

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.41 of 2014

Arising Out of PS.Case No. -5 Year- 2005 Thana -RAMNAGAR District-
WESTCHAMPARAN(BETTIAH)

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Mantu Tiwari, S/o Late Satyendra Tiwari, Resident of Village-Ram Nagar, P.S.-
Ram Nagar, District- West Champaran.

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Ansul, Advocate
Mr. Anuj Kumar, Advocate
Ms. Salma Naaz, Advocate
For the Respondent : Mr. S.N. Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE SANJAY KUMAR)

Date: 29 -06-2017

The sole appellant has assailed the judgment of conviction and order of sentence passed by the learned Trial Court whereby he was found guilty under Section 302 read with Section 34 of the IPC and under Section 27(1) of the Arms Act and was directed to suffer RI for life under Section 302/34 of the IPC and R.I. for 03 years under Section 27 of the Arms Act. In addition, the appellant was also imposed fine under both the heads with default clause.

2. Brief facts, which led to the trial of the accused are as follows: the father of the deceased was at his house at Kunhi



Compound, Ramnagar where at about 6.30PM he was informed that his son Rajeev Kumar Jaiswal @ Guddu (victim) was shot at near the Ram Rekha bridge by some unknown criminals. Hearing the news, he along with the family members hurried to the place of occurrence and after covering a distance of 500 yards reached there to find his son lying in an injured condition having received fire arm injury in his back. On query, his son disclosed that while he was coming home after closing the shop and as soon as reached the northern end of the bridge he saw the appellant with other accuseds. When he further proceeded the appellant fired at him from behind and thereafter they all escaped towards South. With the help of his family members, the informant carried the victim to the nearby Primary Health Centre, Ramnagar where some treatment was given to him before he was referred to Bettiah. When he was carrying his son to Bettiah for treatment on the way he succumbed to the injuries. He returned with the dead body to his house where the police arrived and recorded his statement (Ext. 6) on 10.01.2005 at 9.15 P.M. which gave rise to a formal FIR (Ext.7) drawn on 10.01.2005 at 11.30 P.M. The police officer prepared a '*panchnama*' on the same day at 9.30 PM and dispatched the dead body with the local '*choukidar*' for holding autopsy. After inspecting the place of occurrence, obtaining the post mortem report (Ext. 4) and recording the statement of the



witnesses the charge sheet was laid against the appellant keeping the investigation pending against rest of the accused persons whereon cognizance was taken on 22.09.2007. Separating the case of the appellant, records were committed to the court of session on 15.12.2010. The charges were framed under Section 302 r/w Section 34 of the IPC and Section 27 of the Arms Act against the appellant the contents whereof read over and explained to him to which he pleaded not guilty and claimed to be tried.

3. Upon conclusion of the prosecution evidence statement of the accused was recorded under Section 313 of the Cr. P.C. wherein also he pleaded his innocence and later adduced documentary evidence (Ext. A) in support of his defence. On an appraisal of the prosecution evidence, the trial Court held the appellant guilty of the charges and punished him in the manner noted above.

4. We have heard Mr. Ansul learned counsel for the appellant and Mr. Satyanarayan Prasad APP for the State and perused the materials on record.

5. On behalf of the appellant, it has *inter alia* been submitted that the oral dying declaration allegedly made by the



victim is not free from doubt inasmuch as the same was not made before an independent person like the doctor or the Investigating Officer. In the case at hand, neither the I.O. nor the doctor has been examined by the prosecution. It was incumbent on the prosecution to prove by reliable evidence that the maker (the deceased) was in a fit medical condition to make such declaration. There was ample opportunity to the prosecution, if the evidence of the prosecution is to be believed, to record such oral dying declaration of the victim either before the I.O. or the doctor who attended on him at the PHC, Ramnagar before being referred to Bettia for better treatment. That all the witnesses are chance witnesses. They all belonged to the native village of the informant. On the relevant winter evening they chanced to be at the local Bazaar where the incident had taken place. That the other incriminating circumstances on which reliance has been placed by the learned Trial Court is that few prosecution witnesses have claimed to have seen the appellant escaping from the place of occurrence soon after the incident. Such circumstance, if incriminating, should have been put to the accused while recording his statement under Section 313 Cr. P.C. which has not been done. The prosecution cannot rely on that part of the prosecution evidence. That the informant and other witnesses in course of trial have modulated their evidence when they say that along with the appellant co-accused Pappu Mishra



was also one of the persons present at the place of occurrence when the fire was shot at the deceased. In a case like this, where the prosecution relies on oral dying declaration of the victim, the non-examination of the I.O. and the doctor would be fatal. The evidence of PWs 11 and 12 should be discarded as they were examined by the I.O. in course of investigation almost two years after the occurrence.

6. Learned counsel for the State, however, supported the impugned judgment and submits that apart from the oral dying declaration made by the victim, the evidence of PWs 9 to 14 conclusively prove the guilt of the appellant. Controverting the submission that some part of the evidence was not put to the appellant while recording his statement under Section 313 of the Cr. P.C. it is submitted that the same carries no significance as the Court put to the accused all relevant evidence appearing on record against him.

7. The prosecution, in order to prove the guilt of the appellant, examined altogether 18 prosecution witnesses. Out of whom PWs 2, 3, 4 and 5 have been tendered. The prosecution did not rely on the evidence of PWs 1, 6, 7 and 8 who all have been declared hostile.



8. PWs 9 to 14 are the material witnesses who have spoken about the occurrence and the attending circumstances. PW 15 is a formal witness who has proved the post mortem report of the deceased (Ext.4) issued by the doctor T.N.Shukla. PW-16 Ganesh Prasad as well as PW-17 Pravesh Kumar Jaiswal are the witnesses of seizure list (signatures Ext. 5 and 5/a). PW-18 is again a formal witness who has proved Ext. 6 and Ext. 7 which are the '*fardbeyan*' of the informant and formal FIR respectively. The defence adduced documentary evidence (Ext.A) which is a true copy of the 'Sanha' No. 198 dated 10.01.2005 registered at Ramnagar P.S.

9. The victim died in the incident that occurred on the relevant date and around the time of occurrence as alleged by the prosecution on receiving a fire arm injury on his back is not much in dispute. The oral evidence of PWs 9 to 14 who claimed to have reached immediately after the incident at the place of occurrence had seen the victim lying near the tip of the bridge after having received gun shot injury. The post mortem report (Ext.4) indicates that the autopsy surgeon found a lacerated inverted margin with burnt 1/2" semi circular (oval) ante mortem injury on the back of the right side of mid chest and a communicating lacerated everted



margined wound with bleedings of size 1" x 1 1/3 x cavity deep on the chest. The time elapsed since death as opined by the doctor is within 6 to 24 hours. On the basis of the clinical examination, the doctor further found that the victim was fired from approximately a distance of 20 ft. From the trend of cross-examination made by the defence of the witnesses, it is obvious that the defence has proceeded on the premise that the deceased was done to death by fire arm on the relevant date and time as suggested by the prosecution. Thus, the homicidal death of the deceased stands fully established.

10. The informant (PW14) as well as PW-10 Pradip Sah, PW-11 Jagdish Yadav, PW-12 Nathu Yadav and PW13 in their respective examinations in chief have stated that as they reached the place of occurrence after hearing the sound of gun shot, they found the victim lying on the ground having received injury and had disclosed the name of the appellant as his assailant. However, on close appraisal of their evidence, it is found that PWs 10, 11, 12 and 13 have spoken the name of appellant and one Pappu Mishra given out by the injured to them. Turning to the '*fardbeyan*' of PW-14 it is found that when he reached the place of occurrence the victim disclosed to him that the appellant had fired at him and all other accused(s) thereafter escaped towards south. However, in



Court, while narrating the aforesaid declaration made by the victim to him about the assailant, he has stated that the victim also disclosed that Pappu Mishra was also with him. Indisputably, the informant is not an eye-witness to the assault and fleeing away of the accused(s) from the place of occurrence. He reached the place of occurrence on hearing news of assault on him through a boy at 6.30 in the evening whereafter he covered a distance of 500 yards to reach the Ram Rekha bridge on the northern tip thereof. He carried his son to the Primary Health Centre Ramnagar where some first aid was given to the victim and considering the seriousness of the injury he was referred to Bettiah. The police had arrived at the hospital. However, considering the status of the victim, the doctor referred him to Bettiah and while on way his son died whereafter he returned home. On arrival of the police, his statement was recorded in presence of his nephew Deepak Jaiswal (not examined). In para 4 he has stated that his son was conscious when he reached the place of occurrence and was responding to the questions. He has said about presence of PWs 10 and 11 at the place of occurrence who had reached there prior to him. The defence has drawn our attention to para 6 of his deposition where he has stated that they stayed at the hospital for nearly 45 minutes when the police had also arrived there and made enquires with him. On the strength of the above, it has been vehemently argued



that there was an opportunity available to the prosecution to get oral dying declaration of the victim recorded by the police or the doctor attending on him which was not done. A serious doubt is created on the alleged oral dying declaration of the victim.

11. PW-10 has stated that he was at the Bazaar and when he reached the place of occurrence on hearing the sound of gun shot, the victim disclosed the names of Mantu Tiwari (appellant) and Pappu Mishra whom he identified. He remained at the place of occurrence for 05 minutes and left thereafter. He has justified his statement earlier made before the Magistrate under Section 164 of the Cr. P.C. His evidence gives topography of the place of occurrence. On both sides of the place of occurrence there is vegetable shop. On one side of the bridge towards north at a distance of 100 yards is Bhagat Singh Chowk and on the southern side is Sunder Singh Chowk. The dead body was lying east to the statue. His statement was promptly recorded by the police what he said in his cross-examination would not be much relevant as this witness has admitted that he stayed at the place of occurrence only for 05 minutes and thereafter left from there.

12. PW-11 was also at the Bazaar on the relevant date and on hearing the firing of gun shot, he reached the place of



occurrence and saw the victim lying on the ground with a bleeding injury on his back. Two persons thereafter carried the victim to hospital whereafter he left the place of occurrence. From para 5 of his deposition it is apparent that the place of occurrence was in the midst of the vegetable market where lots of persons used to congregate. He too was in the market busy in purchasing vegetables. What we find from paragraph -6 of his evidence that the victim was not unconscious when he reached the place of occurrence. PW-10 had already arrived at the place of occurrence. While stating about the presence of the informant at the place of occurrence he has stated that the informant too was present near the dead body (paragraph-9).

13. Similar is the evidence of PW-12. He was present at the Bazaar buying fish when on hearing the sound of gun firing he hastily reached the place of occurrence and saw the victim lying in an injured condition. He has, however, further spoken about having seen the appellant escaping from the place of occurrence. His evidence further testifies presence of the informant at the place of occurrence. It has been argued on behalf of the defence referring to his cross-examination that if he had reached the place of occurrence within 2-3 minutes on hearing the firing of gun shot how can this witness say about the presence of the informant at the



place of occurrence from before when the informant himself has stated that he was at his house when at about 6.30 PM on hearing about assault on his son he hurried to the place of occurrence located around 500 yards away from his house. The defence has also questioned the veracity of this witness as he appeared about 2 years after the occurrence before the IO for recording his CD statement as well as the statement under Section 164 of the Cr. P.C.

14. PW-14 is the informant himself. According to him, on hearing the news of firing at his son at about 6.30 PM while he was at his house, he rushed to the place of occurrence to find his son lying in an injured condition when he disclosed the name of the appellant as the one who had assaulted him from the back. He had also disclosed that along with the appellant he had also seen one Pappu Mishra.

15. Having surveyed the relevant evidence we would proceed to examine whether the prosecution has been able to prove the complicity of the appellant in the said crime beyond doubt.

16. The learned trial court has relied much on the evidence of P.Ws. 10, 11, 12, 13 and 14, who reached near the injured to



whom the victim disclosed that the above named appellant had caused firearm injury. The trial court believing the evidence of aforesaid witnesses (P.Ws. 11, 12, 13 and 14) has observed that the oral dying declaration of the victim has been proved by the prosecution. Some of the witnesses have further stated that they saw the appellant and other co-accused fleeing away from the place of occurrence.

17. On careful scrutiny, we find that all the relevant witnesses i.e. P.Ws. 9, 10, 11, 12 and 13 are villagers of the informant having their residence at village Taulaha which situates at a distance of about six kilometers from the place of occurrence. The informant has his another house at a distance of about 500 yards from the place of occurrence. All the witnesses indisputably are the chance witnesses and they all were purchasing vegetables / fish from the vegetable market situating at a distance of about 200 yards towards north-west to the place of occurrence and on the sound of firing, they reached there. The evidence of aforesaid witnesses appears to be contradictory on the point of manner of occurrence. Their presence also appears doubtful for the reasons as stated hereinafter. P.Ws. 9, 10 and 13 have stated that the victim was lying facing the ground. They saw a firearm injury on the back of the deceased. As against this, P.W. 11 has stated that the victim



was lying on the ground having his dorsum touching the ground and his face was upside. P.W. 9 claims to have immediately reached at the place of occurrence and stayed for half an hour. He has stated that the victim had lost conscious and remained so for half an hour and thereafter, he left the place. He has further stated at paragraph no. 9, that the informant was seen near the dead body of the victim. This shows that the victim was not alive or conscious on the spot immediately after sustaining gun shot injury. Another witness P.W. 13 has also stated that he saw the dead body lying at the place of occurrence and it was moved to hospital by the informant. In the evidence of P.W. 9 at paragraph 2 and P.W. 11 at paragraph no. 9, it has come that at the time of occurrence it was a dark on account of foggy and cold day.

18. We further find that there are contradictions also on the point of manner of occurrence. P.W.11 at paragraph no. 6 has stated that Pradeep Sah (P.W. 10) and Jagdish Sah (P.W.13) were present at the place of occurrence before his arrival and on query, they disclosed him about the occurrence. Thus, we find that this witness (P.W.11) is a hearsay witness. From his evidence it further appears that he remained at the place of occurrence for half an hour and during his stay, the victim remained unconscious. He further says that he saw the appellant and co-accused fleeing towards



eastern side from the place of occurrence. P.W. 12 at paragraph nos. 2 and 6 has also stated that he saw the appellant and co-accused fleeing towards eastern direction from the place of occurrence. The version of these two witnesses are contradictory to the evidence of P.W. 13, who has stated that the appellant and co-accused was seen fleeing towards the southern direction. In Fardbeyan, the informant has stated that his son disclosed him that the appellant along with three or four others were seen on the northern end of Ram Rekha bridge and as soon as, he proceeded ahead towards north and reached near the place of occurrence, the appellant and co-accused shot fire from behind and fled towards southern direction. The topography, which has emerged from the evidence of witnesses, is that a bridge on Ram Rekha river goes from south to north. The victim came from southern side and reached at the end of the north end of the bridge. If the appellant and co-accused after causing firearm injury ran towards south from which direction, the victim had come, it was impossible for any of the witnesses coming from vegetable market (northern side) to see the appellant and co-accused fleeing in southern (opposite) direction. All the witnesses claim to be present in the vegetable market situating near Bhagat Singh Chowk quite at a distance of 200 yards north to the place of occurrence. The witnesses have stated that the place of occurrence is a crowdy place. So, in view of



the aforesaid evidence, it appears doubtful that the witnesses could have reached to see the appellant at the place of occurrence or escaping therefrom. We further find different version of the informant at paragraph no. 6 of cross-examination wherein he says that when he reached at the hospital, his son was slightly conscious. He remained there for 45 minutes where the police had visited but the police did not interrogate the informant. In view of aforesaid evidence, there appears no reason as to why the Fardbeyan of the informant was not recorded at the hospital where the police reached at the time of treatment. The informant and some of the witnesses have stated that the victim was treated at Primary Health Centre and thereafter, he was referred to Bettiah for better treatment. The Doctor, who conducted autopsy (Ext. 2) has not mentioned any sign of treatment or bandage over the person of the deceased in the post mortem report. The evidence on record as stated above do not inspire our confidence to believe the presence of chance witnesses at the place of occurrence. All the witnesses are villagers of the informant. In their evidence, it has come that on both sides of Ram Rekha bridge, there are markets and at that time a large number of people had assembled. They all surrounded the victim immediately after the occurrence, but not a single witness from the said market / locality has come to support the prosecution case regarding assault by the appellant. All the



witnesses, who came to support the prosecution case are co-villagers of the informant residing at a distance of more than six kilo meters from the place of occurrence. In their evidence, it has come that they all were purchasing vegetable. In cross-examination, they have stated that there is a market also near their village at a distance of one kilometer. We further find much contradictions in the statement of witnesses on the point of their arrival at the place of occurrence and also on disclosure of name of appellant by the victim. It further appears that the statement of P.Ws. 11 and 12 were recorded by the Investigating Officer after more than two years of the occurrence. The prosecution has not offered any explanation of delay of two years in recording statement by Investigating Officer. In these circumstances, the evidence of Investigating Officer was very essential and the defence has been seriously prejudiced on account of non-examination of the Investigating Officer.

19. The informant admittedly was at his house at a distance of about 500 yards from the place of occurrence and he reached at the place of occurrence on foot which might have taken some considerable time. The witnesses, who immediately reached at the place of occurrence hearing the sound of firing, do not speak about the presence of the informant. Their statement is contradictory on



the point of declaration made by the victim about the assault on him. The informant at paragraph no. 3 has stated that he alongwith his son visited at the place of occurrence. In Fardbeyan he has stated that a boy came at his house and disclosed that someone has shot his son and thereafter, he alongwith his family members reached at the place of occurrence where his injured son narrated about the manner of causing firearm injury by the appellant. The Fardbeyan has been attested by his nephew Deepak Jaiswal. But neither any family members nor the attesting witness of Fardbyan (Deepak Jaiswal) has taken the dock to support the prosecution case of dying declaration of victim.

20. At this juncture another question arises for consideration is as to whether the victim was in a position to narrate the facts which were stated by the informant and some other witnesses. The victim was in semi conscious stage at the Primary Health Centre from where he was referred to Bettiah hospital as stated by the informant (P.W. 14 at paragraph no. 6). The Doctor, who treated and referred the victim to Bettiah was not examined. The evidence of the doctor who first attended on the victim at the P.H.C. could have surely established whether the injured / victim was capable to make such declaration. The prosecution however has not produced him for evidence. The



injury report if prepared by the Doctor has also not been produced on record. The Doctor, who conducted autopsy on the deceased, has also not been examined and the post-mortem report has been proved by an advocate clerk. We have already discussed the nature of injuries sustained by the deceased. The Doctor reported that the firearm injury was through and through on the chest and profused bleeding was found on the place of occurrence. We further find from the evidence on record that the assailant came from behind and shot the victim on his back, resultantly, the victim fell facing the ground. The post mortem report (Ext. 2) shows that the bullet entered from the back and it pierced the lungs and all the chambers of heart were found empty. The injuries were caused on vital part of the body which, in all circumstances, resulted his death as propounded. The prosecution case becomes doubtful as to whether the victim was even conscious for such a long time and had opportunity to disclose the name of assailants. Furthermore, the prosecution had apparently to get the oral dying declaration made in presence of the Investigating Officer or the Doctor who were present at the P.H.C.

21. From the evidence on record, as discussed above, it appears to us that after suffering such type of injuries, the deceased must have become unconscious immediately if he had



not died immediately. Some of the witnesses (P.W.10 at paragraph-3, P.W.11 at paragraph-9, P.W.12 at paragraph-6, P.W.13 at paragraph-4 and P.W.14 at paragraph-5) have said that they saw the dead body of the victim at the place of occurrence and some of them said that the victim was unconscious. The court below has erred on relying upon such weak type of dying declaration as it was oral and there is no medical evidence suggesting that the deceased was in a fit medical condition to make such declaration. The Hon'ble Apex Court in a case of ***Waikhom Yaima Singh Vs. State of Manipur*** (Cr. Appeal No. 802 of 2006) at paragraph-15 has observed that *“There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it.”*

22. The reasons for accepting oral dying declaration by the trial court in view of settled principle, in our view are not cogent, satisfactory and convincing to hold that the deceased was



in a fit condition to make oral declaration to his father (P.W. 14) or any of the witnesses. It will not be safe to convict the appellant on such dying declaration which is full of doubts. Thus, for the reasons assigned and discussions made hereinabove, in our view, the prosecution has failed to prove its case beyond reasonable doubt.

23. In the result, the conviction and sentence passed by the court below against the appellant are set aside and the appeal is allowed. The appellant shall be set at liberty if not required in any other case.

(Sanjay Kumar, J.)

I agree

(Kishore Kumar Mandal, J.)

ajaypd./-

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