

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.745 of 2015

Arising Out of PS. Case No.-31 Year-2011 Thana- DIGHALBANK District- Kishanganj

Hopna Murmu Son of Late Suful Murmu, resident of Village- Karuwamani,
Police Station- Dighal Bank in the District of Kishanganj.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

For the Appellant/s	:	Mr.Raj Kumar, Advocate Mr. Vijay Kumar, Advocate Mr. Sudhanshu Shekhar, Advocate Mr. Rajnish Kumar, Advocate Mr. Sarvottam Kumar, Advocate
For the Respondent/s	:	Mrs. S.B. Verma, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE DR. ANSHUMAN
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 03-03-2023

The present criminal appeal has been preferred against the judgment of conviction dated 04.07.2015 and order of sentence dated 06.07.2015 passed by Sri A.K. Tiwary, Additional District and Sessions Judge-I, Kishanganj in Sessions Trial No. 1184 of 2011 (arising out of Dighalbank P.S. Case No. 31 of 2011) whereby and whereunder the appellant has been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and sentenced him to undergo rigorous imprisonment for life and also imposed fine of Rs. 10,000/- and



in default of payment of fine, simple imprisonment for six months has also been awarded.

2. The prosecution case as per the fardbeyan of informant namely Joshana Murmu (P.W.4) recorded before the police officer of Dighal Bank Police Station on 13.07.2011 at about 11.30 p.m. is that on the same day i.e. 13.07.2011 at about 8.30 P.M., father of informant namely Sufal Murmu was sitting at his house at village Karuwamani and the informant was also present there when informant's brother Hopna Murmu reached along with a *dabia* and stated that informant's father only takes care of his daughter and spends his earning on her. Thereafter informant's brother having enraged assaulted her father on his neck with *dabia* from behind as a result of which her father got badly injured. Thereafter, in a scuffle, both hands of informant's father were cut by *dabia* and thereafter her father fell down and a lot of blood started oozing out. On noise, a number of villagers came and interfered because of which life of her father was saved. Thereafter, informant's father was brought to Dighal Bank hospital for treatment. The informant further stated that her father was not in a position to give statement and further stated that the reason for the occurrence is that she is a widow and after death of her husband, she lives with her father and her father takes care of



her which was not liked by the appellant and because of that reason, her brother, with an intention to kill her father, badly assaulted him due to which he got badly injured.

3. On the basis of fardbeyan of the informant (P.W. 4), Dighalbank P.S. Case No. 31 of 2011 was registered under Section 307 of I.P.C. and investigation was taken up. In course of treatment the victim died and therefore, Section 302 I.P.C. was also added. Charge-sheet under section 302 of the I.P.C. was submitted whereafter cognizance was taken by the jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

4. During trial, the prosecution examined altogether eight witnesses, namely, P.W. 1 Md. Nijamuddin, P.W. 2 Dhuma Murmu, P.W.3 Robin Soren, P.W. 4 Joshna Murmu @ Hofni Murmu (informant), P.W.5 Kishun Soren, P.W.6 Samsul Haq, P.W. 7 Dr. Gadadhar Pd. Pandey (doctor who conducted post-mortem examination) and P.W.8 Nitesh Kr. Choudhary (I.O. of the case). Prosecution has also produced exhibits as Ext. 1 (post-mortem report), Ext. 2 and 2/1(writing and signature on the fardbeyan on 13.07.11) and Ext. 3 (writing and signature on the fardbeyan on 16.7.11). The defence has not produced any oral or documentary



evidence in support of its case. After conclusion of the trial, the learned trial Court found the appellant guilty and convicted and sentenced the appellant in the manner indicated above.

5. Learned counsel for the appellant submitted that the judgment of conviction suffers from several infirmities that have been overlooked by the learned trial Court and therefore, the impugned judgment is not sustainable in the eyes of law. It has been submitted that the prosecution has miserably failed to prove the causative link between the accused and the offence alleged to be committed by him. There are material inconsistencies and contradiction between the statement of the informant made in the fardbeyan before the police and her testimony as a prosecution witness before the learned trial Court. It has also been submitted that the prosecution has failed to prove the source of identification in the present case. Furthermore, learned counsel submitted that the place of occurrence has not been sufficiently proved as no blood was found on the alleged place of occurrence, which is completely inconsistent with the deposition of the P.W.3 and P.W.4, who deposed before the learned trial Court that they saw the deceased lying in a pool of blood. The learned counsel vehemently argues that no seizure was made by the police and I.O. has not made efforts to seize the weapon used in incident. Also,



there is no sufficient material to place reliance on the alleged dying declaration, as the same is not credible and does not inspire confidence. Thus, the counsel for the appellant contends that there is absence of sufficient material to sustain the charge of conviction against the appellant and, therefore, the finding of the learned trial Court is bad in law, wrong on facts, bereft of legal reasoning, devoid of merit and the judgment of conviction and order of sentence are fit to be set aside.

6. Learned APP for the State, on the other hand, has submitted that the judgment of conviction and order of sentence under challenge requires no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It is contended that minor inconsistencies in the testimony cannot be a ground to disbelieve and discard the witness. It has further been contended that the alleged statement of the deceased (then injured) must be considered as a dying declaration and that in itself is sufficient to form the sole basis of upholding the conviction. Learned A.P.P. furthermore submits that the guilt of the appellant is satisfactorily proved from the evidence adduced by the prosecution and there is no infirmity in the impugned judgment of conviction and order of sentence of the learned trial court.



7. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal :

I. Whether there is sufficient evidence to establish the causative link between the conduct of the accused and the *actus reus* in order to hold that death has been caused by the appellant in the present case?

II. Whether the alleged statement of the deceased (then injured) be considered as a dying declaration and thus, form the basis of conviction?

III. Whether latches on part of the prosecution, if any, be fatal for the prosecution in the present case?

IV. Whether the place of occurrence has been sufficiently proved to the judicial satisfaction of the court?

V. Whether there is any other substantive evidence to hold that the prosecution has discharged its onus of proving its case beyond reasonable doubts?

8. With reference to issue no. I, the learned counsel for the appellant has drawn the attention of this Court towards the statement of the informant made in fardbeyan before the police wherein it has been stated that at the time of the alleged



occurrence, the informant was present with her father (now deceased) in his house and in the meantime, the appellant i.e. her brother came and after exchange of few words, he gave a fatal *dabiya* blow at the back of the deceased's neck. However, during the course of trial, the informant (P.W.4) in examination-in-chief explicitly deposed that at the time of the alleged incident, she was present at her *sasural* and upon hearing *hulla*, she went to her father's house where she saw that the appellant was already present. The P.W.4 further deposed that she saw that her father had fallen down having sustained cut injury on the back of his head and was lying in unconscious condition. Thus, there is apparent inconsistency and contradiction in the testimony of the P.W.4, who contends to be the sole eye witness as regards the manner of occurrence.

It is settled legal position that the testimony of an eye witness must not be dangling. There should be no major inconsistency or contradiction and the testimony must be free from blemish and devoid of any ambiguity, uncertainty and loopholes. In criminal law loose, contradictory and uncorroborated statements cannot be relied upon, much less than forming the basis of conviction. It has been observed by the



Hon'ble Supreme Court in the case of ***Sadhu Ram & Another vs The State Of Rajasthan (2003) 11 SCC 231*** that :

“It is no doubt true that the conviction of an accused can be based solely on the testimony of a solitary witness. However, in such a case the court must be satisfied that implicit reliance can be placed on the testimony of such a witness and that his testimony is so free of blemish that it can be acted upon without insisting upon corroboration. The testimony of the witness must be one, which inspires confidence and leaves no doubt in the mind of the court about the truthfulness of the witness.”

In the case of ***Sunil Kumar Shambhudayal Gupta and others versus state of Maharashtra (2010) 13 SCC 657***, the following has been observed:

“The discrepancies in the evidence of eye witnesses, if found to be not minor in nature maybe a ground for disbelieving and discrediting that evidence. In such circumstances witnesses may not inspire confidence if the evidence is found to be in conflict and contradiction with the other evidences and the statement already recorded. In such a case, it cannot be held that the prosecution proved its case beyond reasonable doubt.”

It is trite principle of criminal jurisprudence that the prosecution has the onus to establish not only the *mens rea* and the *actus reus*, but also the causative link, that is, the prosecution



has to objectively establish by sufficient evidences that it was the conduct of that particular accused only which resulted in the death of the deceased. In the present case, there is no sufficient material on the record to establish the causal connection between the conduct of the accused and the *actus reus*. There are glaring inconsistencies in the testimony of P.W.4 and the same cannot be considered a cementing material to fill in the missing gap. Also, the P.W.3 explicitly mentioned that he himself had not seen any person killing the deceased. Thus, we are of the view that the evidence of prosecution is qualitatively and quantitatively insufficient to bring nexus between the conduct of the appellant and commission of the offence alleged against him.

In light of the facts and circumstances of the case and considering the legal position as discussed above, issue no. I is decided in the negative.

9. With reference to issue no. II, after hearing the arguments of the learned counsels for both the parties and upon thorough examination of the material available on the record, it is found that P.W.8 has deposed in the examination-in-chief that the deceased told him that he was killed by his son i.e. the appellant. It is also noteworthy that the Investigating Officer did not take the doctor's certificate so as to ensure whether the deceased was



in a fit medical condition to make any statement. On one hand, the P.W.8 i.e. the I.O. deposed in para no 2 that the deceased (then injured) was in a moribund condition at the time of recording of the statement. On the other hand, contrary to such statement, the PW 4, i.e. the daughter of the deceased in cross examination at para no. 7 deposed that in the hospital, she fed her father tea and biscuit and the police had '*gap-shap*' (gossip) with her father (i.e. the deceased). It is also pertinent to note that though the P.W.8 stated that he recorded the statement of the deceased in writing, but the same has neither been marked as an exhibit nor has it been produced on record. This Court is cognizant of the well established legal position that dying declaration can form the sole basis of conviction. Nonetheless, establishing the genuineness of the dying declaration is a condition precedent to placing reliance and forming it the sole basis of conviction.

In the present case, neither has the I.O. taken the doctor's certificate regarding deceased's fitness of orientation and deposition at the relevant point of time nor has any person been made a witness to the alleged recording of dying declaration, even though the deceased was in custody of the doctor and his daughter was present at that time. In absence of any



corroboration or any other cogent evidence, the statement of I.O. about recording of alleged dying declaration does not inspire confidence. In landmark case of ***Athir versus Govt. of NCT of Delhi (2010) 9 SCC 1***, Division Bench of the Hon'ble Supreme Court propounded the guidelines as to evidentiary value of dying declaration. It was held that :

- (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.*
- (ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.*
- (iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*
- (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.*
- (v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.*
- (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.*
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.*



(viii) *Even if it is a brief statement, it is not to be discarded.*

(ix) *When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.*

(x) *If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.”*

In the case of **Kanti Lal versus State of Rajasthan (2009)**

12 SCC 498, it was observed that :

“It is well-settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution.”



In the case of *State of Gujarat versus Jayrajibhai Punjabhai Varu (2016) 14 SCC 151*, the following was observed :

“A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being... .. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.”

In light of the discussions made above, this Court finds that there are sufficient doubts as to the credibility of the alleged dying declaration and the same does not inspire confidence of



this Court. In the present case, it cannot be made the sole basis of conviction. Accordingly, the issue no. II is decided in the negative.

10. With reference to issue no. III, it is noteworthy that neither any seizure has been made by the investigating officer from the alleged place of occurrence, nor has the murder weapon been recovered. The P.W.8 i.e. the investigating officer has specifically deposed in para no. 8 that he did not make efforts to look for the murder weapon. Furthermore, the injury report has not been collected by the I.O. and the same has not been brought on the record. Such conduct, on part of the investigating officer, speaks volumes about the laches on his part. The investigating police are primarily the guardians of the liberty of individuals. Having been given the duty to deal with the investigation of a criminal case, they must act in accordance with equity, justice, good conscience, reasonableness, non-arbitrariness, fairness and in accordance with the principles of natural justice. Diligence, truthfulness and honesty must be the *modus operandi*. However, where the default on part of the investigating police is so flagrant that it speaks volumes of an irresponsible attitude with utter disregard to established canons of criminal procedure, the same cannot be brushed aside.



In the case of ***Sidhartha Vashisht @ Manu Sharma versus State (NCT of Delhi) (2010) 6 SCC 1***, the Hon'ble Supreme Court observed that :

“The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.”

Accordingly, issue no. III is decided in the affirmative.

11. With regard to issue no. IV, it is relevant to take note that there is sharp contradiction between the testimony of the prosecution witnesses and the post-mortem report of the deceased. It is evident from the post mortem report that the deceased had the following injuries on his person :

- (1) Stitched Incised wound 5" x 1/2" x 3" on back of Head.*
- (2) Stitched Incised wound 7" x 1/2" x 2 1/2" on back of Head below Inj. No. (1)*



*(3) Stitched Incised wound on front of Rt Elbow-
1 1/2" x 1/2" x 1/2"*

*(4) Stitched Incised wound on back of Rt. Index
finger (Hand)- 1 1/2" x 1/2" with fracture of
proximal phalanx.*

*(5) Stitched Incised wound Rt. Middle finger on
back of proximal phalanx 3/4" x 1/4" x 1/4"*

(6) Stitched Incised wound on front of left shoulder.

Cause of injuries- sharp cutting weapon.

Time since death- within 24 hours.

*Cause of death- in my opinion is due to haemorrhage
& shock caused by above injuries."*

Considering the nature of injury nos. 1 and 2 as aforesaid, it is reasonable to come to the conclusion that the deceased (then injured) would have bled profusely. Also, there is specific deposition by P.W.3 and P.W.4 to the effect that they saw the deceased lying in a pool of blood at the place of occurrence. However, in a sharp contradistinction to such testimony, the P.W.8 i.e. the investigating officer deposed that he did not find any blood on the alleged place of occurrence. There is no statement by any of the witnesses to suggest that the blood was removed by any person. Hence, such non-finding of blood at the alleged place of occurrence, seen in context of the abovementioned injuries raises suspicion as to the place of occurrence.



In criminal law, the onus on the prosecution is to prove each allegation by cogent and reliable evidences. The degree of onus in criminal cases is not only to the extent of mere preponderance of probabilities, rather, the degree of standard required to be met is that of 'beyond all reasonable doubts'. In the case of ***State Of U.P vs Krishna Gopal & Anr, 1988 AIR 2154***, it has been observed that :

“A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amount to ‘proof’ is an exercise particular to each case... ... Doubts would be reasonable if they are free from a seat for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it is must be free from an over emotional response. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective-element in the evaluation



of the degrees of probability and the quantum of proof.”

Accordingly, issue no. IV is decided in the negative.

12. With reference to issue no. V, the learned counsel for the appellant has drawn attention of this Court towards absence of any source of identification at the alleged place of occurrence. It is noted that though the alleged occurrence took place at about 08:30 pm and there was no electricity in that village, still no evidence has been brought on record by the prosecution to prove the source of identification. There is conspicuous absence of any statement by any of the witnesses to suggest the presence of any luminous object at the place of occurrence or in the vicinity that would be a source of identifying the accused at night. Such failure on part of the prosecution to prove any source of identification, certainly casts a dent on the story of the prosecution.

In the case of ***Ram Narain Singh versus State of Punjab (1975) 4 SCC 497***, the Hon'ble Supreme Court observed the following:

“On the day of the occurrence i.e. October 2, 1972, it would be quite dark at 8-00 P.M. and unless there was some light burning in the house it would be difficult for the witnesses to have identified the assailants and to have given such a graphic description of the



occurrence... ... There also the accused could not be identified because there is no evidence of any witness to show that any light was burning there, nor does any of the eye witnesses say that he had identified the accused by voice. For these reasons, therefore, we are convinced that even accepting the prosecution case at its face value, if the occurrence took place at 8-00 P.M. the possibility of mistake in identification cannot be excluded in the present circumstances.”

In a criminal trial, it is the duty of the Court to ensure that mere conjectures or suspicion do not take the place of legal proof. Suspicion, howsoever strong or probable it may be, is not a substitute for the legal proof required to substantiate the charges against the accused for commission of crime. It would be a travesty of justice to rely upon the suspicion/conjectures in a criminal case. In the present case, there are glaring inconsistencies in the testimonies of the witness and there is no sufficient evidence worth its salt to make out a foolproof case for conviction. There are several loopholes and missing links in the chain of circumstances as hereinabove indicated, and the appellant cannot be made to fall prey to such latches on part of the prosecution. The dark clouds of suspicion looming large on the story of the prosecution have poured heavily only to wash away all the dust ridden allegations. The prosecution has failed to



pull the ropes sufficiently tight so as to bring conviction to the door steps of the appellant.

Thus, issue no. V is decided in the negative.

13. In light of the legal position as discussed above and on the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellant is not sustainable in the eyes of law and the prosecution has failed to prove its case beyond all reasonable doubts.

14. Therefore, the appeal stands allowed and judgment of conviction dated 04.07.2015 and order of sentence dated 06.07.2015 passed by Sri A.K. Tiwary, Additional District and Sessions Judge-I, Kishanganj in Sessions Trial No. 1184 of 2011 (arising out of Dighalbank P.S. Case No. 31 of 2011), are hereby set aside. Since, the appellant is in custody, he be released from jail custody forthwith, if not wanted in any other case.

(Sudhir Singh, J)

(Dr. Anshuman, J)

Pankaj/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	03.03.2023
Transmission Date	03.03.2023

