

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Shampa Dutt (Paul)

C.R.A. (DB) 82 of 2023

With

C.R.A.N.1 of 2024

Mahendra Sharma

Vs.

The State of West Bengal

For the Appellant

: Mr. Ramdulal Manna, Adv.,
Ms. Manju Manna (Dey), Adv.,
Mr. Sayan Mukherjee, Adv.

For the State

: Ms. Amita Gaur, Sr. Govt. Adv.,
Ms. Sonali Bhar, Adv.

Heard on

: 02.01.2025

Judgment on

: 02.01.2025.

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 10.01.2023 and 11.01.2023 passed by the learned Additional District & Sessions Judge, FTC-1, Raiganj, Uttar Dinajpur in Sessions Trial No. 11 of 2023 arising out of Sessions Case No. 03 of 2013 convicting the appellant for commission of offence punishable under Section 302 of the Indian

Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for six months more.

Prosecution case:-

2. Prosecution case alleged against the appellant is as follows:-

On 04.07.2012 at 9.30 PM one Buddiswar Sarkar was gossiping with appellant at Netaji Subhas Colony (Baioosh Ghar Colony). At that time his father viz., Radha Ballav Sarkar (PW 1) heard sound of firing and rushed to the spot. Enquiring from his son, he came to know Mahendra (i.e. the appellant) had fired at his abdomen resulting in bleeding injury. Buddiswar was taken to Raiganj Sadar Hospital but in view of his critical condition he was referred to a nursing home at Siliguri where he expired the next day.

3. On the written complaint of PW 1, Raiganj P.S. Case No.622 dated 05.07.2012 under Sections 341/326/307/506 of the Indian Penal Code was registered for investigation. Upon death of Buddiswar, Section 302 of the Indian Penal Code was added.

4. During investigation the appellant was arrested. Pursuant to his statement (which was videographed), firearms i.e. pistol, pipegun with live cartridge and one empty cartridge were seized. Charge sheet was filed against the appellant.

5. Charge was framed under Section 302 of the Indian Penal Code and under Sections 25/27 of the Arms Act. During trial, prosecution

examined 13 witnesses and exhibited a number of documents to prove its case. The defence of the appellant was one of innocence and false implication.

6. In conclusion of trial, the trial Judge by the impugned judgment and order dated 10.01.2023 and 11.01.2023 convicted and sentenced the appellant, as aforesaid.

Evidence on record:-

7. PWs 1, 2 and 3 are the parents and wife of the deceased. They are the most vital witnesses.

8. Radha Ballav Sarkar (PW 1) is the father of the deceased and the de-facto complainant. He deposed incident occurred at Netaji Subhas Colony at 9.30 PM. At that time he was in his house. He heard hue and cry from the eastern side of his house. He came out and found that his son suffered injury on the abdomen. His son informed Mahendra had fired at him by a fire arm. He raised hue and cry. His son was taken to Raiganj Sadar Hospital and thereafter, shifted to a nursing home at Siliguri where he expired on the next day. He lodged written complaint scribed by Tarun Roy (PW 10) which was treated as First Information Report.

9. During cross-examination, he stated he was a resident of Netaji Subhas Colony and after the incident they had gathered 50 meters away from their house.

10. Dipali Sarkar (PW 2) is the mother of the deceased and wife of PW 1. She corroborated PW 1 and deposed she heard her son shouting that Mahendra had fired at him. She came out and found her son with bleeding injury on his abdomen.

11. Tula Sarkar (PW 3) is the wife of the deceased. She stated on the date of incident, there was a hot altercation between her husband and Mahendra. Her father-in-law asked her to intervene. She went out and found her husband coming towards their house and Mahendra was fleeing from the spot. Her husband stated Mahendra had fired at him. Her husband was taken to Raiganj District Hospital wherefrom he was shifted to a nursing home at Siliguri where he died. She remained unshaken during cross-examination.

12. Dr. Probir Kumar Deb (PW 5) is the Autopsy Surgeon. He found the following injuries:-

“On examination I found that Raigor mortis was present all over the body. Stiched wound was present 1.5 inches X 1 Inch., 4 inches below left nipple. Stiched wound was present 1 inch X .5 inches, 4 inches below left axial. Abrasion colored was present around the wound in the chest. Perforating injury was present 2 inches X 1 inch X cavity deep in the diaphragm left side. Stomach contains clotted blood. Perforating injury was present 1 inch X ½ inch X cavity deep in the stomach. Mesentary was lacerated in the abdominal cavity. Fracture of 5th & 6th rib present, bullet fragments found, hematoma present in the left anterior chest wall. Hematoma was present over the left lungs. Peritoneal cavity contains blood, liver was pale.”

He opined death was due to the above injuries caused by fire arm homicidal in nature. He proved the injury report (Ext.3).

13. Bharat Ch. Sarkar (PW 6) was posted as SI of Police at Bhaktinagar Police Station. He conducted inquest over the body. He proved the inquest report (Ext.4).

14. Dilip Kr. Roy (PW 12) is the investigating officer. He examined the complainant and recorded his statement. He prepared rough sketch map with index (Ext.12). He arrested the appellant. Appellant made a confessional statement which was video recorded (Material Ext.1) by PW 11. Pursuant to the showing of the appellant, a 9 mm Pistol, one pipegun, live cartridge and one empty cartridge were seized. He sent the articles for opinion from Arms Expert. After completion of investigation, he submitted charge sheet.

Arguments at the Bar:-

15. Learned Advocate for the appellant contends there is no eyewitness to the incident. No independent witness of the locality had been examined. Only interested witnesses i.e. PWs 1 to 3 were examined. Their depositions suffer from inherent contradictions and inconsistencies and ought not to be believed. Exact words used in the purported dying declaration had not been proved. No report from the Arms Expert was produced. Independent witnesses did not support the recovery of fire arms. Accordingly, he prays for acquittal.

16. Learned Senior Government Advocate contends incident occurred beside the house of the deceased. His relatives, i.e. PWs. 1 to 3 were in the house. Hearing the sound of firing they went out and the deceased disclosed that he had been shot by the appellant. Post mortem doctor (PW 5) opined death was due to gunshot injury and corroborates the dying declaration. Accordingly, she prays for dismissal of the appeal.

Analysis and findings:-

(a) Dying declaration – whether reliable?

17. Upon analysis of the evidence on record in the backdrop of the submissions made at the Bar, it appears the fulcrum of the prosecution case is the oral dying declaration made by the deceased to his parents and wife i.e. PWs.1 to 3.

18. PW 1 deposed he heard a sound of firing and went out of the house. He found his son was in front of his house with bleeding injury on his abdomen. His son told him Mahendra fired at him. During cross-examination he clarified that the spot where people had assembled was 50 meters from his residence. On the next day, he lodged First Information Report (Ext. 2). The oral dying declaration finds place in the First Information Report which was promptly lodged after the incident and even before his son had died.

19. PW 1's version is corroborated by his wife (PW 2) and daughter-in-law (PW 3). PW 2 stated that her son had been fired by appellant on the abdomen. She came out and heard her son was shouting that Mahendra had fired at him. She remained unshaken during cross-

examination. PW 3, wife of the deceased deposed on the fateful night her husband had an altercation with Mahendra i.e. appellant. Her father-in-law asked her to go out and intervene. When she went out of the house, she found her husband was coming towards their house and Mahendra was fleeing from the spot. Her husband shouted Mahendra had fired at him.

20. Learned Advocate for the appellant contends the aforesaid witnesses are relations of the deceased. Their evidence ought to be discarded as they are interested witnesses and exact words of the oral dying declaration had not been proved. No local witness had been examined.

21. I am unable to subscribe to this submission. It is trite that evidence of witnesses cannot be rejected merely on the ground that they are related to the deceased. It is normal human conduct that blood relations would not screen the real offender and falsely implicate an innocent in the murder of one of their family members. It is difficult to accept relations of the deceased would falsely implicate the appellant by attributing a fictitious dying declaration to the deceased¹. On the other hand, presence of the witnesses near the place of occurrence has been established. Incident occurred while appellant and the deceased were having a hot altercation near the latter's house. Hearing the sound of fire his relations (PWs 1, 2 and 3) came out of the house and heard the

¹ Prabin Ali and anr vs State of Assam, (2013) 2 SCC 81

deceased say that the appellant had fired at him. Manner and circumstances in which the witnesses were at the spot and heard incident from the mouth of the deceased has been fully established.

22. Capacity of the victim to make the statement has also been proved. Hearing hue and cry, PWs. 1, 2 and 3 came out of the house. The incident had occurred near their house. He shouted that the appellant had fired at him. These circumstances clearly prove the dying declaration was made to the witnesses immediately after the incident. There is no cross examination of the prosecution witnesses including the PM doctor (PW 5) that due to the injuries victim would not be in a fit state to make statement. In the absence of any contrary evidence or even a suggestion that the victim was not in a fit state to make the statement the making of the dying declaration immediately after the incident to PWs 1 to 3 leaves no doubt in my mind with regard to the capacity of the maker to make the dying declaration².

23. All of witnesses have unequivocally stated that the victim stated the appellant had fired at him. There is no variance with regard to the contents of the dying declaration. Reliance on *Darshana Devi Vs. State of Punjab*³ is inapposite. In the said case, the witnesses had differed with regard to a vital circumstance viz., whether the maker of the dying declaration was awake when the accused had poured kerosene oil and set her on fire. In this backdrop, the Hon'ble Apex Court held exact

² Ghanashyam Das v. State of Assam, (2005) 13 SCC 387 (para 4 and 8)

³ 1995 Supp (4) SCC 126

words relating to the manner and circumstances in which the incident occurred not being consistently narrated by the witnesses, the dying declaration was not worthy of reliance. In the present case, all the witnesses unequivocally stated that the deceased stated appellant had fired at him. The gist of the dying declaration as narrated by PWs 1,2 and 3 is, therefore, consistent and does not differ from one another. It is also relevant to note no case of enmity between the appellant and PWs 1, 2 and 3 have been demonstrated so as to render their unequivocal and consistent evidence against the appellant-suspect.

24. The other authorities relied upon by the defense are also distinguishable on facts.

25. In *Nattha Vs. State of M.P.*⁴ the oral dying declaration was not believed as it appeared to be an embellished one. Initially, the prosecution case was that the victim had been fired at by unknown persons but subsequently prosecution relied on the dying declaration implicating the appellant. In the present case, dying declaration was made at the earliest point of time to the family members who had rushed to the spot. The dying declaration also finds place in the First Information Report which was promptly lodged by PW 1 even prior to the death of the victim.

26. In *Sukhar Vs. State of Uttar Pradesh*⁵ the statements of relations were disbelieved on the ground there was inimical relationship between

⁴ 2003 (2) CrLJ 2222

⁵ (1999) 9 SCC 507

the witnesses and the appellant. As noted earlier, there is nothing on record to show that there was inimical relationship between the witnesses and the appellant which would prompt them to falsely implicate the appellant.

b) Medical evidence corroborates dying declaration:-

27. The oral dying declaration is corroborated by the evidence of post mortem doctor (PW 5) who found gunshot injury on the abdomen of the victim and opined that the death was due to the said injuries, ante mortem in nature.

c) Failure to produce arms expert's report- whether fatal?

28. It is also argued independent witnesses had not supported the recovery of fire arms and no ballistic report is placed on record. Failure to place arms report on record is remissness in investigation and cannot in all cases be a ground to acquit an accused. As discussed above, oral dying declaration made to PWs 1 to 3 appear to be credible and is corroborated by medical evidence on record. Given this situation, failure to produce the arms report with regard to the seized weapons would not affect the credibility of the prosecution case.

Conclusion:-

29. For the reasons given above, I do not find any merit in the appeal and the same is accordingly dismissed.

30. Conviction and sentence of the appellant are upheld.

31. In view of the above, connected application is also dismissed.

32. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

33. Let a copy of this judgment along with the trial court records be forthwith sent down to the trial Court at once.

34. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

[Shampa Dutt (Paul), J.]

[Joymalya Bagchi, J.]

as/PA