

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.844 of 2016

Arising Out of PS.Case No. -148 Year- 1993 Thana -RAMNAGAR District-
WESTCHAMPARAN(BETTIAH)

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Md. Mustaque Khan, son of Late Subhan Allah Khan, resident of village- Phulkaul,
P.S.- Ram Nagar and District- West Champaran Appellant

Versus

1. The State of Bihar.
 2. Fakhruddin Khan, son of Shamsuddin Khan, resident of Village- Chhawghariya,
P.S. Ram Nagar, District- West Champaran.
 3. Islam Mian, son of Nathuni Mian, resident of Village- Sonekher, P.S. Ram
Nagar, District West Champaran.
 4. Auranjeb Khan, son of Noor Mohammad Khan, resident of Village-
Chhawaghariya, P.S. Ram Nagar and District- West Champaran.
 5. Zakir Shah, son of Idris Shah, resident of Village- Phulwariya, P.S.- Ram Nagar
and District- West Champaran Respondents
- =====

Appearance :

For the Appellant : Md. Abu Haidar, Advocate

For the Respondents : Mr. S.C.Mishra, APP

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

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 24-10-2016

Heard learned counsel for the appellant and the
learned counsel for the respondents.

2. The instant appeal is directed against the judgment
dated 30.6.2016, passed by the Additional Sessions Judge I, West
Champaran at Bagaha, in Sessions Trial No. 394 of 1994,
whereby respondents no. 2 to 5, namely, Fakhruddin Khan, Islam
Mian, Auranjeb Khan and Zakir Shah, have been acquitted of the
charges under sections 302/34 of the IPC and section 27 of the

Arms Act.

3. The instant case was instituted by Ram Nagar Police Station on basis of dying declaration of one Subhan Allah Khan dated 21.5.1998 recorded by PW 3 Dr. Kiran Shankar Jha which was forwarded to the Officer-in-charge of Ram Nagar Police Station for institution of a case.

4. The prosecution case, based on dying declaration of the deceased Subhan Allah Khan, in brief, is that on 21.5.1998 at about 7 PM he was near his house at Ram Nagar. In the mean time, one Fakhruddin Khan s/o Shamsuddin Khan, resident of village Chhawghariya, Police Station Ram Nagar, District West Champaran and Islam Mian, son of Nathuni Mian, resident of village Sonekher, Police Station Ram Nagar, District West Champaran also arrived. Soon thereafter, Islam Mian opened fire upon the deceased informant which hit his stomach and chest. The informant was able to recognize them, as the fire shot was opened from a near distance. The dying declaration was recorded by PW 3 Dr. Kiran Shankar Jha at 7 PM in the Outdoor Patient's Department (OPD) of Ram Nagar Hospital. On basis of dying declaration recorded by PW 3 Ram Nagar Police Station Case No. 148 of 1993 under sections 302/34 of the IPC and 27 of the Arms Act was instituted.



5. The prosecution, in support of its case, examined five witnesses. Out of these five witnesses, PW 1 Pradeep Kumar Agrawal and PW 2 Bal Krishna Agrawal have not claimed to identify the accused persons causing gun shot injury. PW 3 Dr Kiran Shankar Jha has claimed to have recorded dying declaration of the deceased. PW 4 Sheopujan Prasad, a peon in the OPD of the Ram Nagar Hospital, produced inquest report as well as post mortem report, which have been marked as exhibits 2 and 3 respectively. PW 5 Arun Kumar Chaudhary is the Investigating Officer (IO) of the case, who stated that the place of the occurrence is *Veranda* of a shop, namely, '*Saurabh Hardware*'.

6. It appears that on consideration of materials on record, the trial court acquitted opposite parties no. 2 to 5, namely, Fakhruddin Khan, Islam Mian, Auranjeb Khan and Zakir Shah of the charges. While coming to the aforesaid conclusion, the trial court observed that the dying declaration (exhibit 1) is recorded at 7.10 PM at the OPD of the Ram Nagar Hospital, whereas, according to the inquest report, the dead body was lying near the place of occurrence in village Ram Nagar at about 7.15 PM. Furthermore, the recording of dying declaration and the signature of the deceased were in two different inks. The trial

court further observed that the genesis of recording of dying declaration at the OPD of the Ram Nagar Hospital also becomes doubtful as the OPD register of the Ram Nagar Hospital does not reveal that the injured was brought to the said OPD for treatment.

7. Learned counsel appearing for the appellant has assailed the impugned judgment of acquittal. He submits that the trial court has not appreciated the evidence of prosecution witnesses, who have fully supported the case of the prosecution in their evidence. He further submits that the conviction can be sustained on the solitary evidence of dying declaration. He next submits that the deceased died on account of fire arm injury and this fact has not been disputed by the defence also.

8. Heard learned counsel for the parties and perused the materials on record.

9. None of the witnesses, produced by the prosecution, has claimed to have identified the opposite parties no. 2 to 5 as the persons who caused gun shot injury to the deceased. There is no dispute to the proposition of law that the conviction can be sustained on dying declaration alone but the same should inspire confidence and its genuineness is not in doubt. In the instant case, we find that the dying declaration is recorded at 7.10 PM in the OPD of the Ram Nagar Hospital,



whereas as per the inquest report, the dead body was found lying at the place of occurrence which was near the *Varanda* of a shop, namely, '*Saurabh Hardware*' at 7.15 PM.. The prosecution has failed to explain that if PW 3 Dr. Kiran Shankar Jha, referred the patient to Bettiah for better treatment, then how his dead body was found lying dead within five minutes at the place of occurrence i.e. near the *Varanda* of a shop, namely, '*Saurabh Hardware*'. Besides this, there is no certificate of the doctor on record stating that the deceased was in a fit medical condition to make his dying declaration, save and except, his bald evidence to the aforesaid effect in the court.

10. In the facts and circumstances of the case, we are in agreement with the findings of the trial court that the prosecution has failed to establish its case beyond all reasonable doubts. In the result, the appeal is dismissed.

(Samarendra Pratap Singh, J)

(Rajendra Kumar Mishra, J)

Bhardwaj

AFR/NAFR	N.A.F.R.
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