

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.396 of 1994

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

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Jai Chand Sah @ Mastan, S/O Brahmdeo Sah, resident of Sultanganj, P.S.
Sultanganj, District- Bhagalpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Ms. Shaheen Begum, Amicus Curiae.

For the Respondent/s : Mr. Dilip Kumar Sinha, A.P.P.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 27-02-2018

1. This Criminal Appeal has been preferred by sole appellant against the Judgment of conviction dated 01.07.1994 and sentence order dated 07.07.1994 passed by the learned 6th Additional Sessions Judge, Bhagalpur, in Sessions Trial No. 130 of 1993, whereby and whereunder, he convicted the sole appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life.

2. P.W.9, Ghanshayam Keshri @ Ghanshyam Mandal, gave his Fradbeyan to A.S.I. of Sultanganj Police Station to this effect that, on the same day, he got information that his nephew,



namely, Gyan Prakash Keshri @ Babu got firearm injury and he had been taken to Bhagalpur Hospital for treatment. Having got the aforesaid information, he rushed to Bhagalpur Hospital, where he met his nephew, Gyan Prakash Keshri @ Babu, who disclosed that on 11.03.1992, at about 7 P.M., appellant, Jai Chand Sah, shot six round fire on him, but only one fire hit on his abdomen and having got the aforesaid injury he fell down. Thereafter, local people brought him to hospital.

3. On the basis of the above stated Fradbeyan of P.W.9, Ghanshyam Keshri @ Ghanshyam Mandal, on 13.02.1992 at about 7.30 P.M. formal F.I.R. for the offence under Section 302 of the Indian Penal Code and Section 27 of the Arms Act was drawn up against the sole appellant. First Information Report and other relevant documents were put up before the Chief Judicial Magistrate, Bhagalpur on 17.02.1992. However, the matter was investigated and after investigation police submitted charge sheet against the appellant and two others. The cognizance of the offence was taken and the case was committed to the court of Sessions, in usual way. The appellant and two other charge sheeted accused were put on trial and, accordingly, the appellant stood charged for the offence punishable under Section 302 of the Indian Penal Code whereas remaining two accused stood charged



for the offence punishable under Section 302/34 of the Indian Penal Code. No charge for the offence under Section 27 of the Arms Act was framed.

4. In course of trial, prosecution got examined, altogether, fifteen witnesses and also got exhibited some documents in documentary evidence. The statement of appellant and other accused were recorded under Section 313 of the Cr.P.C., in which, they claimed their false implication. No evidence was adduced by the appellant as well as other accused in support of their defence.

Learned trial court after scrutinizing the entire evidence, convicted and sentenced the sole appellant whereas remaining two accused were acquitted of the charges.

5. Learned amicus curiae appearing for the appellant assailed the impugned Judgment of conviction and sentence order, arguing that the conviction of the appellant is based solely on the so-called oral dying declaration of the deceased, but as a matter of fact, the above stated so-called oral dying declaration of the deceased is highly doubtful and it appears that the police in collusion with the informant and others got developed the story of oral dying declaration and implicated the appellant with ulterior motive. Learned amicus curiae further submits that Fradbeyan of



P.W.9 was recorded on 11.02.1992 and formal First Information Report was drawn up on 13.02.1992, but the Fradbeyan and formal First Information Report reached to the court on 17.02.1992 and no explanation regarding the aforesaid inordinate delay has been given by the prosecution. Learned amicus curiae further submits that the witnesses made contradictory statements in respect of so-called dying declaration of the deceased and, therefore, it was unsafe to pass the Judgment of conviction and sentence order solely on the ground of un-substantiated oral dying declaration, but the learned trial court failed to take note of above stated facts.

6. On the other hand, learned Additional Public Prosecutor supported the impugned Judgment of conviction and sentence order, arguing that the learned trial court has discussed each and every points in the impugned Judgment and clarified as to under which circumstances, the First Information Report could not reach before the learned Chief Judicial Magistrate, Bhagalpur in time. He further submitted almost all the material witnesses stated that the deceased was in conscious state and he was in position to speak before his death, therefore, it would not be proper to disbelieve the oral dying declaration of the deceased. He further submits that the oral dying declaration of the deceased can be made the basis of conviction and the aforesaid dictum of law



has already been settled by the Apex Court in several decisions.

7. Having heard the contentions of both the parties, we went through the record. From perusal of the record, we find that P.W.1, P.W.2, P.W.3, P.W.4, P.W.11 and P.W.12 have been declared hostile whereas P.W.5 Manoj Kumar @ Bullu, P.W.6 Om Prakash Keshri, P.W.7 Budheo Mandal, P.W.8 Bhola Prasad Keshri and P.W.9 Ghanshyam Keshri @ Ghanshyam Mandal (informant) claimed that the deceased had disclosed the name of appellant as his assailant before his death. P.W. 13 is the mother of the deceased and admittedly, she is not an eye witness of the alleged occurrence.

8. P.W.10 is Dr. N.N. Bhagat, who conducted the postmortem examination on the corpus of the deceased. This witness found two wound of entry and two wound of exit. This witness stated that the firing on the deceased must had been made from his back side. Furthermore, this witness stated that a person even after receiving the injuries found on the person of the deceased can remain in sense for some long hours.

9. P.W.14 is another Doctor, who examined the deceased when the deceased was admitted in Jawahar Lal Nehru Medical College Hospital. This witness stated that he had given information to the police for recording the dying declaration of the



deceased as the deceased was in a position to speak.

10. P.W.15, Raghunath Rai, is the Investigating Officer and he proved the place of occurrence and other relevant documents.

11. It would appear from perusal of the evidence available on the record that except so-called oral dying declaration of the deceased there was nothing before the trial court. The trial court relied upon the oral dying declaration of the deceased, but in our view, the above stated so-called oral dying declaration is not sufficient to convict the appellant. It is admitted case of the prosecution that the deceased died at about 10 P.M., on 11.02.1992 and Fradbeyan of P.W.9 was recorded at 8.45 P.M. on the same day. Furthermore, we find that some witnesses admitted that police having got information of the occurrence had reached at the hospital and had made inquiry from the deceased, as the deceased was in a position to speak, but it is surprising enough that neither dying declaration nor the statement of the deceased was recorded by the police. Furthermore, we find that P.W.9 claimed that deceased had disclosed before him that six rounds of fire was made, but only one fire hit to him whereas P.W.3 claimed that deceased disclosed before him that two fire hit to him. Furthermore, we find that the deceased after the occurrence was



immediately taken to the clinic of a private Doctor, but there is nothing on the record to show that the deceased had disclosed the name of assailant at the clinic of the aforesaid private doctor because the prosecution claimed that for the first time deceased disclosed the name of his assailant, while he was being taken to the Bhagalpur Hospital. However, it is also admitted position that deceased received firearm injury while he was going with a procession and there was huge crowd in the aforesaid procession. The postmortem report of the deceased reveals that he sustained injury from his back side. There is nothing on the record to show that there was light on the place of occurrence. Although, the learned trial court tried to explain the aforesaid lacunae observing that there was sufficient light in the above stated procession, but there is nothing on the record to support the above stated observation of the learned trial court and it appears that the aforesaid observation of learned trial court is nothing but only a hypothesis. However, we do agree with the submission of the learned amicus curiae that only on the basis of suspicious oral dying declaration, a judgment of conviction cannot be passed. Therefore, in our view, the appellant deserves to get the benefit of doubt.

12. On the basis of aforesaid discussions, this



criminal appeal is allowed and the impugned Judgment of conviction and sentence order are hereby set aside. Accordingly, the appellant is acquitted of the charge. He is on bail, hence, he is discharged from the liability of his bail bonds.

13. Let the copy of first page and last page of the judgment be handed over to the learned amicus curiae for needful.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

Bhardwaj/-

AFR/NAFR	
CAV DATE	
Uploading Date	06.03.2018
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