

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.504 of 1994

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Motilal Baitha, Son of Bharai Baitha, resident of village and Police Station-
Raghunathpur, District- Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Prince Kumar Mishra, Amicus Curiae

For the Respondent/s : Mr.. S. N. Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 25-11-2021

The appellant/accused no.1 by this appeal is challenging the Judgment and order dated 05.09.1994 passed in Sessions Trial No.270 of 1988 by the learned Additional Sessions Judge, Siwan, thereby convicting him for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life. Along with the appellant/accused, his sons, namely, accused no.2 Nagendra Baitha and accused 3 Bigu Baitha were also put up for trial. However, they came to be acquitted by the impugned Judgment and order. For the sake of conveyance, the appellant/accused shall be referred in his original capacity.

2. The facts in brief leading to the prosecution case projected from the police report can be summarized thus;



(a) On 03.09.1986 at about 8.30 A.M. Kailash Baitha (since deceased) was affixing a wooden stump in front of yard of his house for tethering animals. At that time, accused Motilal Baitha accompanied by his sons came there and started questioning him as to why he has affixed the wooden stump. Quarrel started on this reason. During that course wordy duel, accused persons lifted Kailash Baitha and thrust him on the ground. Kailash Baitha was using a Khanti (instrument used for digging soil) for affixing the stump. Accused Motilal Baitha took that Khanti and gave a blow thereof on the head of Kailash Baitha. Co-accused, Nagendra Baitha and Bigu Baitha also assaulted him with sticks and bricks. This incident according to the prosecution, accused was witnessed by P.W.6 Paramdeoti Devi, P.W.1 Dahari Baitha (brother) and P.W.3 Sanichari Devi (sister-in-law of the deceased Kailash Baitha). Because of shout of Kailash Baitha, other villagers such as Balkishore, Kariman, P.W.2 Saheb Baitha and Hira Baitha reached at the spot. The accused persons ran away.

(b) Injured Kailash Baitha accompanied by his brother P.W.1 Dahari Baitha, P.W.3 Sanichari Devi and P.W.6 Paramdeoti Devi went to the Police Station Raghunathpur. Where the First Information Report of Kailash Baitha (since



deceased) came to be recorded by P.W.9 Bipin Bihari Sharan, Police Station Officer. Accordingly, the subject crime was registered and the injured was referred to the hospital. P.W.11 Dr. Gopal Das examined Kailash Baitha at about 11 P.M. of 03.09.1986 and found him to have suffered lacerated wounds on skull and left side of lower rip apart from swelling.

(c) On the next day of 04.09.1986 Kailash Baitha succumbed to injury suffered by him. His dead body was taken to the Police Station by the relatives. P.W.9 Bipin Bihari Sharan, Investigating Officer took inquest notes and sent it for autopsy to Sadar Hospital, Siwan. P.W.6 Dr. Anil Kumar of Civil Hospital Siwan conducted postmortem examination on the dead body of Kailash Baitha and found him to have died of shock and hemorrhage as a result of abdominal injury caused by hard and blunt surface. Routine investigation followed leading to the filing of the charge sheet against three accused persons including appellant/accused Motilal Baitha.

(d) After committal of the case, the learned Trial Judge framed the charge for the offence punishable under Section 302 r/w 34 of the Indian Penal Code against the accused persons, who adjured the guilt and claimed tried.

(e) In order to bring home the guilt to the accused



persons, the prosecution has examined in all 12 witnesses. Defence of the accused persons was that of total denial. They examined Baijnath Choudhary as D.W.1.

(f). After hearing the parties, the learned trial court was pleased to hold that appellant/accused Motilal Baitha gave a blow of Khanti (instrument for digging) on head of Kailash Baitha causing his death and therefore, he is guilty of the offence punishable under Section 302 of the Indian Penal Code. It is further held by the trial court that two co-accused Nagendra Baitha and Bigu Baitha were stated to have used weapons like sticks and evidence regarding sharing of common intention against him is lacking. Similarly, evidence regarding use of weapons viz, i.e, brick and stick by them is also contradictory. With this observations, they both came to be acquitted whereas appellant/accused came to be convicted as indicated in the opening para of this Judgment and he is accordingly sentenced.

3. We heard Mr. Prince Kumar Mishra, the learned Advocate appointed as an amicus curiae to assist this Court for espousing the cause of the appellant/accused as well as the learned Prosecutor for the State. We have also examined the record and proceedings. It is argued by Mr. Mishra the learned Advocate that evidence of the prosecution regarding use of



weapons by the co-accused is contradictory and discrepant. P.W.6 Paramdeoti Devi has deposed that accused Bigu Baitha used stick whereas accused Nagendra Baitha used brick. As against this, P.W.7 Parvati Devi attributed stick to co-accused Nagendra Baitha and brick to co-accused Bigu Baitha. He further argued that statement of the deceased cannot be construed as the dying declaration. The evidence of the prosecution lacunae and unsatisfactorily. As against this, the learned Prosecutor supported the impugned Judgment and order of conviction and resultant the sentence.

4. At the outset, let us examine whether deceased Kailash Baitha died homicidal death. Evidence of P.W.9 Bipin Bihari Sharan, the Investigating officer shows that after recording statement of Kailash Baitha, he sent Kailash Baitha for medical examination by issuing letter to the Medical Officer. This is how P.W.11 Dr. Gopal Krishna Das had examined deceased Kailash Baitha at about 11 P.M. of 03.09.1986. Evidence of this Medical Officer shows that he found following injuries on the person of Kailash Baitha;

A. Lacerated wound of size 1"X1/4"X1/2" on the vault of skull.

B. Lacerated wound of size 1/2"X1/4"X1/4" on the left side of lower lip.



C. Swelling of size 3”X3” on left side of abdomen below cocktail region.

5. As deposed by P.W.11, Dr. Gopal Krishna Das, the injuries found on the person of Kailash Baiha were possible by hard and blunt substance like Khanti. Those were simple in nature. He further deposed that because of abdominal injury noticed by him, he referred Kailash Baitha to Sadar Hospital for examination. Evidence of this witness is further corroborated by the injury certificate issued by him which is Ext.8. In cross-examination, this witness stated that injury no. 1 noticed by him can be possible by brick, lathi, Khanti (instrument for digging). He denying the suggestion that injury no. 1 noticed by him can be possible by fall on head. Evidence of P.W.11 Dr. Gopal Das does indicate that he noticed three injuries on the person of deceased Kailash Baitha which according to him were simple in nature.

6. After death of Kailash Baitha, his dead body was dispatched to the Civil Hospital, Siwan and during its postmortem examination, P.W.5 Dr. Anil Kumar noted that the dead body was having following wounds;

A. Stitched wound at mid partial region of scalp of size of 1”X1/4” scalp deep.

B. Lacerated wound on left side of chest of size of 1/2”X1/4 skin deep.

C. Swelling on left side of abdomen below costal margin of size of 2”X 1/2”. On dissection, Subdural



heamotoma was found present. Abdominal cavity was found full of blood.

Upon conducting postmortem examination on the dead body, as per version of Dr. Anil Kumar, Kailash Baitha died because of shock and hemorrhage as a result of abdominal injury caused by hard and blunt substance like Khanti (instrument for digging). Evidence of this witness corroborated by contemporaneous report of postmortem examination proved by him. In cross-examination, this witness admitted that injuries noted by him can be caused by multiple fall on earth. From the evidence of P.W.5 Dr. Anil Kumar read with evidence of P.W.11 Dr. Gopal Krishna Das, it becomes clear that Kailash Baitha died homicidal death caused by shock and hemorrhage as a result of abdominal injury. Thus it may be safely concluded that Kailash Baitha died homicidal death.

7. Now let us examined whether prosecution has proved commission of the offence punishable under Section 302 of the Indian Penal Code by accused Motilal Baitha and if not, what offence is proved against him.

8. Though, the prosecution has claimed that P.W.1 Dahari Baitha, P.W.2 Saheb Baitha and P.W.3 Sanichari Devi are eye witnesses to the incident in question , they all turned hostile to the prosecution. There evidences is of no assistance to the



prosecution. Evidence of P.W.6 Paramdeoti Devi – widow of the deceased shows that after the incident of assault on Kailash Baitha, she along with her injured husband Kailash Baitha went to the police station for lodging report. Evidence of P.W.9 Bipin Bihari Sharan, Investigating Officer shows that at about 10 P.M. of 03.09.1986, injured Kailash Baitha came to the police station and lodged a report. As per version of P.W.9 Bipin Bihari Sharan, Police Inspector, he himself wrote the report lodged by injured Kailash Baitha and then Kailash Baitha affixed his thumb impression on the said report in his presence. P.W.9 Bipin Bihari Sharan, the Investigating officer further deposed that thereafter he put his signature on the said report. P.W.9 Bipin Bihari Sharan proved the report lodged by Kailash Baitha which is at Ext.1 and further stated that he prepared the printed FIR Ext.2 on the basis of the said report. Thereafter, he issued request letter to the Medical Officer for examining injured Kailash Baitha. Though, P.W.9 Bipin Bihari Baitha was subjected to the searching cross-examination by the defence, this portion of evidence is not challenged or shattered in the cross-examination. As evidence of P.W.6 Paramdeoti Devi – widow and P.W.9 Bipin Bihari Sharan, the Investigating officer coupled with that of P.W.5 Dr. Anil Kumar shows that said



Kailash died because of abdominal injury caused to him in the incident in question, his statement in the form of the FIR at Ext.1, automatically evaluates to the status of his dying declaration. At this juncture, it is apposite to quote relevant provisions of Section 32(1) of the Evidence Act which read thus;

Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death. – When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

9. Now let us examine the statement at Ext.1 made by deceased Kailash Baitha and recorded by P.W.9 Bipin Bihari Sharan the Investigating officer who is stating the circumstances of transactions which has caused his death.



10. Dying declaration (Ext.1) of Kailash Baitha is to the effect that at about 8.30 AM of 03.09.1986 when he was affixing the wooden stump at the front yard of his house, accused persons came there and questioned him as to why he is affixing that wooden stump. He told the accused persons that he is doing so for tethering animals. At that point, there was wordy duel between him and the accused persons. The dying declaration of Kailash Baitha further shows that then the accused persons lifted and thrust him on the ground. Accused Motilal took the Khanti, which was being used for digging soil for affixing stump and by that Khanti, accused Mottilal Baitah hit him on his head. This cause bleeding wound. The deceased further stated that then he started shouting. Thereafter, sons of accused Motilal Baitha, namely, Nagendra Baitha and Bigu Baitha further started assault with sticks. The person sitting there namely, (P.W.3) Sanichari Devi, (P.W.1) Dahari Baitha, (P.W. 5) Paramdeoti Devi, (P.W.2) Saheb Baitha, Kewal Hira and Balkishore came there then accused persons ran away. Kailash Baitha further stated that then (P.W. 1) Dahari Baitha, (P.W.3) Sanichri Devi and (P.W.6) Paramdeoti Devi took him to the police station. This is what, deceased Kailash Baitha has stated before P.W. 9 Bipin Bihari Sharan, Police Inspector of



Police Station Raghunathpur and these narrations were then recorded in writing by the said witness. Thus, contents of this statement at Ext.1 made by deceased Kailash Baitha are disclosing cause of death of Kailash Baitha as assaulted him by the appellant/accused and the co-accused.

11. Now let us put on record, law laid down by the Hon'ble Supreme Court regarding appreciation of evidence in respect of the dying declaration. In **Khushal Rao Vs. State of Bombay (AIR 1958 SC 22) ; (2008 ALL SCR (O.C.C) 41)** the Supreme Court has laid down propositions of law relating to the test of reliability of dying declaration. The relevant paragraph thereof reads thus :-

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made ; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence (4) **that a dying declaration stands on the same footing as another piece of**



evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence. (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

The Supreme Court in **Padmaben Shamalbhai Patel Vs. State of Gujarat (1991) 1 SCC 744** has observed thus :-

"If, in the facts and circumstances of the case, it is found that the maker of



the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence neither extra strong nor weak and can be acted upon without corroboration if it is found to be otherwise true and reliable.”

12. We have noted the dying declaration of Kailash Baitha made by him before P.W.9 Bipin Bihari Sharan in the earlier paragraphs.

13. Let us now examined whether the said statement of deceased Kailash Baitha is gaining corroboration from other evidence available on record. It will have to be seen that said statement of deceased Kailash Baitha is giving truthful account of the incident happened with him and the same is not the result of tutoring, prompting or imagination. It will also have to be seen whether it is established that Kailash Baitha was having opportunity to observe and identify the assailants and was in a fit state to make the declaration. In this regard, evidence of P.W.9 Bipin Bihari Sharan is clear and cogent. His evidence shows that whatever was stated by the declarant, was recorded by him in the words of declarant.



There is nothing in the cross-examination to infer that the declarant was not in a position to make the declaration or somebody else was tutoring or prompting him in making the declaration.

14. P.W.6 Paramdeoti Devi is the widow. Her evidence shows that on the day of the incident, she was at her door and at that time, her husband Kailash Baitha was affixing the stump on the ground. As per her version, all accused persons came there. They lifted Kailash Baitha and thrust him on the ground. Appellant/accused Motilal Baitha gave a blow of Khanti on head of Kailash Baitha causing bleeding injury. She testified that acquitted co-accused Bigu Baitha assaulted Kailash Baitha by means of stick on abdomen whereas acquitted co-accused Nagendra Baitha assaulted Kailash Baitha by means of brick. Her evidence further shows that appellant/accused Motilal Baitha is nephew of Kailash Baitha. She claimed that the incident took place at the spur of the moments and there were no talks between the prosecuting party and the accused persons. She stated that blood stain mat came to be seized in her presence. In cross-examination, she stated that when she went to the spot, all accused persons ran away because they saw her



husband lying dead.

15. So far as P.W.7 Parvati Devi is concerned, she claimed to have seen the accused persons lifting and thrusting her father-in-law Kailash Baitha on ground. She claimed that appellant/accused Motilal Baitha assaulted Kailash Baitha by Khanti (instrument for digging), acquitted co-accused Nagendra Baitha by stick and acquitted co-accused Bigu Baitha by brick. In cross-examination, she stated that when she visited the spot, nobody had gathered there but subsequently, she stated that other persons such as Sanichra Devi, Dahari Baitha and Saheb Baitha were present there. She stated that initially, there were talks between her father-in-law Kailash Baitha and co-accused Bigu Baitha, so also that the incident took five minutes to complete.

16. We unable to accept the argument of the learned counsel for the appellant/accused that evidence of P.W.6 Paramdeoti Devi and that of P.W.7 Parvati Devi is contradictory. What is material is the incident of assault. Whether the acquitted co-accused used one weapon or other is of no relevance in the instant case. Evidence of both these witnesses shows that the appellant/accused was one of the person who lifted and thrust the deceased on ground. Both



these witnesses have unanimously stated that the appellant/accused used Khanti for giving blow on head of deceased Kailash Baitha.

17. So far as P.W.8 Malti Devi is concerned, we feel that she is not an eye witness to the incident because as her version, when she reached on the spot, she saw her father-in-law Kailash Baitah drenched in blood. In all probability, she reached the spot after the incident.

18. Evidence of P.W.9 Bipin Bihari Sharan, the Investigating Officer shows that on his visit to the spot of the incident, he found the stump affixed on the ground. He also noted that there were blood stains of blood on the spot and the mat lying at the spot was stained with blood. This witness duly proved seizure memo Ext.6 and Ext.6/1 of these articles, so also that of Khanti which was lying nearby the field.

19. In our considered opinion, this evidence duly corroborates the dying declaration Ext.1 made by deceased Kailash Baitha to P.W.9 Bipin Bihari Sharan, the Investigating Officer and it is giving truthful account of the incident. Thus evidence on record and more particularly the dying declaration of Kailash Baitha shows that appellant/accused Motilal baitha had given a blow of Khanti



on head of the deceased Kailash Baitha and he was one of the person who lifted and thrusted the deceased on the ground. The dying declaration of Kailash Baitha at Ext.1 shows that thereafter acquitted co-accused assaulted him with sticks. P.W.6 Paramdeoti Devi has stated that acquitted co-accused Bigu Baitha had in fact assaulted the deceased by means of stick on the abdomen. Thus role attributed to the appellant/accused is only that of inflicting a blow of khanti (instrument for digging) on head of the deceased as well as lifting and thrusting the deceased on the ground. On this background, if evidence of the autopsy surgeon P.W.5 Dr. Anil Kumar is noted then it is seen that death of Kailash Baitha was because of shock and hemorrhage as a result of abdominal injury caused by hard and blunt surface. This abdominal injury caused to Kailash Baitha is certainly not attributable to appellant/accused Motilal Baitha. Therefore, we are of the considered opinion that the learned Trial Court totally erred in convicting appellant/accused Motilal Baitha for the offence punishable under Section 302 of the Indian Penal Code simplicitor by holding that by giving blow of Khanti by him on head of Kailash Baitha, appellant/accused Motilal Baitha caused death of Kailash Baitha. The death was



due to abdominal injury and there is no evidence to connect the appellant/accused to that injury. The learned trial court has already held that Section 34 of the Indian Penal code is not attracted in the crime in question and had acquitted both the co-accused. That Judgment has become final. Therefore, the appellant/accused is not certainly liable for penal consequences in respect of the offence punishable under Section 302 of the Indian Penal Code. However he is liable for commission of the offence punishable under Section 324 of the Indian Penal Code, for voluntarily having caused hurt by dangerous weapon “Khanti” to deceased Kailash Baitha after lifting and thrusting him on the ground. Undoubtedly, the injury which can be attributable to the appellant/accused was simple in nature, as vouched by P.W.11 Dr. Gopal Krishna Das.

20. We put on record words of appreciation for the able assistance rendered by Mr. Prince Kumar Mishra, learned Amicus Curiae, to this Court in arriving at the proper conclusion for deciding in that appeal. We direct the High Court Legal Services Authority to pay an amount of Rs.5,000/- to Mr. Prince Kumar Mishra, learned Amicus Curiae, for service rendered by him.



21. In the result, the appeal is partly allowed with the following order;

(I). The appeal is partly allowed.

(II). The impugned Judgment of conviction and order of sentence imposed on appellant/accused Motilal Baitha for the offence punishable under Section 302 of the Indian Penal Code is quashed and set aside. The instead appellant/accused Motilal Baitha is convicted of the offence punishable under Section 324 of the Indian Penal code for having voluntarily cause hurt to deceased Kailash Baitha by dangerous weapon “Khanti” (instrument for digging). For the offence punishable under Section 324 of the Indian Penal Code, the appellant/accused Motilal Baitha is sentenced to suffer imprisonment for a period of one year.

(III) The appeal is accordingly disposed of.

(A. M. Badar, J)

Sunil Kumar Panwar, J: I Agree

(Sunil Kumar Panwar, J)

Bhardwaj/-

AFR/NAFR	
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