruction, *post mortem examination* was conducted. In paragraph 3, he has stated that the dead body was handed over to him by some constable. He has also stated that general features, in case of poisoning, were present in the body.

10. PW 6 and PW 10 are also Investigating Officers, who were associated with the investigation at various stages. The Investigating Officer (PW 10) said, in his evidence, that he received the FSL report from the office, at Purnea, after submission of the charge sheet.

11. PW 9 was posted as Assistant Director Forensic Science

Laboratory, Patna. He has deposed that upon chemical examination, “*thymate*” poison was found from the dark brown fluid of *viscera*. The said poison is used in farming as an insecticide.

12. Upon analyzing the evidence of the prosecution witnesses, the learned trial Court came to a finding that the prosecution miserably failed to prove the charges framed against respondent No.2 for various reasons as elaborately discussed in the impugned judgment and order. The learned trial Court found material contradictions between the statement made by the informant in his *fardbeyan* and his evidence in course of trial.

13. According to the prosecution’s case, as disclosed in the *fardbeyan*, the deceased was taken from the coal shop, firstly, to Dr. O.P. Sah, whereas the wife of the deceased (PW 4) deposed in her evidence that one Dr. Awinash Chandra Mishra was called by her to attend the deceased at coal shop and he, had, in fact attended on her husband. This fact has neither been mentioned by the informant in his *fardbeyan* nor in his evidence in course of trial. Further, according to the witnesses, on the advice of Dr. O.P. Sah, the deceased was taken to a private hospital. The Investigating Officer, in his examination, deposed that Dr. O.P. Sah had told him (the I.O.) that the deceased was brought to senses by him (Dr. O.P.Sah) and he (deceased) had said that his friend had administered to him poison but he did not disclose the name of that friend. The learned



trial Court, in our considered view, rightly doubted the circumstances, firstly, because Dr. O.P. Sah did not inform the police as regards the occurrence nor was he examined as a witness in the course of trial. It further appears that the Sadar hospital was quite close to the coal shop of the deceased, to which he could have been taken, but he was instead referred to a far away private hospital, for no explicit reason.

14. According to the prosecution's case, as emerging from the *fardbeyan* and the evidence of witnesses, the informant learnt about the deteriorating condition of his brother, who was at his coal shop, on the basis of the information received from his father. He, thereafter, rushed to the shop. (PW 4), wife of the deceased, was informed about the occurrence by one Jitendra Paswan (PW 1), a staff in the shop of the deceased. The father of the deceased, who had informed the informant about the deteriorating condition of the deceased, was at the shop. PW 4, wife of the deceased, and PW 5, the informant, who is brother of the deceased, are the witnesses, who have claimed that the deceased had told them that respondent No.2 (Ramesh Agarwal) had administered to him poison. PW 5, in his evidence, in the course of trial, said that the deceased had told him that respondent No.2 had "*probably*" administered to him poison.

15. The conduct of these prosecution witnesses in not informing the police immediately, thereafter, or after reasonable time



creates a reasonable doubt about their version. According to them, they had taken the deceased to Dr. O.P. Sah. The Investigating Officer, in his evidence, has said that Dr. O.P. Sah had told him that the deceased was brought to him and he had referred him for treatment to Hope Hospital. Dr. O.P. Sah is said to have told the Investigating Officer that the deceased had disclosed to him that '*his friend*' had administered to him poison, without naming '*his friend*'. On the one hand, PW 4, in her evidence, stated that the deceased became unconscious after telling her about the occurrence and, thereafter, he did not come back to his senses, the Investigating Officer has referred to statement of Dr. O.P. Sah, to whom the deceased was taken from the shop for treatment, to the effect that that the deceased was brought to senses by him and before him, the deceased had stated that poison was administered by his friend. As noted above, Dr. O.P. Sah was not made even a *charge-sheet* witness nor was he examined, in course of trial, as a witness, who, was undoubtedly, a material witness.

16. Learned counsel, appearing on behalf of the appellant, has strenuously attempted to convince us that the statement of the deceased before the witnesses was clear and un-ambiguous and was made, when he had lost all hopes of his survival. He has accordingly submitted that the learned trial Court has committed an error by acquitting respondent No.2 and not giving due credence to the dying declaration made by the

deceased before the witnesses. He has submitted that the said dying declaration, made by the deceased, stood corroborated by FSL report, according to which, the deceased died of poisoning, as thymate was found in the brown fluid of his viscera.

17. Can it be said beyond all reasonable doubt that it was respondent No.2 who had administered poison to the deceased, on the basis of what witness Nos.4 and 5 deposed, in their evidence, as regards disclosure made by the deceased to the effect that Ramesh Agrawal, respondent No.2 had administered to him poison and subsequent *viscera* report showing cause of the death to be poisoning? Could the prosecution successfully and beyond any reasonable doubt prove the dying declaration of the deceased at the trial? Whether the evidence of witnesses are free from doubt and are reliable on the basis of which it can be said that it was respondent No.2, and only he, responsible for administering the deceased, poison? These are the questions, which need to be addressed in the present appeal.

18. The legal maxim 'nemo moriturus praesumitur mentire' (a man will not meet his Maker with a lie in his mouth) is the heart and soul of Section 32(1) of the Evidence Act, 1872, which gives credence to the statements of a person, who is dead, when it relates to cause of his death or as to any circumstance of the transaction, which resulted into his death despite the fact that such statement made by him cannot be subjected to

cross-examine in a criminal trial. Because of the weight, which is attached to a dying declaration made by a person as evidence in a criminal trial, the Courts proceed with utmost care and caution, when it comes to the proof of dying declaration so made.

19. Further, unless testimony of interested witnesses find corroboration from independent witnesses, the evidence of such interested witnesses, on the point of dying declaration, cannot be implicitly accepted.

20. In the present case, except the evidence of the informant (PW 5) and the wife of the deceased (PW 4), there is no evidence to support the prosecution version that at the time of making of the statement, the deceased was conscious and alert enough to tell them the reason why his condition had deteriorated. Apart from their evidences, there is nothing to show that the deceased was in a fit condition to make any declaration before them. As per statement of PW 4, the deceased was not conscious, when he was taken to Dr. O.P. Sah and, then, to the Hope Hospital. Their conduct in not informing the police immediately after they allegedly learnt that poison was administered to the deceased by opposite party No.2, because of which his condition had deteriorated, creates serious doubt over veracity of their evidence. This doubt gets strengthened, when we notice that Dr. O.P. Sah and the said Hope Hospital did not inform the police about the occurrence. As a matter of



fact, there is absolutely no evidence to show as to what steps did the informant or his family members take to inform the police about the occurrence. Even the Investigating Officer, in his evidence, has stated that the police learnt about the death of the deceased from unknown sources. With such being the conduct of the informant/prosecution witnesses, it was surely not safe for the trial Court to have accepted their testimony and convicted respondent No.2 of the offences of which he stood charged.

21. Coupled with the above and most importantly, the clear evidence of the informant (PW 5), at the trial, is that the deceased had told him that the respondent No. 2 herein had probably administered to him poison. If one were to believe PW 5 that even the deceased did not know, for short, that the respondent No. 2 was the one who had administered poison to him. In the face of such indefinite and uncertain evidence, it could not have been held, and has rightly not been held, by the learned trial Court, that the prosecution had proved its case beyond reasonable doubt against the respondent No. 2.

22. The principles, governing test of admissibility and reliability of an evidence as dying declaration, have been clearly laid down and reiterated by the Supreme Court in its judicial pronouncements, relevant portion of some of which are being referred to and quoted in the following paragraphs.

23. In case of **Arun Bhanudas Pawar v. State of Maharashtra**, reported in (2008) 11 SCC 232, emphasizing the need that oral dying declaration, made by the deceased, should be treated with care and caution, such statement being not subject to cross-examination, held as follows:

“It is well-settled law that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother who, as stated above, arrived at the hospital only on the following day at about 3.30 p.m. when Dr. Nitin had already operated Raju for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certificate to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased Raju to his mother PW Sundarbai relied upon by the prosecution and accepted by the trial Court and the High Court, in our view, was not cogent, satisfactory and convincing to hold that deceased Raju before his death was in a fit condition to make oral declaration to his mother.”

24. In case of **Sunder Lal v. State of Rajasthan**, reported in (2007) 10 SCC 371, the Supreme Court held that conviction can be based solely on dying declaration if the Court is satisfied that it is truthful, coherent and consistent.

“13. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.” (Emphasis is supplied)

25. We may also refer to the principle reiterated by the Supreme Court in case of **P.V.Radhakrishna v. State of Karnataka**, reported in (2003) 6 SCC 443.

26. On the contrary, in the present case, the witnesses have not been able to prove beyond all reasonable doubt the fact that the



deceased did make any statement in their presence naming respondent No.2 as the person responsible for administering to him poison. Their statements on this point are full of inconsistencies and are not free from doubt keeping in mind their conduct and other attending circumstances. In the present case, it had certainly remained a mystery as to who did what and why. The police did not have the earliest opportunity to start investigation. Information was withheld from them firstly by the informant and his family members and, secondly, by Dr. O.P. Sah to whom the deceased was allegedly taken for treatment and, thirdly, by Hope Hospital, where the deceased was treated. Even the doctors of Hope Hospital were not examined to throw light on the condition of the deceased at the time, when he was brought to the Hospital. Besides what have been discussed hereinabove, there is not even a particle of evidence on record that the respondent No.2 had, in his possession, at the relevant point of time, the poison, i.e., *thymate*, which has allegedly been administered to the deceased.

27. In view of the above, we do not find any infirmity in the impugned judgment and the order of the learned trial Court recording acquittal of respondent No.2. Further, it is settled principle that if view taken by a trial Court can be a possible and reasonable view recording acquittal of accused, this Court, in appellate jurisdiction against acquittal, is not required to interfere on the ground that other view is also

possible. Unless some clinching material is shown in an appeal against acquittal, which can be said to be sufficient to assure conviction of the accused person, who has been acquitted, the appeal cannot be entertained.

28. We do not find any infirmity in the judgment and order under appeal. This appeal is, accordingly, dismissed.

29. However, there shall be no order as to costs.

(Chakradhari Sharan Singh, J.)

I. A. Ansari, ACJ.: I agree.

(I. A. Ansari, ACJ.)

A.I./A.F.R.

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