

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.230 of 1995

Against the judgment of conviction dated 29th June, 1995 and order of sentence dated 30.06.1995 passed by 12th Additional Sessions Judge, Patna in Sessions Trial No.270 of 1987

Chandra Shekhar Azad @ Kiriya, son of late Shyam Sundar Sah, resident of Salimpur Ahra, P.S. Gandhi Maidan, District-Patna. Appellant/s

Versus

The State of Bihar Respondent/s

with

Criminal Appeal (DB) No. 224 of 1995

Umesh Kumar @ Sethiya, son of Tulshi Ram, resident of Mohalla-Salimpur Ahra, Police Station-Gandhi Maidan, District-Patna, at present residing at Adalatganj, Chaprasi Quarter, Police Station-Kotwali, District-Patna.

... .. Appellant/s

Versus

The State Of Bihar Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 230 of 1995)

For the Appellant/s : Ms. Sandhya Kumari, *Amicus Curiae*

For the Respondent/s : Mr. Abhimanyu Sharma, APP

(In Criminal Appeal (DB) No. 224 of 1995)

For the Appellant/s : Ms. Sandhya Kumari, *Amicus Curiae*

For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 19-04-2018

Appellants herein challenge their conviction recorded by the 12th Additional Sessions Judge, Patna, in Sessions Trial No.270 of 1987 convicting them for offences under Section 302 of the Indian Penal Code read with Section 27 of the Arms Act.

Appellant Chandra Shekhar Azad alias Kiriya in Criminal Appeal (DB) No.230 of 1995 has been convicted to



undergo life imprisonment for offence under Section 302 of the Indian Penal Code and three three years R.I. for an offence under Section 27 of the Arms Act. Similarly, appellant Umesh Kumar alias Sethiya in Criminal Appeal (DB)No.224 of 1995 has been convicted under Section 302/34 of the Indian Penal Code to undergo R.I. for life.

It is the case of the prosecution that the victim, now deceased Raj Kumar Raut, was admitted in the Patna Medical College and Hospital for treatment in the emergency ward and he recorded the *ferdbeyan* in question on 28th October, 1986 at 7.30 a.m. to the Sub-Inspector of Police Sri Ram Singh, P.W.2, Incharge Station House Officer Kadamkuan Police Station. It was stated in the *ferdbeyan* that the deceased used to sell ticket of cinema on black and he used to do so along with the appellant Chandra Shekhar Azad @ Kiriya. It is said that appellant Chandra Shekhar Azad @ Kiriya used to demand Rs.1/- per ticket sold as a Rangdari and when the deceased-informant refused to pay the amount, it is alleged that on 27.10.1986 at about 8.30 P.M. when the informant along with his friend one Sanjay Kumar had gone to realize the money from a Phulwala of B. N. Rai Road near Machhali Bazar, Kadamkuan, in the dark, the appellant Chandra Shekhar Azad @ Kiriya along with co- accused Sethiya came there and appellant



Chandra Shekhar Azad @ Kiriya took out a country made pistol from his pocket, fired on the stomach on the informant as a result of which the informant fell down. Thereafter, both the accused fled away. It is said that the informant went to his house and thereafter his mother Ratani Devi took him in a rickshaw to the Patna Medical College and Hospital where he was under treatment. It is further stated that the *ferdbeyan* was recorded in the presence of the maternal uncle of the deceased Shivaji Raut, who was standing nearby and whose signature was taken in the *ferdbeyan* as an attesting witness.

Based on the same, the case was registered, investigation took place. In the meanwhile, the informant died in the hospital on 10.11.1986. He was subjected to postmortem by P.W. 1 Dr. R. P. Shrivastava, who submitted postmortem report Ext.-P/1. The charge-sheet was filed, the case was committed to the Court of Sessions and after trial, the appellants having been convicted, this appeal.

Learned *amicus curiae* appearing for the appellants argued that in this case, only two witnesses have been examined. They are Dr. R. P. Shrivastava, P.W.1, who conducted the postmortem and Sri Ram Singh, Sub-Inspector of Police, as P.W.2. She submits that eye witness Sanjay Kumar, who was present



along with the deceased when the incident took place, has not been examined. The maternal uncle of the deceased, who was present when the *ferdbeyan*, which ultimately is now a dying declaration, was recorded, has not been examined, no doctor or staff of the hospital were examined or called at the time of recording of the *ferdbeyan*/dying declaration and even the mother of the informant who took him to the hospital has not been examined. *Inter alia* contending that the entire conviction is based on the sole testimony of P.W.2 and is based on the *ferdbeyan* Ext.-P/2, which is now treated to be a dying declaration, learned *amicus curiae* argues that the conviction is unsustainable, the so called dying declaration has not been recorded in accordance to the requirement of law and placing reliance on the following judgments, she argues that the conviction based on the aforesaid document is unsustainable. The judgments relied upon are **Ramakant Mishra alias Lalu and others Versus State of Uttar Pradesh**, (2015) 8 SCC 299; **State of Maharashtra v. Nisar Ramzan Sayyed**, AIR 2017 SC 2363; and **Puran Chand Versus State of Haryana**, (2010) 6 SCC 566.

Learned counsel representing the prosecution refuted the aforesaid contention, took us through the statement of P.W.2 Sri Ram Singh and argued that there is no reason to disbelieve the statement of the Investigating Officer and as the *ferdbeyan* Ext.



P/2 was recorded at a time when the deceased was in a fit state of mind to give the statement, the judgments relied upon by the learned counsel for the appellants will not apply in the facts and circumstances of the case. Learned counsel for the prosecution tried to justify the conviction based on the *ferdbeyan* Ext. P/2.

Having heard learned counsel for the parties and on going through the so called statement/dying declaration of the deceased available on record as Ext. P/2, we find that according to the deceased own version when the incident took place, his friend Sanjay Kumar was present with him and both of them had gone to the Phulwala shop situated in B. N. Rai Road near Machhali Bazar, Kadamkuan when the incident took place. Even though the Investigating Officer, P.W.2 Sri Ram Singh in his statement speaks about recording the statements of four witnesses, surprisingly neither the statements of witnesses are available on record nor the eye witness to the incident, namely Sanjay Kumar and the Phulwala examined, no justification or reason is given as to why they have not been examined. That apart, according to the statement of the deceased after he sustained the injuries he went to his house, narrated the incident to his mother and thereafter it is his mother who took him to the Patna Medical College and Hospital in a rickshaw. Neither the Rickshawala, nor the mother of



the deceased Smt. Ratani Devi have been examined. Non examination of these vital witnesses, who could have thrown much light on the case of the prosecution, creates serious dent in the case of the prosecution. That apart, if the statement of the deceased Ext.-P/2 was recorded by P.W.2 in the hospital that also in the emergency ward as indicated by him, it is not known as to why the doctor treating the deceased was not called for and a statement obtained as to whether the deceased was in a fit state of mind to give the statement. P.W.2 Sri Ram Singh admits in his statement that when he examined the deceased, the Nurses and other staff of the Hospital were present, but it is not known as to why their signatures were not taken in the statement as witness to the same and examined in the Court. Now after death of the deceased, Ext.P/2 assumes the significance of a dying declaration and if it was a dying declaration then requirement of law as laid down in various judgments should have been followed before accepting the aforesaid dying declaration for placing conviction.

In the case of **Ramakant Mishra alias Lalu** (supra), the principle of law with regard to admissibility of a dying declaration as a piece of evidence has been elaborately considered by the Supreme Court after taking note of the requirement of



Section 32(1) of the Evidence Act, 1872 and in paras 7, 8 and 9, the principle has been crystallized in the following manner:-

“7. The defence has rested very heavily nay, almost entirely, on the alleged Dying Declaration attributed to the deceased. The admissibility of a Dying Declaration as a piece of evidence in a Trial is governed by Section 32(1) of the Evidence Act, 1872. Section 32, as a whole, enunciates the exceptions to the rule of non-admissibility of hearsay evidences, eventuated out of necessity to give relevance to the statements made by a person whose attendance cannot be procured for reasons stipulated in the section. Postulating the essential ingredients to define what exactly would constitute a hearsay is an arduous task, and since we are only concerned with one of its exceptions, we should forbear entering into the entire arena. The risks while admitting a Dying Declaration and the statements falling within the domain of Section 32(1) run higher in contrast to other sundry evidences, and this entails a huge bearing on their admissibility and credibility. Such statements are neither made on oath nor the maker of the statement would be available for cross-examination nor are they made under the influence of the supremacy and the solemnity of the courtroom. This is the reason why this Court has consistently underlined the necessity to examine this specie of evidence with great circumspection



and care. However, once a Dying Declaration is held to be authentic, inspiring full confidence beyond the pale of doubt, voluntary, consistent and credible, barren of tutoring, significant sanctity is endowed to it; such is the sanctitude that it can even be the exclusive and the solitary basis for conviction without seeking any corroboration. At this juncture, it is worthwhile noting that the sanctity attached to a Dying Declaration springs up from the rationale that a person genuinely under the sense of imminent death would speak only the truth.

8. In addition to the Dying Declaration, which is only one of the species of the genus of Section 32(1), there could be other statements, written or verbal, which also would be encompassed within the sweep of this section, and at this point the Indian law drifts from the English law. This is further evident from the usage of phraseology in the section, embracing not only statements made about "cause of death" but also about "any of the circumstances of the transaction which resulted in the death", whether or not the person making the statement was under "expectation of death". These statements could be in the form of a suicide note, a letter, a sign or a signal, or a product of any reliable means of communication; their genuineness and credibility shall, of course, be reckoned by the Court entertaining the matter concerned. A Dying



Declaration enjoys a higher level of credence vis--vis any other statement abovementioned, which is on account of the former being made in the "contemplation of death". "Contemplation of death" is the primal factor to segregate Dying Declarations from other statements. But no hard-and-fast rule can be laid down to confine the contemplation within the circumference of few hours or a few days in which death of the maker of the statement must happen so as to elevate that statement to the level of a Dying Declaration. Moreover, the state of mind of the maker would also be material in discerning completely as to whether the maker was mentally fit to make the statement and whether the maker actually could have contemplated death.

9. The definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:-

“Dying Declarations. - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where



the killing of the declarant is the crime charged to the defendant. *Shepard v. United States*, 78 L. Ed. 196: 54 S. Ct. 22 : 290 U.S. 96 (1933). Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. [the Federal Rule of Evidence, Rule 804(b)(2): “Statement under the Belief of imminent Death”].”

Similar is the principle laid down by the Hon’ble Supreme Court in the case of **Nisar Ramzan Sayeed** (supra). In this case also, the importance of a dying declaration, the manner of which recording and consideration to be made have been taken note of and it is in conformity with the principle laid down in the case of **Ramakant Mishra alias Lalu** (supra).

If we analyze the dying declaration in the backdrop of the aforesaid principle, we are of the considered view that the dying declaration, apart from the fact that it does not meet the requirement of law, does not inspire confidence on us and solely based on such a dying declaration, we feel that it is very dangerous to record a conviction, particularly when the prosecution has



miserably failed to explain before us as to why important eye witnesses to the incident, namely Phulwala and Sanjay Kumar, have not been examined, why the mother of the deceased has not been examined and why his maternal uncle Sri Shivaji Raut was not produced before the Court for examination when he was a witness to the recording of the *ferdbeyan* which is now a dying declaration.

Taking note of all these lacuanes in the case of the prosecution, we have no hesitation in holding that the prosecution has miserably failed to bring home the guilt of the accused persons beyond reasonable doubt and, therefore, it is a fit case where the appeals should be allowed, the conviction set aside and the appellants set at liberty.

Accordingly, both these appeals are allowed, conviction set aside. The appellants are on bail. Now, they are discharged from the liabilities of their bail bonds.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Sunil/-

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