

(1999) 04 PAT CK 0055

In the Patna High Court

Case No : Criminal Appeal No's. 531, 548 and 558 of 1986

Chandeshwar Singh and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 23-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162(2)
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 147, 302, 324, 326, 34

Citation : (1999) 47 BLJR 1138 : (1999) CriLJ 3085

Hon'ble Judges : N.N. Singh, J;D.P.S. Choudhary, J

Bench : Division Bench

Advocate : Yindhya Keshri Kumar and Wasi Akhtar, Ranjana Sinha and Rashid Alam, for the Appellant; Kailash Bihari Prasad, Addl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

N.N. Singh, J.—All these three appeals, arising out of judgment of conviction and order of sentence dated 30th September, 1986 passed by 2nd Additional Sessions Judge, Sitamarhi, in Sessions Trial No. 142 of 1985 were heard together and are being disposed of by this common judgment. All six appellants, Chandeshwar Singh, Lalan Singh, Mahesh Singh, Bacha Singh of Criminal Appeal No. 531 of 1986 and appellant Chandrika Singh of Criminal Appeal No. 548 of 1986 and appellant Lakshman Mahto of Criminal Appeal No. 558 of 1986 were convicted under Sections 302/34 of the Indian Penal Code and were sentenced to undergo life imprisonment thereunder.

2. The prosecution case is that Madan Kumar Sinha (deceased) resident of village Gazipur, who was running a medical shop in the adjacent village Dumari, when, as usual on 25-9-1984 at about 5.00 p.m. after closing his medical shop, was returning to his home and reached near the Mango orchard of Baijnath Singh, these appellants came out of the orchard and caught hold of him. Further case of prosecution was that appellant Lakshman Mahto had stabbed him in his abdomen

and appellant Chandrika Singh had also stabbed him on his shoulder and the rest appellants had surrounded him. It was stated that Madan Kumar Sinha raised alarm and fell down unconscious and that witnesses arrived there to whom he named his assailants and as there was bleeding from his wounds, he was brought to Sheohar Referral Hospital for treatment where he gained his consciousness and at about 11.00 p.m., P.W. 20 Sindhu Paswan, A.S.I, recorded his fardbeyan (Ext. 4) and issued requisition to S.D.O. for deputing a Magistrate to get dying declaration of Madan Kumar Sinha recorded. Further case of prosecution is that at about 1.00 p.m. P.W. 18, Executive Magistrate Girindra Narayan Thakur came to hospital and recorded his dying declaration (Ext. 7) and after 2.30 p.m. his condition deteriorated and finally at about 6.00 p.m. he succumbed to his injuries.

3. Fardbeyan (Ext. 4) of Madan Kumar Sinha recorded by P.W. 20 was forwarded to officer Incharge Shyampur Bhataha for institution of a case and for investigation. On that basis a formal F.I.R. (Ext. 4/1) was drawn up and Shyampur Bhataha P.S. Case No. 43 of 1984 was registered by the police under Sections 147, 341, 324 and 326 of the Indian Penal Code against three named appellants and the police after due investigation submitted charge-sheet against all six appellants and after cognizance and commitment, they were put on trial and were convicted as aforesaid.

4. The defence of the appellants appeared to be that they were falsely implicated in this case due to enmity and litigation.

5. The prosecution examined altogether 22 witnesses in support of its case out of whom P.W. 6 Md. Soyab, P.W. 10 Jogendra Raut, P.W. 12 Lal Bachan Singh and P.W. 15 Madhushudan were tendered for cross-examination. P.W. 8 Satrugan Prasad Srivastava, P.W. 21 Jitendra Jha and P.W. 22 Ram Laxman Rai are formal witnesses. P.W. 14 is Dr. Wasim Siddiqui who treated deceased Madan Kumar Sinha in Sheohar Referral Hospital and proved the injury report (Ext. 6) and bed head ticket (Ext. 6/1) P.W. 13 is Dr. Awadh Kishore who held post-mortem examination on the dead body of Madan Kumar Sinha and proved the post-mortem report (Ext. 5). P.W. 20 is A.S.I. Sindhu Paswan who recorded the fardbeyan (Ext. 4) of Madan Kumar Sinha in Sheohar Referral Hospital which after the death of Madan Kumar Sinha was treated as first dying declaration. P.W. 19 is the Investigating Officer, S.I. Jogendra Singh who was suspended in course of investigation on the allegation of showing favour to the accused-appellants and for getting recorded one ante dated S. D. Entry No. 394 of appellant Chandeshwar Singh. P.W. 17 is another police officer Daroga Singh who took charge from P.W. 19 and submitted charge-sheet in this case. P.W. 18 is G.M. Thakur, A.D.S.O. and Executive Magistrate who recorded the second dying declaration (Ext. 7) of Madan Kumar Sinha (deceased).

6. P.W. 1 Lakshmeshwar Prasad, P.W. 2 Zafir Alam, P.W. 3 Anil Kumar Verma, P.W. 5 Ram Swaroop Mandal, P.W. 7 Abdul Rajak, P.W. 9 Raghunath Prasad, P.W. 11 Umesh Prasad and P.W. 16 Ganesh Jha are witnesses who reached at the P.O.

after the occurrence and they are also witness on the point of oral dying declaration made by Madan Kumar Sinha naming his assailant i.e. the appellants. P.W. 16 Ganesh Jha also claimed to have seen appellant Mahesh Mahto running towards north and five to seven persons running towards the orchard.

7. This is a case in which there are three dying declaration. The prosecution case is that the deceased named his assailants before the witnesses who arrived at the P.O. on hearing his alarm. Besides the oral dying declaration, the fardbeyan (Ext. 4) of Madan Kumar Sinha, after his death, will also be treated as dying declaration u/s 32(1) of the Evidence Act as the maker of the fardbeyan died subsequently and his statement was related to the cause of his death. Though this was recorded by the police officer, it would be admissible in view of exception provided in Section 162(2) of the Code of Criminal Procedure. The third dying declaration is exhibit 7 recorded by P.W. 18 who was deputed to record the dying declaration by S.D.O. on the requisition of P.W. 20.

8. The law with regard to dying declaration is very clear. The conviction can be made even on the basis of dying declaration uncorroborated by any other evidence, provided the Court is satisfied after searching and scrutiny that the dying declaration was the truthful version of the occurrence in which the deceased received injuries, resulting in his death. The scrutiny regarding truthfulness of dying declaration should be made in the light of surrounding facts and circumstances of the case keeping in mind that the statement was by a person who has not been examined in Court on oath and a dying man, normally, is not expected to implicate innocent persons falsely. With these guidelines, I proceed to scrutinise the evidence adduced by the prosecution in this regard.

9. The trial Court has discussed the evidence of witnesses who claimed to have arrived at the scene of occurrence on hearing alarm raised by injured Madan Kumar Sinha, in paragraph 11 of its judgment. It has mentioned there in that P.W. 2 Md. Zafir was the first person to go near the injured Madan Kumar Sinha on hearing his alarm when he was returning from his boring. P.W. 2 claimed that injured Madan Kumar Sinha told him that appellant Lakshman Mahto has stabbed in his abdomen and appellant Chandrika Singh had stabbed him on his back and other four appellants Lalan, Chandeshwar, Bacha Singh and Mahesh were also with the assailants. P.W. 19, the I.O., had found the boring of P.W. 2 at a distance of 100 yards north of the P.O. and thus it was natural that on his return from his boring he could reach at the P.O. at the earliest". P.W. 2 named P.W. 7 Abdul Rajak as the second man who had reached near the injured and thereafter he named P.Ws. 1, 3, 5, 9 and 16 as the persons who arrived there and amongst them except P.W. 16, all were related to deceased Madan Kumar Sinha. It was argued on behalf of the appellants that not much weight should be given to their testimony. The learned trial Court has rightly observed that only on the ground of relationship, their evidence cannot be brushed aside and that all that was necessary was that such evidence should be carefully scrutinised. The trial Court further held that these witnesses were cross-examined at length and on

careful consideration of it, he could not get any ground to disbelieve them. It was also rightly held by the trial Court that the statements of witnesses were consistent and corroborating to each other.

10. P.W. 16 claimed to have wrapped a towel around the injury in the abdomen of Madan Kumar Sinha. P.W. 1 Lakshmeshwar Frasad, uncle of the deceased, claimed to have gone at the P.O. where he found Madan Kumar Sinha lying in the way near the orchard. He claimed that P.Ws. 4, 9 and 11 had also gone with him and P.Ws. 2 and 7 had also reached there. He stated about the oral dying declaration of Madan Kumar Sinha naming these appellants and clearly alleging that Lakshman Mahto had given a dagger blow in his abdomen and Chandrika Singh had also given a dagger blow on his shoulder. Though his attention was drawn towards so called contradictory statement of this witness in paragraph 21 of the cross-examination but that attention was not drawn in a proper way. The attention of P.W. 1 was not drawn towards his statement made before the police by this witness rather his attention was drawn towards the statement of the witness made in his examination-in-chief. Such procedure is not permissible in law. It appears that the defence tried to establish that this witness had not named appellants Bacha Singh, Chandeshwar Singh, Lalan Singh and Mahesh Mahto as the person who had caught him but from paragraph 22 of the cross-examination of I.O. (P.W. 19) it is clear that P.W. 1 had named the aforesaid four persons though he had not stated that they had caught him. Thus, at least this much is established that all the appellants were present there as per statement of P.W. 1 made before the police. P.W. 2 supporting the evidence of P.W. 1 stated that when he was there, Madan Kumar Sinha had not become unconscious and that Madan Kumar Sinha had fallen down at a distance of 40 laggas south of the orchard of Baijnath Singh and that the foot-path was one and half cubic wide. P. W. 3 Anil Kumar Verma, P.W. 4 Navijan Sah, P.W. 5 Ram Swaroop Mandal, P.W. 7 Abdul Rajak, P.W. 9 Raghunath Prasad (father of the deceased), P.W. 11 Umesh Prasad and P.W. 16 Ganesh Jha corroborated the evidence of P.Ws. 1 and 2 regarding oral dying declaration of Madan Kumar Sinha stating that Lakshman Mahto had given a dagger blow in his abdomen and Chandrika Singh had assaulted him with dagger on back and that other four appellants had surrounded him. Injured Madan Kumar Sinha was carried to Sheohar Referral Hospital by P.Ws. 1,3,5,11 and 16 where he was treated.

11. When Madan Kumar Sinha (deceased) in injured condition was brought to Sheohar Referral Hospital, his fardbeyan (Ext. 4) was recorded at" 11.05 p.m. by P.W. 20 A.S.I. Siudhu Paswan. I have discussed above that after the death of Madan Kumar Sinha his fardbeyan (Ext. 4) under the law, would be treated as dying declaration. In the fardbeyan the deceased had alleged that on way to his house when he passed near the orchard of Baijnath Singh, the accused persons came out of the orchard and while Lakshman Mahto gave a dagger blow in his abdomen, Chandrika Singh had inflicted injury on his shoulder by dagger and Bacha Singh and two to three others had caught him. It was also alleged that he had differences with Lakshman Mahto regarding toddy shop and there was land

dispute with Chandrika Singh. The another dying declaration (Ext. 7) was recorded by the Executive Magistrate Sri G.N. Thakur (P.W. 18) at 1.05 a.m. on 26-9-84 i.e. after two hours of recording of the fardbeyan (Ext. 4). This dying declaration is in question-answer form as per requirement of law. The trial Court in para 14 of its judgment has discussed this dying declaration (Ext. 7) and the circumstances under which, in absence of judicial Courts there, the dying declaration was recorded by an Executive Magistrate. It has also been discussed that P.W. 18 in his evidence has given, in short, the entire account as to how deponent described about the occurrence which took place and that he named all the six appellants in his dying declaration.

12. The dying declaration (Ext. 7) was assailed on behalf of the appellants on the ground that no signature or thumb impression of Madan Kumar Sinha was taken by the Magistrate (P.W. 18) and as such it was claimed that such dying declaration cannot be relied upon and, in support thereof, reliance was placed on behalf of the appellants on a decision reported at State of U.P. Vs. Shishupal Singh, . In that case the dying declaration was neither signed by the deceased nor it contained date and time of occurrence and no explanation was given that the deceased was not in a position to sign the dying declaration and as such the cause given, resting on such dying declaration, was not found sufficient for safely basing the conviction of the accused. The learned trial Court while discussing this point in para 18 of its judgment has held that in this present case the Magistrate (P.W. 18) had given explanation that he had the impression that signature of the deponent on the dying declaration was not necessary. He had further stated in cross-examination that the patient was in his senses and the doctor was present there. P.W. 14 Dr. Wasim Siddiqui, in his evidence while describing the two injuries found on the person of Madan Kumar Sinha, stated that the patient had made statement before the police in his presence and that in treatment he had given him glucose and Hemasil and after transfusion he became fully conscious and then his statement was recorded by the Magistrate also. This clearly indicated that Madan Kumar Sinha was in a fit mental condition when his dying declaration (Ext. 7) was recorded. P.W. 14 stated that he had sent requisition to police and Magistrate for examination of the patient. He proved the bed head ticket (Ext. 6/1) which explains the condition of the injured.

13. It has been pointed out by the trial Court in para 18 of its judgment that as per entry made in the bed head ticket (Ext. 6/1) and the statement of P.W. 18 the right hand of the injured was busy for intravenous application of glucose and Hemasil and as such his signature or thumb impression could not be taken. The trial Court relied on a decision of Sikkim High Court in the case of Urgen Sherpa Vs. State of Sikkim, where absence of signature or the thumb impression was not considered essential requirement, if the deponent was not able to put his signature or thumb impression. The trial Court also held that when the dying declaration was recorded by a competent Magistrate in a proper manner i.e. in question-answer form, such declaration stood on much higher footing than on the oral testimony. In case of Sambhu Singh Vs. The State of Bihar, a Division

Bench of this Court held that where the Magistrate, on being satisfied that injured was in fit state of mind and was in a position to make the statement recorded the dying declaration, without getting doctor's certificate, the Magistrate being responsible officer, his testimony should not unnecessarily be doubted. Here in this case the evidence of doctor (P.W. 14) and the bed head ticket (Ext. 6/1) indicate clearly that the patient was in a fit state of mind. P.W. 18 has given the explanation as to why he did not get the signature or thumb impression of the patient. The other test was as to when this dying declaration was received by the I.O., P.W. 19, S.I. Jogendra Singh. The Investigating Officer of this case clearly stated in his evidence that he received the fardbeyan and dying declaration (Ext. 7) together. It is important to note that P.W. 19 was suspended for siding with the accused persons. Thus, this dying declaration (Ext. 7) was promptly sent to the I.O. and there was no question of any interpolation in it. The decision, reported in State of U.P. Vs. Shishupal Singh, will not apply in this case as Ext. 7 contained the date and time of recording and the explanation has been given, as discussed above, that the deceased was not in a position to sign. Besides this, his case did not rest on said Exhibit 7 only as the fardbeyan was also recorded on the statement of the injured who subsequently died and there are evidence of witnesses, discussed above, regarding oral dying declaration also.

14. The settled principle of law is that a dying declaration must be closely scrutinised for the truthfulness bearing in mind that the statement was by a person who has not been examined in Court on oath and that a dying man normally is not likely to implicate an innocent person falsely. Madan Kumar Sinha succumbed to his injuries. P.W. 13 Dr. Awadh Kishore who held post-mortem examination on the dead body of Madan Kumar Sinha and proved the post-mortem report (Ext. 5) described injuries and the injuries found by him on the person of the deceased fully tallied with the injuries found by P.W. 14 and described in injury report (Ext. 6).

15. The learned Counsel for the appellants, in course of (sic) submitted that time of occurrence noted on the formal F.I.R. was 7.00 p.m. and the question of visibility and identification would arise. The trial Court has rightly held that time of occurrence as mentioned in the fardbeyan in Roman digit was 6.00 p.m. which the office recording the formal F.I.R. wrongly treated as 7 p.m. Thus, the time of occurrence was 6.00 p.m. and as such identification of the accused persons by the deceased cannot be doubted. Another discrepancy was pointed out by the learned Counsel for the appellants regarding place of occurrence as mentioned in the dying declaration (Ext. 7) where the deceased had stated that he was assaulted in the orchard, but in the fardbeyan it was mentioned as "near the orchard". The I.O. P.W. 19 also described the P.O. as a foot-path near the orchard. Thus, I do not find any discrepancy regarding place of occurrence which was the foot-path near the orchard.

16. The dying declaration (Ext. 7) was also assailed on the ground that it

contained the names of all six appellants whereas in the fardbeyan (Ext. 4) which was recorded only two hours ago, injured Madan Kumar Sinha had named only three accused persons, namely, Laksham Mahto, Chandrika Singh and Bacha Singh and two to three others. It was submitted that naming of other three appellants was due to tutoring in the hospital where the patient was surrounded by his own men. The learned Addl. P. P. rightly submitted that there was no inconsistency in both the dying declarations as the manner of occurrence, the weapon used were the same and while in Exhibit 4 three names were mentioned along with two to three others unnamed, in Exhibit 7 all six names were disclosed. The learned trial Court has discussed this point in paragraph 23 of its judgment and has rightly held that omission of the deceased to mention the names of three accused persons out of six persons in his statement before the police is no ground to disbelieve his subsequent statement (Ext. 7) in which he disclosed the names of all six persons before the Magistrate. The learned Addl. P. P. placed reliance on a decision of the case of Bolem Bhasker Rao v. State of Andhra Pradesh, reported at 1996 SCC 49, where it was held that non-mentioning of the names of one of the participants in earlier dying declaration recorded by the I.O. was not fatal to the prosecution and possibility of the deceased failing to remember his name due to injuries cannot be ruled out. Thus, I do not find any merit in this objection also, raised on behalf of the appellants.

17. Sri Vindhya Keshri Kumar, the learned Counsel for the appellants contended that those appellants against whom there was no allegation of assault should not have been convicted in absence of clear proof that they had any common intention to commit the crime. I do not find any merit in this argument as involvement of four non-assaulting appellants was clear from the allegation that they had surrounded Madan Kumar Sinha. The learned Addl. P. P. rightly submitted that when they came together and went together, it should be inferred that they shared the common intention. He placed reliance on a decision, reported at Krishnan and another Vs. State of Kerala, where it was held that proof of overt act was not essential for the common intention. Thus, even if the four appellants did not cause injury, it cannot be inferred that they did not share the common intention with the co-accused who caused the fatal injury.

18. Summing up the entire discussions made above, I find no merit in all the three appeals and, accordingly, they are dismissed. The bail bonds of the appellants who are on bail are hereby cancelled and they are directed to surrender in the Court below forthwith and the trial Court is also directed to take steps for their arrest to serve out the remaining portion of their sentence.

D.P.S. Choudhary, J.

19. I agree.