
(2014) 08 JH CK 0080
In the Jharkhand High Court
Case No : Cr. Appeal (DB) No. 384 of 2004

Mangal Koya

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 32, 33
Penal Code, 1860 (IPC) — Section 302, 304B, 307

Citation : (2015) 2 AJR 16 : (2014) 4 JLJR 318

Hon'ble Judges : Dhirubhai Naranbhai Patel, Acting C.J.; P.P. Bhatt, J

Bench : Division Bench

Advocate : D.K. Chakravarty, Advocate for the Appellant; Pankaj Kumar, Advocate for the Respondent

Judgement

Dhirubhai Naranbhai Patel, Actg. C.J.

1. This appeal has been filed against the judgment of conviction dated 25th September, 2003 and order of sentence dated 27th September, 2003, passed by the Additional Distt. & Sessions Judge, Fast Track Court-II, East Singhbhum, Jamshedpur in Sessions Trial No. 131 of 2002, whereby and whereunder this appellant has been convicted for committing murder of Mangal Lakra and sentenced to undergo Rigorous Imprisonment for Life. This appellant has also been convicted and sentenced to undergo Rigorous Imprisonment for two years u/s. 27 of the Arms Act.

"Prosecution Case:

It is the case of the prosecution that on 15th June, 2001 at 19.45 hrs. (7.45 P.M.) Fardbayan of informant Mangal Lakra (deceased) was recorded by the Police in the Emergency Ward of MGM Hospital, Jamshedpur that on 15th June, 2001 at 13.30 hrs. (i.e. 1.30 P.M.) while informant was pulling the cable for his friend Sohan Kujur from the adjacent school building, Mangal Koya (accused)

came there and forbade the informant to do so and asked him to take Dish connection from him. The Informant refused and pulled the cable and Mangal Koya left. On the very same day, i.e. on 15th, June, 2001, at about 17.30 hrs. (i.e. 5.30 P.M.), while informant was at his house washing his mouth, Mangal Koya came there and asked the informant to accompany him to R.D. Tata School for a talk regarding Dish cable wire. Informant, in good faith/accompanied Mangal Koya to the field of R.D. Tata School. They talked while walked and during such course when informant turned back, Mangal Koya took out the pistol from his waist and fired at his back. Blood oozed out from his back and stomach and Mangal Koya filed away. Thereafter when informant, crying and shouting, returned to his house, Babloo and two other boys of his Basti took him to the MGM Hospital where his treatment was going on. He further alleged that occurrence took place at about 17.45 hrs.

2. Details regarding witnesses in a tabular chart

Argument on behalf of the appellant

3. Major omission, contradiction and improvement in the depositions: Counsel for the appellant submitted that there are major omissions, contradictions and improvements in the deposition of prosecution witnesses, which was not properly appreciated by the trial court and hence judgment of conviction and order of sentence passed by the trial court deserves to be set aside.

4. Offence not proved beyond reasonable doubt: It is further submitted by counsel for the appellant that prosecution has failed to prove the offence of murder beyond reasonable doubt. In support of this contention, counsel for the appellant argued on several points, which are as under:

There is no eye witness to the incident.

P.W. 1., P.W. 2 and P.W. 3 never stated about any dying declaration: As per case of the prosecution when Mangal Lakra (deceased) was fired at by Mangal Lakra, he, in the injured condition, fell down in front of the house of his sister (P.W. 1), but in her deposition sister of the deceased (P.W. 1) never stated about any oral dying declaration made by the deceased. P.W. 2 and P.W. 3, who had taken the deceased to the hospital in an injured condition, have not stated before the trial court that there was an oral dying declaration of the deceased. Thus, neither the sister of the deceased (P.W. 1) nor P.W. 2 and P.W. 3, who took Mangal Lakra (deceased) to the Hospital, stated before the learned trial court that injured Mangal Lakra has ever stated before them that it is this appellant who fired at him.

P.W. 4 is a hearsay witness.

P.W. 5: This witness has stated in paragraph 3 of his deposition that Mangal Lakra was unconscious when he went to see him at the hospital. Thus, there can not be a dying declaration given by Mangal Lakra before this witness. This aspect of the matter has not been properly appreciated by the learned trial court.

P.W. 7 and P.W. 9: Dr. Lalan Choudhary (P.W. 7) is the doctor who carried out post mortem examination of deceased Mangal Lakra and Dr. N.K. Sinha (P.W. 9) has treated injured Mangal Lakra.

As per last paragraph of the deposition of P.W. 9 (Dr. N.K. Sinha of M.G.M. Hospital at Jamshedpur), he is not sure whether the patient was conscious or not at the time of admission.

Thus, P.W. 5 and P.W. 9 have not stated in before the learned court that Mangal Lakra was conscious at the hospital.

The person who recorded the dying declaration not examined by the prosecution: The police officer, who recorded the so-called statement of Mangal Lakra in the hospital, which is treated as a dying declaration by the trial court, was also not examined by the prosecution. This makes the whole situation doubtful about the consciousness of Mangal Lakra as except P.W. 6, nobody deposed that Mangal Lakra was conscious at the hospital.

No endorsement of any doctor of the hospital on the dying declaration: Moreover, no endorsement has been taken by the police upon the dying declaration of any doctor of MGM Hospital.

Therefore, in totality of these evidences on record, prosecution has failed to prove the offence of murder committed by this appellant beyond reasonable doubt. Hence, judgment of conviction and order of sentence passed by the learned trial court deserve to be set aside.

5. Reported decisions cited in support of the aforesaid argument: Counsel for the appellant has also relied upon the following decisions:--

- (a) Decision rendered in the case of Sukhar Vs. State of Uttar Pradesh, .
- (b) Decision rendered in the case of Smt. Shakuntala Vs. State of Haryana, .
- (c) Decision rendered in the case of Panchanand Mandal @ Pachan Mandal and Another Vs. State of Jharkhand, paragraphs 14-15.

On the basis of the aforesaid decision it is further submitted by counsel for the appellant that looking to the evidence of the prosecution witnesses, in absence of any evidence about the consciousness of the victim when he was hospitalised and in absence of any endorsement of any medical officer upon the dying declaration about the consciousness of the patient and in absence of the evidence of the Investigating Officer, who has recorded the dying declaration, it can not be said that the dying declaration is proved beyond reasonable doubt and if the dying declaration is not proved beyond reasonable doubt, and as there is no eye witness to the offence of murder, the judgment of conviction and order of sentence deserve to be quashed and set aside.

6. Period of custody: This appellant has remained in judicial custody since approximately last 11 years.

7. Arguments of the A.P.P.: Counsel for the State, learned A.P.P. submits that no error has been committed by the learned trial court in appreciating the evidences and rightly convicted and sentenced the appellant accused. In support of his above contention, learned A.P.P. argued on the following points:

8. Dying declaration is proved beyond reasonable doubt on the basis of the deposition of P.W. 6 and P.W. 5: It is submitted that there is a dying declaration, recorded by a police officer, signed by P.W. 6 and looking to the examination-in-chief and cross-examination of P.W. 6 and cross-examination of P.W. 6 the factum of dying declaration is proved by the prosecution beyond reasonable doubt. The fact that Mangal Lakra was conscious as on the date on which the dying declaration was recorded, i.e. on 15th June, 2001 at about 19.45 hrs, has been proved by P.W. 6 beyond reasonable doubt. It has also been submitted by the P.W. 5 in Para 2 of his deposition that he was also present when the dying declaration was reduced to writing. These two witnesses have proved the dying declaration and once the dying declaration is proved, there is no need of any corroborative piece of evidence.

9. Counsel for the State has relied upon the following decision in support of his contentions:--

Smt. Shakuntala Vs. State of Haryana, .

Learned A.P.P. submitted on the basis of aforesaid two decisions that once there is a cogent, convincing and reliable piece of evidence, which prove the dying declaration of the deceased, there is no reason not to believe the factum of the dying declaration.

Medical evidence corroborative of the dying declaration: This appellant has committed murder of the deceased by causing firearm injuries. Medical evidence also corroborates the dying declaration.

Thus, the fact that the prosecution has proved the offence of murder beyond reasonable doubt is properly appreciated by the trial court and therefore, this appeal may not be entertained by the trial court.

Observation of this court

10. Facts of the case on the face of record:

Having heard both sides and looking to the facts and circumstances of the case, it appears that the incident has taken place on 15th June, 2001 at about 19.45 hrs. The informant Mangal Lakra has given his Fardbayan to the police to Golmuri Police Station at M.G.M. Hospital, Jamshedpur in the Emergency Ward that on the very same day, i.e. on 15th June, 2001 at 13.30 hrs. while the informant was pulling cable of Dish from the adjacent school for his friend Sohan Kujur, he was asked by the appellant not to do so. In spite of that the deceased completed his work. Later on, this appellant came to his house and asked the informant to accompany him to the R.D. Tata School, Jamshedpur, where he fired at the back

of the informant injuring him. Detailed statement has been given and there is a signature of the informant on this statement, which is recorded by the police. On the basis of this statement a case was registered by Golmuri Police Station as Golmuri P.S. Case No. 119 of 2001. Investigation was carried out. Initially the offence under Section 307 I.P.C. was registered. Later on, when Mangal Lakra expired during the course of treatment on 22nd June, offence of murder was added. Upon completion of investigation charge-sheet was filed and the case was committed to the court of sessions, where it was numbered as Sessions Trial No. 131 of 2002. On the basis of depositions of the prosecution witnesses and documentary evidences like Fardbayan, post mortem report etc. learned trial court has convicted this appellant and sentenced him to undergo Rigorous Imprisonment for life under Section 302 of the I.P.C. and further to undergo Rigorous Imprisonment for two years under Section 27 of the Arms Act. Both the sentences were ordered to run concurrently.

Against this judgment of conviction dated 25th September, 2003 and order of sentence dated 27th September, 2003, passed by the Additional Distt. & Sessions Judge, Fast Track Court-II, East Singhbhum, Jamshedpur in Sessions Trial No. 131 of 2002, this appeal is filed.

11. P.W. 1: It appears that P.W. 1 is the sister of the deceased and in front of her house injured Mangal Lakra fell down. This witness, in her deposition, never stated about any oral dying declaration of the victim Mangal Lakra before her as to who caused his injury. Thus, there is No. oral dying declaration before his sister by Mangal Lakra. P.W. 1 has also stated that he came to know about the injury sustained by her brother from the public at large. Thus, she is a hearsay witness.

12. P.W. 2 and P.W. 3: Looking to the over all evidence given by the prosecution, it appears that P.W. 2 and P.W. 3 had accompanied injured Mangal Lakra to the Hospital, i.e. M.G.M. College and Hospital, Jamshedpur. Had there been any oral dying declaration before these two prosecution witnesses, they would have deposed to that effect before the trial court, looking to the deposition given by P.W. 2 and P.W. 3, namely Bablu Kujur and Sohan Kujur, they have not supported the case of the prosecution and therefore, they have been declared hostile. Thus, these two witnesses have also not stated anything before the trial court about the so-called dying declaration or whether Mangal Lakra was conscious in the hospital.

13. P.W. 4: Looking to the deposition of P.W. 4, who is the brother-in-law of the deceased, it appears that he has deposed before the court that he has not seen the incident but came to know from the public at large that Mangal Koya has caused firearm injuries upon deceased Mangal Lakra. Thus, he is also a hearsay witness. Nothing has been stated by this witness about the consciousness of Mangal Lakra or about any oral dying declaration.

14. P.W. 9: Looking to the deposition of P.W. 9 (Dr. N.K. Sinha), who has initially

treated Mangal Lakra, it appears that he has prove the injured report, which is at Ext.-6. He has stated in his deposition, in the last paragraph, that he is not sure whether Mangal Lakra was conscious or not.

15. Thus, it appears from the over all evidences on record, i.e. from the deposition of P.W. 1, P.W. 2, P.W. 3, P.W. 4 and P.W. 9, it was not proved as to whether patient Mangal Lakra was conscious in the hospital or not.

16. P.W. 5 and P.W. 6: Now, much reliance has been placed by the prosecution upon the deposition of P.W. 5 and P.W. 6.

Looking to the deposition of P.W. 5 (Kundu Lakra), it appears that this witness has stated in his examination-in-chief in para 1 that Mangal Lakra told them at the hospital that the appellant caused firearm injury upon him. While in his cross-examination, he has stated that Mangal Lakra was unconscious at the hospital. Cross-examination is in the hand of the defence. Every examination-in-chief is to be tested through cross-examination. Ex-amination-in-Chief cannot be accepted by the court as gospel truth in isolation of the cross-examination and the deposition should be treated as a whole. Keeping in mind this basic principle of criminal jurisprudence and looking to the evidence of P.W. 5 in para 3, it is a very doubtful proposition as to whether Mangal Lakra was at all conscious in the hospital.

P.W. 6 has wholly supported the case of the prosecution and has stated before the learned trial court that he was also present when Fardbayan of Mangal Lakra was recorded and that he has seen the Fardbayan.

17. Thus, there is one witness in favour of the prosecution, whereas from the deposition of six other prosecution witnesses consciousness of Mangal Lakra in MGM Hospital. Jamshedpur is not proved, beyond reasonable doubt.

18. Police Officer who recorded the Dying Declaration, was not examined: Further, looking to the evidences on record, it appears that the police officer who recorded the dying declaration or the person who has reduced in writing the oral dying declaration has not been examined by the prosecution. This examination is vital to the prosecution, especially when other depositions on record are of hearsay witnesses. If other evidences were cogent, convincing and beyond reasonable doubt, in that situation, non-examination of the police who has reduced in writing the oral dying declaration might not be vital to the prosecution, but in the facts of the present case, as stated herein above, when neither the sister of the deceased (P.W. 1) nor the independent witnesses P.W. 2 and P.W. 3, who took injured Mangal Lakra to the Hospital has stated before the trial court about any so-called dying declaration. Similarly, independent witness Dr. N.K. Sinha (P.W. 9), who treated the deceased has stated in the last paragraph of his deposition that he is not sure whether the patient was conscious or not.

19. In this set of circumstances, examination of the police officer, who has

reduced in writing the dying declaration is vital to the prosecution case and in absence of his evidence it cannot be said that the prosecution has proved the dying declaration beyond reasonable doubt. The whole situation casts a doubt about the consciousness of the patient.

20. No endorsement of the attending doctor on the dying declaration: Moreover, there is no endorsement of the doctor upon Fardbayan recorded by the police about the consciousness of the patient. There ought to have been an endorsement of Dr. N.K. Sinha (P.W. 9), who treated injured Mangal Lakra at MGM Hospital, Jamshedpur. On the contrary, this doctor deposed in the last para of his deposition that he is not sure about the consciousness of the patient. Thus, a doubt has arisen as to whether Mangal Lakral was conscious or not and whenever there is a doubt in the mind of this court the benefit of doubt has to be given to the appellant.

21. Period of custody: However, the appellant has already remained in jail for approximately 11 years.

22. It has been held by the Hon"ble Supreme Court in the case of Smt. Shakuntala Vs. State of Haryana, , paragraphs 9, 11 and 12 as under:--

"9. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness.....The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant.....

xxx xxx xxx

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.....

xxx xxx xxx

11. There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

12. The evidence of PWs-5 and 6 clearly established that the dying declaration was made when the deceased was in a fit condition to give declaration. It is to be noted that the accident occurred on 6.4.1997 at about 9.00 a.m. but the deceased breathed her last on 11.4.1997. The doctor (PW-5) has categorically stated that the deceased was in a fit condition to give the statement. The Judicial Magistrate (PW-6) also stated that the deceased was in a fit condition to give the

statement and was able to understand what was being asked and was able to understand what was being asked and she answered specifically in the aforesaid background, it can not be said that the dying declaration is not believable."

(Emphasis supplied)

23. It has been also held by the Hon"ble Supreme court in the case of Sukhar Vs. State of Uttar Pradesh, , paragraph 2 as under:--

"2. Prosecution case in nutshell is that Nakkal appeared at the police station on the date of occurrence at 9.40 a.m., and narrated the incident as to how he was injured by the accused. The police then treated the said statement as First Information Report and started investigation.....It is to be stated that while the trial was pending the injured Nakkal died but the prosecution did not make any attempt to establish how he died or his death is in any way connected with the injury sustained by him on the relevant date of occurrence. Even it is not known as to when he died. The learned Sessions Judge was of the opinion that the FIR recorded by the Investigating Officer and the statement of Nakkal recorded under Section 161 of the Code of Criminal Procedure was admissible under Section 33 of the Evidence Act and relying upon the said material as well as the statement of PW-1 to the effect that the injured told him that the accused, Sukhar IMS fired at him, the learned Sessions Judge convicted the accused/appellant under Section 307, IPC and sentenced him to undergo rigorous imprisonment for five years. On an appeal, the High Court came to the conclusion that the FIR as well as the statement given by the injured to the Investigating Officer is not admissible as dying declaration under Section 32 of the Evidence Act and in our view, the said conclusion is unassailable. The High Court further came to the conclusion that the statement of the injured under Section 161 of the Code of Criminal Procedure could not be held admissible in evidence under Section 33 of the Evidence Act and we do not see any infirmity with the said conclusion....."

(Emphasis supplied)

24. It has been held by the Hon"ble Supreme Court in the case of Panchanand Mandal alias Pachan Mandal & Anr., reported in AIR 2013 SCW 5778 paragraphs 14, 15 and 16.

"14. In the instant case, ominous allegations have been made against the in-laws of the deceased. No specific incident has been stated by the PW 13; Bholia Devi mother of the deceased. No specific incident has been stated by the P.W. 14; Bachchu Saw, brother of the deceased" in their statements. Nothing is on the record to suggest that the deceased was subjected to the cruelty and harassment "soon before her death" and "in connection with the demand of dowry".

15. Thus, we find that practically there was no evidence to prove that there was any cruelty or harassment for or in connection with the demand of dowry soon

before the death of the deceased. Moreover, the deceased has not made any statement in her dying declaration indicating demand of dowry. Defence has successfully created a valid doubt as to authenticity of the dying declaration as the police officer who recorded the same was not examined. Such deficiency in evidence proves fatal for the prosecution case as evidence of cruelty and harassment in general is not sufficient to attract Section 304-B IPC.

16. In view of the above facts, we hold that the prosecution miserably failed to prove the case beyond reasonable doubt. Hence, the conviction and sentence awarded cannot be maintained. We accordingly set aside the impugned judgment dated 10.8.2001 passed by the Session Judge, Deoghar in Sessions Trial No. 158/1999 in respect of Panchanan Mandal and Malti Devi and the judgment dated 20.9.2006 passed by the Division Bench of the Jharkhand High Court in Criminal Appeal No. 447/2007. Appeal is allowed. The accused are directed to be released forthwith, if not required in any other case."

(Emphasis supplied)

25. In view of the aforesaid decisions, examination of the investigating officer who recorded the Fardbayan is must because other prosecution witnesses have not stated about the consciousness of the deceased in the Hospital. On the contrary, one witness (P.W. 5 in paragraph 3 of his deposition has stated that patient was unconscious. No doctor has been examined by the prosecution who says with all firmness that patient Mangal Lakra was conscious. On the contrary, on perusal of the last para of the deposition given by P.W. 9, the doctor who treated Mangal Lakra in the Hospital, it appears that he was not sure whether the patient was conscious or not and therefore, it is very doubtful whether the dying declaration was actually given by the injured Mangal Lakra or not. This aspect of the matter was not appreciated by the learned trial court. In the facts and circumstances discussed above, this criminal appeal is allowed and the impugned judgment of conviction dated 25th September, 2003 and order of sentence dated 27th September, 2003, passed by the Addl. Distt. & Sessions Judge, Fast Track Court-II, East Singhbhum, Jamshedpur in Sessions Trial No. 131 of 2002 is quashed and set aside and the appellant is acquitted from the charges levelled against him. Therefore, this appellant, namely Mangal Koya, who is in judicial custody for nearly 11 years, is directed to be released forthwith, if not wanted in any other case.