

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1 of 2005

Arising out of P.S. Case No.259 Year-2001 Thana-Buxar (T) District- BUXAR

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1. Taj Mohammad, Son of Saheb Jaan Khan
2. Mohammad Shamim, Son of Taj Mohammad
Both Residents of Village Mosafirganj, P.S. Buxar (Town), District Buxar.
..... Appellants

Versus

The State of Bihar

..... Respondent

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Appearance :

For the Appellants : Mr. Ravi Ranjan, Amicus Curiae

For the State : Mr. Abhay Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

Date: 18-01-2018

Heard the learned Amicus Curiae for the appellants and
the learned APP for the State.

2. The appellants have preferred this appeal against the
judgment of conviction and order of sentence dated 29.09.2004,
passed by learned Additional Sessions Judge, Fast Track Court-I,
Buxar in Sessions Trial No.229 of 2002, arising out of Buxar (T) P.S.
Case No.259 of 2001 whereby Mohammad Shamim has been
convicted under Section 304 part I of the Indian Penal Code; whereas
another accused/appellant Taj Mohammad has been convicted under
Section 304 part I read with Section 34 of the Indian Penal Code,
however, both appellants are sentenced to undergo RI for ten years.
Being aggrieved with the said judgment of conviction and order of
sentence both appellants have preferred this appeal.

3. The prosecution case in brief is that on 31.10.2001 at



around 7 P.M. Munna Sai, the informant (deceased) returned back to his home after plying rickshaw. He was informed that Taj Mohammad in the morning was showing some currency to daughter-in-law of Md. Lal Babu (PW2) one of his relatives. Knowing this misdeed, Munna Sai went to Shamim, son of Taj Mohammad, complaining him that his father's action is highly improper. Being enraged, Mohammad Shamim took out knife and on the door step of the informant's house attacked with knife causing injury on his left thigh and testicals causing serious injury leading to profuse bleeding. Taj Mohammad also turned up and started abusing in filthy language, Shamim threatened Md. Lal Babu (PW2) to eliminate him in the similar manner. This occurrence was watched by Jamalu Miya (PW1), his wife Majo Khatun (PW3) and wife of the informant Sakila Khatun (PW4) and many other persons living in the neighborhood. Md. Lal Babu (PW2) took him to hospital on the rickshaw but on the way the Police Officer (PW6) reached after receiving the information of the occurrence and recorded the statement of Munna Sai, the informant. Later on the case was entrusted to him for investigation by the S.H.O., Buxar Town Police Station. On conclusion of the investigation police submitted charge-sheet under Sections 302/34 of the Indian Penal Code, accordingly, charge was framed by the sessions court and on completion of trial Mohammad Shamim was convicted under Section



304 part I; whereas his father Taj Mohammad was convicted under Sections 304 part I read Section with 34 of the Indian Penal Code.

4. Mr. Ravi Ranjan, learned Amicus Curiae appearing on behalf of the appellants in this case submits that in this case none of the eye-witnesses has supported the allegation. All such witnesses turned hostile. Only two witness, Ram Saran Das (PW6) and another Md. Suleman, the doctor (PW5) have not turned hostile but they are not the witnesses of the occurrence. Rest all other witnesses have turned hostile. The trial court has convicted both the accused only on the statement of the informant treating the same as dying declaration under Section 32(1) of the Indian Evidence Act but the trial court overlooked the fact that the statement treated as dying declaration is not trustworthy. In absence of the fact brought on the record that whether Munna Sai after receiving such grievous injury was sensible enough to make the statement as recorded by the I.O. No statement was recorded in the hospital though as per the prosecution case he was brought to the hospital immediately after the occurrence. Even there is no signature or thumb impression of any other witness including the family members that statement was taken in their presence though the prosecution case is that Md. Lal Babu (PW2) was bringing him to the hospital and was accompanying him. There is no other corroborative piece of evidence in the case to support the prosecution case that these



two convicts have committed the alleged offence. Moreover, there is no evidence that any blood was found at the place of occurrence neither any clothes of the deceased was seized by the police. Such seizure becomes necessary because the case is that after the assault at the door step of the informant he was bleeding profusely. In perfunctory manner the entire investigation was conducted by the I.O. Learned Amicus Curiae appearing for the appellants placed reliance on the decision of Ramilaben Hasmukhbhai Khristi & Anr. v. State of Gujarat, reported in AIR 2002 SC 2996. Elaborating the ratio in this case, it is submitted that in the said case the deceased was set to fire and died within 7-8 hours of the incident but the statement of the victim did not bear any endorsement about her mental fitness and the language in the statement was very lengthy. Such a language also created doubt and in the present case language used is also not of a rickshaw puller. Learned Amicus Curiae for the appellants also relies on other decision, i.e., Chacko v. State of Kerala, reported in (2003) 1 SCC 112.

5. Learned APP appearing on behalf of the State submits that the statement of the informant Munna Sai, recorded by the police officer on the road while being taken to the Buxar Sadar Hospital is a dying declaration wherein he had stated that Mohammad Shamim assaulted him with knife and Taj Mohammad was also present there



and he succumbed to injury. The statement of a dead person after getting the same recorded before his death is an admissible piece of evidence in view of Section 32(1) of the Evidence Act.

6. Having considered the rival submissions of both sides, the only mute question to be decided in this case is whether the fardbeyan of the informant Munna Sai may be safely relied by the Court treating the same as dying declaration to convict both the accused particularly in absence of any other direct or even circumstantial evidence. Prosecution in this case altogether examined eight witness including three eye-witnesses, whose names find place in the statement of the informant itself namely his wife Sakila Khatun @ Rozi (PW4) who is one of the relatives of Md. Lal Babu (PW2) and maternal uncle of the deceased Jamalu (PW1) including rest other eye-witnesses Langer Thakur (PW7) and Ibrar Ansari (PW8) too have been declared hostile. Even in the cross-examination done by the prosecution side no positive evidence in support of its case has been elicited. The place of occurrence in this case is the doorstep of the deceased witnessed by other family members but none of them have supported the case of the prosecution rather they have expressed ignorance of the occurrence. The dying declaration is a statement made by person, who is in eminent danger of death, so the principle is that a person who is to die in the immediate proximity cannot tell a



lie, hence this principle is exception to the rule of hearsay. It is also said that it is not necessary that a dying declaration should be certified by a doctor regarding the mental state of affair or about the consciousness of the victim but in case of absence of such certificate Court requires to make closure scrutiny regarding placing reliance on the statement along with other attending circumstances and evidence for the purpose of convicting the accused solely on that material. Majo Khatun (PW3), wife of Munna Sai, the deceased, in her testimony had expressed complete ignorance regarding this occurrence and the manner in which her husband died so declared hostile by the prosecution. Even the fardbeyan, the I.O. (PW6) who has recorded fardbeyan of the deceased has not taken care of taking signature or thumb impression of Md. Lal Babu (PW2) who is said to be accompanying the injured Munna Sai while taking him to Sadar Hospital, Buxar for medical care and treatment. Md. Lal Babu (PW2) has also expressed ignorance regarding the occurrence causing death of Munna Sai, he too was declared hostile. This is also evident from the testimony of the informant itself that he visited Buxar Sadar Hospital immediately thereafter and recorded restatement of the informant in the Hospital but again he has not taken care of taking the statement in presence of the doctor with the certificate regarding his consciousness and fitness of giving the information. The evidence on



the record also shows that Munna Sai was suffering from profuse bleeding as he was stabbed in his testicals a very sensitive part of the body and in the same night he was taken to PMCH as referred by the doctor of the Sadar Hospital, Buxar but on the way he died, so in such situation whether he was in a fit state of mind or in a conscious stage to give such vivid description of the occurrence becomes doubtful. The I.O. (PW6) has conducted the entire investigation in lackadaisical manner, not taking the signature of LTI of any of the witnesses in whose presence the statement of the informant was recorded, neither blood stain was recovered from the place of occurrence nor blood soaked clothes of the deceased was seized. Even there is no preliminary injury report on the record showing the condition of the informant while first being taken to Sadar Hospital, Buxar, wherefrom he was referred to PMCH. This creates doubt whether he was in conscious state of mind for giving fardbeyan. Moreover, there is no other corroborative piece of evidence available on the record to establish the charge against the accused persons beyond all reasonable doubt, so the Court has no option rather to hold that the conviction cannot be upheld on such fardbeyan or the statement of the informant treating it as dying declaration as there is no endorsement on it by the doctor or any of the witnesses to prove that the said statement was recorded in their presence or Munna Sai was in a conscious state of



mind and capable of giving such statement. Another relevant factor for which the Court nurses doubt regarding the statement is the language in backdrop of the fact that the informant was a rickshaw pullar and the language used by the informant is of a literate person, so it is not safe treating the fardbeyan of Munna Sai as a dying declaration and there is no other material on the record showing involvement of the appellants in committing the crime, even deceased wife Majo Khatun (PW3) and rest all eye witnesses have turned hostile, so giving them the benefit of doubt they are acquitted and since both are on bail, therefore, they also discharged from the liabilities of their respective bail bonds.

7. The appeal stands allowed.

8. The Court also expresses appreciation for assistance given by Mr. Ravi Ranjan, the learned counsel appearing as Amicus Curiae in this case. Let a copy of this judgment be sent to the Patna High Court Legal Services Committee for payment to the learned counsel appearing in this case as Amicus Curiae.

(Arun Kumar, J.)

S.Kumar/-

AFR/NAFR	AFR
CAV DATE	NA
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