

(2011) 12 PAT CK 0099

In the Patna High Court

Case No : Criminal Appeal (DB) No. 354 of 1989

Bachan Sah and Tiha Sah

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 05-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161(3), 313

Evidence Act, 1872 — Section 114, 32, 32(1), 60

Penal Code, 1860 (IPC) — Section 147, 302, 323, 324, 34

Citation : (2012) 4 PLJR 427

Hon'ble Judges : Navaniti Prasad Singh, J; Ashwani Kumar Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Navaniti Prasad Singh

1. The case was running on the daily cause list for quite some time. Since no one appeared to assist the court, Mr. Harish Kumar, an Advocate, who was present in the court was requested to appear amicus curiae in the matter. He agreed to our request and ably assisted the court.

2. The appeal is directed against the judgment and order dated 9.6.1989 passed by Sri Budhadeo Narain Sinha, the 3rd Additional Sessions Judge, Gopalganj in Sessions Trial No.109 of 1987/12 of 1987 by which appellant no.1, Bechan Sah has been convicted u/s 302 of the Indian Penal Code and appellant no.2, Tiha Sah has been convicted u/s 302 read with section 34 of the Indian Penal Code and both of them have been sentenced to undergo rigorous imprisonment for life.

3. The prosecution case is based upon oral statement of Sheo Charan Mahto (since deceased) which was recorded in Gopalganj Sadar Hospital on 30.5.1986 at 1 a.m. by Sukhlal Dubey, Sub-Inspector of Police of Gopalganj Police Station (not examined). The said fardbeyan was forwarded to the Officer Incharge, Mahammadpur Police Station on 30.5.1986 itself for necessary action as the

place of occurrence fell within his jurisdiction. Mr. Laxmi Narain Manjhi (P.W.7) Officer Incharge, Mohammadpur Police Station thereafter sent the said fardbeyan to the Officer Incharge Baikunthpur Police Station to register a case under sections 147, 323 and 324 of the Indian Penal Code and directed the Assistant Sub. Inspector of Police, Randhir Kumar Rai (P.W.5) to investigate the case. Accordingly, on 30.5.1986 at about 6 p.m. Baikunthpur (Mohammadpur) P.S. Case No.64 of 1986 was instituted and investigation was taken up.

4. As per oral statement of Sheo Charan Mahto on 29.5.1986 in the evening at about 6 p.m. the appellants came and asked him to accompany them to quarrel with co-villager Karjhangar Manjhi with whom they had quarrelled. The informant refused to go with them. The appellants got annoyed and started abusing them upon which appellant no.1 Bachan Sah is alleged to have inflicted two "Bhala" blows out of which one hit the informant on the back side of the shoulder and the other hit him on his right thigh. Thereafter, Tiha Sah (appellant no.2), Sugriv Sah (a co-accused whose case was split up being minor) and acquitted co-accused Ratan Sah and Gambhir Mahto are alleged to have indiscriminately assaulted upon him by means of Lathi. The informant contended that the occurrence was witnessed by his wife Bachi Devi (P.W.1) and other neighbours of the village. He was taken to hospital where he was undergoing treatment. The informant alleged that the accused persons intended to kill him. The oral statement recorded by Sub.Inspector of Police, Sukhlal Dubey of Gopalganj Police Station was read over to him and finding the contents to be true he put his left thumb impression (hereinafter to be referred to as L.T.I.) on it at the Gopalganj hospital itself.

5. As noted above, the first information report was initially registered under Sections 147, 323 and 324 of the Indian Penal Code only against the appellants and three others namely Sugriv Sah, Ratan Sah and Gambhir Mahto. In course of treatment, the informant died on 10.6.1986 at 2.00 a.m. in the Sadar Hospital, Gopalganj and thus Section 302 of the Indian Penal Code was also added. The police on conclusion of investigation submitted charge sheet against all the five accused persons. The learned Magistrate took cognizance of the offence and committed the case to the court of Sessions for trial. One of the accused Sugriv Sah was found to be 13 years of age on the alleged date of occurrence and thus his trial was split up from other accused persons. The trial court framed charge u/s 302 of the Indian Penal Code against appellant Bachan Sah, under Sections 302/34 and 323 of the Indian Penal Code against the appellants Bachan Sah, Tiha Sah as also against co-accused Gambhir Mahto and Ratan Sah.

6. The accused persons did not plead guilty and claimed to be tried. On conclusion of the trial co-accused Ratan Sah and Gambhir Mahto were acquitted giving them benefit of doubt by the trial court. However, the appellants were convicted and sentenced in the manner stated above.

7. The prosecution examined seven witnesses in course of trial in order to prove the charges. Out of them P.W.1 Bachi Devi, P.W.3 Sunderwati Devi and P.W.4 Jitan Mahto claim to be the persons who witnessed the occurrence. P.W.2 Bodha

Mahto is said to have seen the accused persons running away immediately after the occurrence. P.W.5 Randhir Kumar Rai is the first investigating officer who conducted major part of the investigation whereas P.W.7 Laxmi Narayan Manjhi is the second investigating officer who had submitted charge sheet in the case. P.W.6 Dr. Rameshwar Singh is the doctor who first examined the informant in an injured condition and subsequently pursuant to his death conducted postmortem examination of his dead body.

8. In order to prove charges, apart from the oral evidence, the prosecution has also proved fardbeyan marked as Ext.1, formal first information report marked as Ext.2, injury report of the informant (since deceased) marked as Ext.3 and carbon copy of the inquest report marked as Ext.4. The defence has not adduced any evidence in the court on its behalf. From the trend of the cross-examination as also from the reply to the questions put to the accused persons u/s 313 of the Code of Criminal Procedure it appears that the plea of defence is of innocence and false implication.

9. Learned counsel for the appellants submits that the trial court has not appreciated the evidence correctly. The witnesses who deposed before the court have made contradictory statement to each other. The investigating officer has contradicted them in material particulars making the investigation perfunctory. The investigating officer has failed to collect material exhibits such as blood stained soil and blood stained cloth of the deceased and the witnesses. The police officer who recorded the fardbeyan of the informant has deliberately been withheld. No explanation has been given for his non-examination on behalf of the prosecution and his non-examination has caused serious prejudice to the defence case. The fardbeyan cannot be treated to be a dying declaration in terms of section 32(1) of the Evidence Act as before recording the fardbeyan it has not been certified by any one that the informant was in a fit state of mind to make such statement. The fardbeyan has not been witnessed by the doctor or staff of the hospital where it is said to have been recorded.

10. Before we discuss the evidence of the witnesses who deposed in the court, we would like to test the fardbeyan which has been treated by the trial court to be a dying declaration. By now it is well settled that though the dying declaration is entitled to great weight but it is worthwhile to note that the accused has no power of cross-examination. Such power is beneficial for eliciting the truth as an obligation of oath could be. This is the reason that the court insists that dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court has to scrutinize the dying declaration carefully and ensure that the declaration is not the result of tutoring, prompting or imagination. There is neither rule of law nor of prudence that the dying declaration cannot be acted upon without corroboration. If the court is satisfied that dying declaration is true and voluntary, but where the dying declaration is suspicious it should not be acted upon without corroboration of evidence. A dying declaration which suffers from infirmity cannot be the basis of conviction. It is

also well settled law that where the prosecution version differs from the version as given in the dying declaration, the said dying declaration cannot be acted upon.

11. In the present case we find from the injury report (Ext.3) that Dr. Rameshwar Singh (P.W.6) examined the informant Sheo Charan Mahto initially on 29.5.1986 at 11 p.m. in Sadar Hospital, Gopalganj and found the following injuries on his person which are as under:

(i) one penetrating wound 1" x 1/2" x deep going to right chest cavity with surgical emphysema spreading in neck, right chest wall and right side of face. Wound situated below right axilla on posterior axillary line.

(ii) one penetrating wound 1/2" x 1/4" x 1/2" on the front of right thigh in its middle third.

12. Injury no.1 was found to be grievous whereas injury no.2 was held to be simple. According to the doctor (P.W.6), both injuries were caused by sharp penetrating weapon. The age of the injuries was held to be within six hours. The injury report has been proved by P.W.6 and has been marked as Ext.3 in this case. The same was issued under the signature of P.W.6 on 31.5.1986. We find that the doctor after initially examining the informant on 29.5.1986 at 11 p.m. again examined him on 30.5.1986 in the morning and confirmed his earlier report. It is worthy to note it here that there is apparent cutting at four places. With respect to injury no.1 in the injury report at all the four places the word "left" written earlier had been substituted by the word "right". P.W.6 has admitted the fact in his cross-examination and has explained that the mistake occurred at four places and thus he corrected it and put his initial at all four places where the correction was made.

13. When we see the aforesaid injury report (Ext.3) it is apparent that prior to recording of fardbeyan the informant was already admitted in Gopalganj Sadar Hospital. The police reached there at 1 a.m. There is nothing on the record to show as to who informed the police pursuant to which Sukhlal Dubey, Sub.Inspector of Police of Gopalganj Police Station reached in the hospital and recorded the fardbeyan. We further find that the Medical Officer was present in the hospital but the fardbeyan was not recorded by him. The Medical Officer has not even certified regarding mental state of the informant prior to recording of his statement. Even the person who recorded the fardbeyan has not certified that the informant was in a fit state of mind to make such statement. To top it all, Sukhlal Dubey, who recorded the fardbeyan has not been examined as a witness in this case on behalf of the prosecution. He was certainly a material witness. The alleged fardbeyan in question was recorded by him. There is no explanation on behalf of the prosecution as to why he has not been examined in this case. The only presumption would be that he has been withheld by the prosecution. His non-examination in the court has certainly prejudiced the defence. The informant admittedly died after ten days of the occurrence. No effort was made

to record the statement of the informant either by a Magistrate or by a doctor although he remained alive for number of days. There was sufficient time for the Magistrate to be called for recording dying declaration. The investigating officer in cross-examination admitted the fact that he did not record the statement of the police officer who recorded the fardbeyan in course of investigation. He further admits that he did not know as to whether any other witness was present at the time of recording the fardbeyan. He also admits that there is no certificate by the doctor on the fardbeyan.

14. The doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as "the evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as a witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

15. We are of the view that the statement of the informant in the case at hand which has been relied upon by the trial court as a dying declaration for awarding conviction to the appellants suffers from serious infirmities. It does not inspire confidence of the court in its correctness.

16. We further find an important aspect in this case. P.W.6 Dr. Rameshwar Singh while deposing in the court has categorically stated in his examination in chief that he examined the informant Sheo Charan Mahto on 29.5.1986 at 11 p.m. on police requisition and found injuries mentioned above. If there was a police requisition pursuant to which the doctor examined the informant at 11 p.m. on 29.5.1986, the presumption would be that the informant had first visited the police station. The police requisition has not been brought on record. In other

words, the same has been withheld from the court. The requisition must have been prepared prior to 11 p.m. on 29.5.1986. There must be a report of the police regarding the incident. If there was already a report of cognizable offence before the police pursuant to which the police requisition was issued to the doctor for examining the injured, the same should have been treated as first information report and any subsequent statement could not be treated as first information report. The court would draw an adverse inference in terms of section 114(g) of the Evidence Act for not bringing on record the police requisition as also the report received earlier in time to the police regarding the occurrence. The fardbeyan which has been treated as a dying declaration further becomes suspicious for the reason aforesaid.

17. Now we have to see the corroborative evidence of the witnesses examined in the court. P.W.1 Bachi Devi is wife of the deceased, P.W.2 Bodha Mahto is uncle of the deceased, P.W.3 Sunderwati Devi is wife of P.W.4 Jitan Mahto and P.W.4 Jiten Mahto is brother of the deceased.

18. P.W.1 has stated in her chief that on the date and time of occurrence her husband and his younger brother Jitan Mahto (P.W.4) were sitting at the door on a "Chauki". On shouting, she came out from the courtyard and found the accused persons present there. The appellant Bachan Sah inflicted a "Bhala" blow on his "Panjra" (beneath the shoulder). The other four accused persons assaulted her husband by "Lathi". The deceased was taken to hospital for treatment where he died after ten days. In cross-examination she stated that the deceased was taken to hospital by her and her brother-in-law (Dewar) P.W.4 Jitan Mahto. Sri Krishna Dubey (not examined) was not present at the time the informant was taken to hospital and he came in the next morning. She admitted in cross-examination that her husband became unconscious due to the injuries sustained by him and he regained consciousness on the next morning. She further stated that at the time of recording the fardbeyan of her husband, said Sri Krishna Dubey was present. She admits in cross-examination that she came out of her house, She saw her husband fallen on the ground in an unconscious state. When we closely scrutinize the deposition of P.W.1, we find that the alleged fardbeyan in question could not have been recorded at 1 p.m. on 30.5.1986 as, according to her, the victim became unconscious after assault and his statement could be recorded in the next morning when he regained consciousness in presence of Sri Krishna Dubey who, according to her, was not available in the night on 29.5.1986 and who reached in the hospital in the next morning on 30.5.1986. She further rules out the possibility of witnessing the occurrence by her own eyes by saying that when she came out of her house, her husband had already fallen on the ground and had become unconscious.

19. P.W.2 Bodha Mahto has stated in his examination-in-chief that he came on shouting at the place of occurrence and found the accused persons running away. His nephew, Sheo Charan Mahto was lying on the ground. The appellant, Bachan Sah, was holding a Bhala in his hand and others were armed with Lathi. The

victim was taken to Gopalganj Sadar Hospital where he died after ten days. P.W.2 claims to have accompanied the victim while being taken to hospital but P.W.1 Bachi Devi in her deposition has categorically stated that it was she and Jitan Mahto (P.W.4) who together carried the victim to hospital. In cross-examination P.W.2 has clearly admitted the fact that he reached at the place of occurrence immediately after the occurrence took place. At that point of time no one acquainted to him was present there. He has further admitted that when he reached there the victim was unconscious. If we scrutinize the deposition of this witness we find that admittedly he is not an eye witness of the occurrence. However, he reached immediately after the incident at the place of occurrence and no one else acquainted to him was present there. He rules out the possibility of any known person being present at the place of occurrence.

20. P.W.3 Sunderpati Devi has stated in her examination-in-chief that she was cooking inside her house at the time of occurrence. Her husband and her brother-in-law (the deceased) were sitting at the door on a "Chauki". On shouting, she came out. She saw appellant, Bachan Sah, inflicting "Bhala" blows on Panjra and thigh of the deceased. The other four accused persons assaulted him with "Lathi". Attention was drawn in cross-examination towards her previous statement made before the police. P.W.6 Randhir Kumar Rai the first investigating officer, who recorded her statement u/s 161(3) of the Cr.P.C. contradicted her by admitting the fact that she had not stated before him that her husband was sitting together with the deceased informant on a cot. He further contradicted her by saying that in her statement she had stated that it was appellant, Tiha Sah, who had inflicted "Bhala" blow on the deceased. P.W.3 in her cross-examination has admitted that when she came out of her house she could see her husband (the deceased) and the accused persons only. Others reached subsequently and no lady member was present there. When we scrutinize the evidence of P.W.3, we find that she is not telling the truth. She has been contradicted by the investigating officer in material particulars. She has assigned the role of inflicting "Bhala" on the deceased to appellant no.2 Tiha Sah. Her deposition is in contradiction to other witnesses as also in contradiction to the fardbeyan where role of inflicting Bhala blow is assigned to appellant no.1 Bachan Sah. She has also stated that when the occurrence took place she was alone inside the house and no lady member was present there. If she is to be believed, she rules out the possibility of P.W.1 Bachi Devi, wife of the informant, being present at the time of occurrence.

21. P.W.4 Jitan Mahto claims himself to be an eye witness. He has supported the fardbeyan in cross-examination. His attention has been drawn to the previous statement made before the police. The investigating officer has contradicted him in material particulars. The investigating officer has categorically stated in his cross-examination that P.W.4 did not claim to be present together with his brother on a "Chauki" at the door of the house at the time of occurrence. He had clearly stated before him that at the time of occurrence he was working in his field and he came running subsequently on hue and cry being raised. When he

came at the place of occurrence P.W.1 Bachi Devi and P.W.3 Sunderwati Devi were crying and his injured brother was lying on the ground. When we look to the evidence of this witness, we find that he has materially improved his version while being examined in the court.

22. P.W.6 Dr.Rameshwar Singh while being examined in the court contended that on 10.6.1986 at 11 a.m. he held postmortem examination on the dead body of Sheo Charan Mahto and found the following ante mortem injury.:-

(i) one penetrating wound 1"x 1/2"x deep going in right chest cavity situated in right posterior axillary line of chest wall 2" below axilla. On opening the chest cavity, the right chest cavity was half full of clotted and semi-clotted blood and the right lung found pierced in its upper lob on its posterior-lateral aspect and the whole lung was collapsed.

(ii) One penetrating wound stitched and healed in front of right thigh.

23. According to the doctor, the injuries were caused by sharp penetrating weapon such as "Bhala". No other injury was found on the person of the deceased.

24. It is the consistent case of the prosecution that four of the named accused persons were armed with "Lathi". They assaulted the informant by "Lathi". No "Lathi" injury or any injury caused by any hard and blunt substance could be noticed by the doctor, who examined him initially and issued injury report. Even after death no ante mortem injury caused by hard and blunt substance could be noticed by the doctor.

25. The ocular testimony of the witnesses has greater evidentiary value vis a vis medical evidence but when medical evidence totally improbabilises the ocular testimony that become a relevant factor.

26. In the instant case, the medical evidence totally improbabilises the version of the prosecution regarding manner of assault as alleged which makes the prosecution case doubtful.

27. From the discussions made hereinabove, we find that the witnesses examined in court i.e. P.W 1 to P.W.4 are all related to the informant. They have contradicted each other apart from being contradicted by the investigating officer in material particulars. They do not seem to be telling truth before the court. The veracity of the fardbeyan is under cloud of doubt for the reasons assigned herein above. The prosecution has deliberately withheld the initial information given to the police regarding the occurrence. The requisition sent to the doctor by the police for examining the injured has not been brought on record. The Sub. Inspector of Police who recorded the fardbeyan has not been examined in the court nor any explanation has been given for his non-examination. The investigating officer admits that he did not record the statement of scribe who recorded the fardbeyan in course of investigation. Though the occurrence is said to have taken place in midst of the village in front of the door of the house of the

informant, no independent witness has come forward to support the prosecution case. The related witnesses examined in the court did not stand to the test of cross-examination. There is no medical certificate to the fact that while making fardbeyan the informant was in a fit state of mind. This becomes very relevant in the back ground of the fact that the statement was being recorded while the informant was admitted in the government hospital. The informant survived for ten days but no effort was made to get his statement recorded either by a Magistrate or by the Medical Officer. The L.T.I of the informant has not been attested by any other witness.

28. If all these facts are taken together the only conclusion to which we can arrive is that the prosecution has failed to prove the charge against the appellants beyond reasonable doubt.

29. In the result, the appeal is allowed. The judgment and order of the trial court convicting and sentencing the appellants is set aside. The appellants are discharged from the liability of their bail bonds.

30. We appreciate the sincere efforts of Mr.Harish Kumar, learned counsel for the appellants who argued the case amicus curiae. The Legal Services Authority of Patna High Court is directed to pay Rs.1,500/- to the counsel as fee for assisting the court amicus curiae.