

(2020) 01 PAT CK 0066

In the Patna High Court

Case No : Criminal Appeal (DB) No. 301 Of 1994

Munna Shukla

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 18-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 326

Arms Act, 1959 — Section 27

Code Of Criminal Procedure, 1973 — Section 313

Citation : (2020) 01 PAT CK 0066

Hon'ble Judges : Hemant Kumar Srivastava, J;Prabhat Kumar Singh, J

Bench : Division Bench

Advocate : Surya Nilambari, Amicus Curiae, S.C. Mishra

Final Decision : Allowed

Judgement

1. The above stated sole appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and 27 of the Arms Act and has been sentenced to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code and rigorous imprisonment for a term of seven years for the offence punishable under Section 27 of the Arms Act by learned 1st Additional Sessions Judge, Bhagalpur in Sessions Trial No. 437 of 1992 / 31 of 1992 vide judgment of conviction and sentence order dated 13.5.1994. However, both the sentences were ordered to run concurrently.

2. Mojahidpur P.S. Case No. 158 of 1988 under Sections 307 and 326 of the Indian Penal Code and 27 of the Arms Act was registered on 19.11.1988 on the basis of fard-e-beyan of Jayant Kumar, who made his statement before Ram Chandra Prasad (P.W. 10), the then A.S.I. of Kotwali Police Station, on 19.11.1988 at about 9.30 P.M. at B.M.C.H. Emergency Ward, to this effect, that on the same day, he along with P.W. 1 Pappu @ Pradip Sah and P.W. 5 Sadanand Lall Chaurasia was going to the house of Sadanand Modi to take Prasad and at about 9 P.M., when he as well as above stated two persons reached near

Sikandarpur Panhatta Chowk, appellant shot fire of his pistol on him from his back, which hit to him. He, further, claimed that one Shyam Krishna Modi and one unknown persons was also along with appellant, when appellant opened fire on him. He, further, claimed that having sustained injury, he as well as P.W. 1 and P.W. 5 saw the appellant and his associates and identified them and after that he as well as P.W. 1 and P.W. 5 ran towards the house of Sadanand and they entered inside the house of Sadanand and bolted the room from inside but appellant and the above stated two persons followed them and they started pushing the door and also hurled abuses. He, further, claimed that after sometime, the door was opened but in the meantime, appellant and his associates had already fled away from there. He, further, claimed that P.W. 1, P.W. 5 and P.W. 8 (Ratneshwar Vishwakarma) and P.W. 9 (Arun Kumar Sah) witnessed the occurrence and with the help of some other people, they brought him to B.M.C.H. on a rickshaw for treatment where his treatment was going on. However, he expressed his inability to say the motive behind the alleged occurrence. The formal first information report was drawn up on the same day and was sent to Court through special messenger but the formal first information report and fard-e-beyan of the Jayant Kumar informant were produced before the Chief Judicial Magistrate, Bhagalpur on 21.11.1988. It is pertinent to note here that in course of treatment, informant Jayant Kumar died and Section 302 of the Indian Penal Code was added.

3. P.W. 13 Sitaram Singh took charge of investigation and recorded the further statement of informant Jayant Kumar and also recorded the statements of other witnesses. He inspected the place of occurrence but before completion of investigation, he handed over charge of investigation to P.W. 11 Raj Shekhar Prasad by the order of Superintendent of Police, Bhagalpur.

4. P.W. 11 Raj Shekhar Prasad after completion of investigation submitted charge-sheet against appellant and two others.

5. The cognizance of the offence was taken and case was committed to the court of Sessions.

6. The appellant was put on trial before Additional Sessions Judge, Bhagalpur in Sessions Trial No. 437 of 1992 / 31 of 1992 as the two charge-sheeted accused, namely, Shyam Kishore Modi and Pradip Kumar Verma died before commencement of trial.

7. The appellant stood charged for the offences punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act for causing the death of Jayant Kumar and using firearm for committing the murder of said Jayant Kumar. The appellant denied the charges and claimed to be tried.

8. In order to prove the charges, prosecution examined, altogether, 13 prosecution witnesses and also got exhibited some documents including postmortem report etc.. The statement of appellant was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution story and claimed his false

implication.

9. Two witnesses were examined by the court as court witnesses.

10. No evidence was adduced by the appellant in support of his defence but from perusal of the statement recorded under Section 313 of the Code of Criminal Procedure as well as trend of cross-examination of the prosecution witnesses, it is obvious that the defence of the appellant was denial of the prosecution claim.

11. Learned Additional Sessions Judge having relied upon testimonies of P.W. 1 and P.W. 5 as well as treating the fard-e-beyan of Jayant Kumar as his dying declaration convicted and sentence the appellant in the manner as stated above.

12. Learned Amicus Curiae, Ms. Surya Nilambari Advocate, appearing for appellant assailed the impugned judgment of conviction and sentence order, arguing that the learned trial court failed to appreciate the prosecution evidence in its right perspective. She, further, submitted that the learned trial court committed error in treating the fard-e- beyan of informant Jayant Kumar as his dying declaration. Continuing her submission, she submitted that the learned trial court failed to take note of this fact that informant Jayant Kumar was not in a position to make statement because of his serious injuries. She submitted that the informant (deceased) Jayant Kumar claimed that he sustained firearm injury on his back which travelled through his body and came out from chest and, furthermore, deceased Jayant Kumar claimed that the occurrence took place at 9:00 P.M., whereas his so-called fard- e-beyan was recorded at 9.30 P.M. but the nature of injury found on the person of deceased Jayant Kumar goes to show that having sustained such type of serious injury a person would not be able to make such a long and detailed statement within such a short span of time of occurrence. She, next, submitted that P.W. 10 claimed to have recorded the fard-e- beyan of deceased Jayant Kumar on 19.11.1988 at 9:30 P.M. while he was at Bhagalpur Medical College Hospital and P.W. 10 admitted that after giving the statement, Jayant Kumar died in the hospital. She, further, submitted that P.W. 10 has admitted that when he reached to take statement of informant Jayant Kumar, he saw that the treatment of Jayant Kumar was going on and doctor was present there. He, further, claimed that he sought permission from the concerned doctor for recording the statement of Jayant Kumar but doctor asked him to wait some time and when doctor completed the treatment, he recorded the fard-e-beyan of Jayant Kumar after taking permission of concerned doctor. Learned Amicus Curiae submitted that the aforesaid admission of P.W. 10 goes to show that neither he nor concerned doctor testified the mental and physical condition of deceased before recording his statement, and, furthermore, the P.W. 10 failed to ascertain as to whether deceased Jayant Kumar was in fit mental condition to give statement or not. She submitted that, no doubt, certification of doctor regarding the mental fitness of the statement maker is not necessary before recording the statement of a person but it is boundened duty of a person, who records the statement of an injured person to testify as well as to satisfy himself about the mental fitness of the statement maker but in the present case, there is

nothing to show that P.W. 10 formed his independent opinion regarding the mental fitness of the deceased Jayant Kumar before recording his statement and, therefore, the aforesaid lacuna in the prosecution case creates doubt about this fact as to whether deceased Jayant Kumar was in fit mental condition or not when his statement was recorded. She, further, submitted that according to prosecution case, the fard-e-beyan of deceased was recorded on 19.11.1988 at 9.30 P.M. at B.M.C.H. but admittedly, the fard-e-beyan of deceased was put up before learned Chief Judicial Magistrate, Bhagalpur on 21.11.1988 but no explanation of the aforesaid delay was given by the prosecution and, therefore, the aforesaid delay creates a doubt about genuineness of the fard-e-beyan of deceased. She, further, contended that no blood or other objective evidences were found on the place of occurrence and apart from this, according to prosecution case, the alleged occurrence took place at 9.00 P.M. and, therefore, it is obvious that at the time of alleged occurrence, there was complete dark and the Investigating Officer did not find any means of identification. Therefore, the aforesaid circumstance also makes the prosecution case doubtful.

13. On the other hand, learned Additional Public Prosecutor supported the impugned judgment of conviction and sentence order arguing that P.W. 1 Pappu @ Pradip Sah, P.W. 5 Sadanand Chaurasia and P.W. 8 Ratneshwar Vishwakarma claimed to have seen the alleged occurrence and they, specifically, stated that it was appellant who shot fire on the deceased from his back. He, further, submitted that the aforesaid statement of P.W. 1, P.W. 5 and P.W. 8 is corroborated by postmortem report of deceased. He, further, submitted that, moreover, the case was lodged on the basis of fard-e-beyan of deceased Jayant Kumar, which was recorded within half an hour of the alleged occurrence and, subsequently, informant Jayant Kumar died and, therefore, the fard-e-beyan of deceased informant became his dying declaration. He, further, submitted that in fard-e-beyan, deceased-informant claimed that it was appellant, who shot fire on him. Learned Additional Public Prosecutor, further, submitted that it is not mandatory that before recording the dying declaration or fard-e-beyan, there must be certification of the doctor in respect of mental and physical fitness of the statement maker and if the dying declaration inspires confidence to the Court, the Court can convict the accused solely on the basis of dying declaration. He submitted that in the present case, admittedly, the fard-e-beyan of deceased-informant is his dying declaration and there is no infirmity in the fard-e-beyan of the deceased-informant and, therefore, learned trial court rightly convicted and sentenced the appellant.

14. He, next, submitted that so far as non- finding of blood as well as other signs on the place of occurrence is concerned, the same cannot make any difference, especially, when eye witnesses as well as deceased made specific statement regarding the alleged occurrence.

15. He, next, submitted that, no doubt, the deceased-informant did not disclose the source of light but it is an admitted position that appellant was his neighbour

and the appellant was well known to him from before and the postmortem report goes to show that the firing was made from a very close range and, therefore, it cannot be said that the informant as well as other witnesses were not in position to identify the appellant due to lack of proper light.

16. As I have already stated that, altogether, 13 prosecution witnesses were examined on behalf of the prosecution and out of aforesaid 13 prosecution witnesses, P.W. 1 Pappu @ Pradip Sah, P.W. 5 Sadanand Chaurasia and P.W. 8 Ratneshwar Vishwakarma claimed themselves to be eye witnesses of the alleged occurrence. Furthermore, it is an admitted position that deceased died in course of his treatment and according to prosecution case, before his death, deceased-informant gave his fard-e-beyan to P.W. 10. Therefore, the evidence of P.W. 1, P.W. 5, P.W. 8, P.W. 10 and P.W. 12 are very important.

17. Now it has to be seen as to whether any reliance can safely be placed upon the testimonies of P.W. 1, P.W. 5, P.W. 8 and P.W. 10 and P.W. 12 and as to whether any reliance can safely be placed upon the fard-e-beyan of deceased-informant or not.

18. P.W. 10 Ram Chandra Prasad, the then A.S.I, of Kotwali Police Station, Bhagalpur, claims that on 19.11.1988, he was posted at Police Shivir of B.M.C.H. and on the above stated date at about 9:30 P.M., he recorded the fard- e-beyan of informant-deceased Jayant Kumar. This witnesses, further, claimed that deceased-informant Jayant Kumar put his thumb impression on his fard-e-beyan as he was not in position to sign the fard-e-beyan. This witness, further, claims that P.W. 5 also put his signature on the aforesaid fard-e-beyan. This witness proved the entire fard-e-beyan as Ext. 2 and signature of P.W. 5 Sadanand Chaurasia as Ext. 1 / 4. This witness, further, claimed that after recording the fard-e-beyan, deceased- informant died and, thereafter, he prepared inquest report, which was witnessed by P.W. 5. This witness proved the inquest report as Ext. 3. This witness, further, claimed that deceased-informant was in conscious state and he was in fit state to give his statement. On being cross-examined by the defence, this witness admitted that his statement was not recorded by Investigating Officer. He, further, admitted that he recorded the fard-e-beyan of the informant at the Emergency Ward of B.M.C.H.. This witness, further, admitted that he got information about the deceased-informant from Emergency Ward of B.M.C.H. through P.I. No. 1369 dated 19.11.1988. This witness, further, admitted that when he reached to the Emergency Ward of B.M.C.H. to take statement of deceased- informant, his treatment was going on and the doctor was present there and when he sought permission from the concerned doctor to record the statement of deceased- informant, the concerned doctor asked him to wait for sometime and after sometime when the concerned doctor completed the treatment of deceased-informant, he recorded the fard-e-beyan of deceased-informant after taking permission from the concerned doctor. He also admitted that he took near about half an hour to record the statement of deceased-informant. He, further, stated that the doctor was also present there for near

about 10 minutes and when he finished the recording of fard-e-beyan of deceased-informant, the doctor was not present there. He also admitted that he did not take signature of concerned doctor on the fard-e-beyan of deceased-informant. He, further, stated that, at the time of recording the fard-e-beyan of deceased-informant, deceased-informant was able to speak and when he asked the deceased-informant to sign the fard-e-beyan, deceased-informant told that he could not sign the fard-e-beyan and after that he took thumb impression of the deceased. This witness, further, admitted that he cannot say as to when deceased died but he got information about the death of deceased-informant through P.I. No. 1369.

19. P.W. 1 Pappu @ Pradip Sah claimed that after the alleged occurrence when he went to the house of P.W. 5 Sadanand, he came to know that the deceased-informant was taken to hospital and after that he also went to the hospital where he saw that deceased-informant was giving his statement to police. On being cross-examined by the defence, this witness admitted that when he reached at the hospital, he noticed that the condition of deceased-informant was not proper and he remained in hospital for near about 10 minutes.

20. P.W. 5 Sadanand Chaurasia claimed that he brought the deceased on a rickshaw to the hospital where deceased died within 1-2 hours in course of his treatment. This witness identified his signature on the fard-e-beyan of deceased-informant. On being cross-examined by the defence, this witness claimed that he had put his signature on fard-e-beyan of deceased-informant at about 11 P.M. and his signature on fard-e-beyan of deceased-informant was taken by police. This witness has nowhere stated that in his presence the fard-e-beyan of deceased-informant was recorded and this witness stated only to this extent that police took his signature on fard-e-beyan of deceased-informant. P.W. 8 Ratneshwar Vishkarma claimed that he along with P.W. 5 took the deceased to hospital on a rickshaw and the fard-e-beyan of deceased-informant was recorded by police in presence of P.W. 1 and P.W. 5.

21. P.W. 12 Dr. N.N.Bhagat claimed that he did postmortem examination on the dead body of deceased on 20.11.1988 at 11 A.M. and found following injuries :

(1) Firearm wound of entry 1 cm in diameter margin inverted tattooing in 2 ½ " area. 1 ½ " left of mid spinal line, 12" below on cervical prominence on back.

(2) Firearm wound of exit 1 ¼" in diameter margin inverted 2 ½ " left of mid abdominal line, 1" below left costal margin on left side of abdomen. Furthermore, P.W. 12 found that both the above stated wounds were indicating projectile travelled through the wound of entry, through posterior muscle wall, through left kidney lacerating it, through column and spleen and perforating the stomach and mesentery and through wound of exit. P.W. 12 opined that the aforesaid injuries were antemortem in nature by firearm and cause of death was haemorrhage and shock and the aforesaid injuries were sufficient to cause death. On being cross-examined, P.W. 12 admitted that there was injury on the stomach of the

deceased and the projectile passed through the stomach. P.W. 12 further admitted that the tattooing is possible by firearm, if fire is made within 3-4 feet distance and the tattooing was also possible from one foot as well. He also admitted that in cases as above bleeding is normally profuse and resistance to wound differs from man to man. This witness expressed his inability to say as to what time will take the man to die with like injuries as received by the deceased. This witness also admitted that the Projectile travelled slightly downwards .

22. P.W. 8 Ratneshwar Vishwakarma also claimed himself to be eye witness of the alleged occurrence. He claimed that on the alleged date of occurrence, he had gone to take Prasad at the home of P.W. 5 Sadanand Chaurasia and he reached near a betel shop situated at Panhatta Chowk. He, further, claimed that he purchased cigarette from the above stated betel shop and proceeded towards house of Sadanand Chaurasia (P.W. 5) and at that time P.W. 5, P.W. 1 and deceased were also along with him. He, further, claimed that as soon as they entered in a lane, deceased sustained firearm injury from his back near the house of P.W. 5 Sadanand Chaurasia. He, further, claimed that it was appellant, who shot fire on the deceased and having heard the sound of fire, he turned and saw the appellant and one Shyam Modi as well as one unknown person in electric light. He, further, claimed that he as well as others entered into the house of P.W. 5. The appellant and his associates made attempt to break the door of house of P.W. 5 but after sometime when the appellant and his associates left the place, they came out of the house and deceased was taken to hospital on a rickshaw by P.W. 5. He, further, claimed that he as well as others followed the rickshaw and reached to the hospital where the fard-e-beyan of deceased was recorded by police in his presence as well as in presence of P.W. 1 and P.W. 5. On being cross examined, this witness claimed that he had reached at the house of P.W. 5 at about 8.00 P.M. at remained there till 8.45 P.M. He, further, claimed that when he reached at the house of P.W. 5, he saw the deceased, P.W. 1 and P.W. 5, who were present in the house of P.W. 5 from before. He, further, claimed that he left the house of P.W. 5 at 8.45 P.M. and came at the Chowk where the alleged occurrence took place. He, further, claimed that while he was going to the house of P.W. 5, he had seen the appellant and two others. He, further, claimed that P.W. 5 was not aware of this fact that he was also coming to his house. He, further, claimed that he had made statement before the police to this effect that he had seen the appellant at the place of occurrence. He, further, admitted that his statement was recorded by police after 4-5 days of the alleged occurrence.

23. P.W. 11 Raj Shekhar Prasad, the second Investigating Officer of this case, admitted in his cross- examination that P.W. 8 had not claimed himself to be eye witness of the alleged occurrence before him nor claimed to have seen the appellant and others committing the alleged occurrence. P.W. 11, further, admitted that P.W. 8 had not claimed before him that at the time of alleged occurrence, he was going with deceased. The above stated fact clearly goes to show that P.W. 8 improved his statement in course of trial because in course of investigation, he had not claimed himself to be eye witness of the alleged

occurrence. Moreover, P.W. 1 and P.W. 5 including deceased had also not claimed in their respective statements that P.W. 8 was also along with them when the occurrence took place. Moreover, the learned trial court has also doubted about the claim of the P.W. 8 and, therefore, in my view, no reliance can safely be placed upon the testimony of P.W. 8.

24. In the case of *Jaswant Singh Vs. State (Delhi Administration)* reported in AIR 1979 SC 190, it has been held by the Apex Court that the dying declaration, which is not recorded by a Magistrate has to be scrutinized closely but it is well settled that if the Court is satisfied on a close scrutiny of the dying declaration that it is truthful, it is open to the court to convict the accused on its basis without any independent corroboration.

25. In the case of *Laxman Vs. State of Maharashtra* reported in (2002)6 SCC 710, the Hon'ble Supreme Court has held that before relying upon a dying declaration, the court must decide that the declarant was in a fit state of mind to make the declaration but where the eye witnesses' evidence to that effect was available, mere absence of doctor's certification as to the fitness of the declarant's state of mind would not ipso facto render the dying declaration unacceptable and where the medical certificate indicated that declarant was conscious, it was indeed a hypertechnical view to say that there was no certification as to fitness of state of mind of the declarant.

26. In *Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, Andhra Pradesh* reported in (2007) 15 SCC 465, the Hon'ble Supreme Court held that before relying upon a dying declaration, all attendant circumstances should be considered, including the weapon which injured the victim, nature, and extent of injuries, victim's physical condition, his conduct, and what was said to him and by him and, furthermore, the Hon'ble Supreme Court held in the above stated decision that dying declaration can form the sole basis for conviction but at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth and, furthermore, it is the duty of the court to find that the deceased was in a fit state of minds to make the dying declaration and in order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion and, furthermore, for relying upon the dying declaration, the court must conscious that dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition, mentally and physically, to make such statement.

27. Ext. 2 goes to show that deceased- informant made his statement (fard-e-beyan) on 19.11.1988 at about 9.30 P.M. before P.W. 10 at Emergency Ward, B.M.C.H.. Furthermore, "Ext. 2" goes to show that alleged occurrence took place on the same day at about 9:00 P.M., therefore, the aforesaid fact clearly goes to show that according to prosecution case, the fard-e-beyan of deceased-informant was recorded within half an hour of the alleged occurrence. Furthermore, "Ext. 2"

goes to show that deceased-informant sustained injury from his back and projectile passed through his stomach. The aforesaid fact is also corroborated by the deposition of P.W. 12 as well as postmortem report of the deceased. Furthermore, I find that the projectile passed through the stomach of deceased rupturing almost all organs, such as kidney, spleen etc.

28. P.W. 1, as I have already stated, claimed himself to be eye witness of the alleged occurrence. This witness also claimed that after the alleged occurrence when he reached at the hospital, he saw that the statement of deceased was being recorded by the police. He, further, claimed that he returned to his house and in next morning, he came to know that the deceased died in course of his treatment. This witness claimed that the inquest report of the deceased was prepared in his presence. Admittedly, P.W. 1 has not been made witness on fard-e-beyan (Ext. 2) of the deceased, though P.W. 1 and P.W. 8 claimed that the fard-e-beyan of deceased was recorded in their presence. This witness, further, admitted in his cross-examination that when he reached at the hospital, he saw police and family member of deceased, who were present at the hospital. This witness, further, admitted that when he reached at the hospital, he noticed that the deceased was not in good condition but his treatment was not going on. He, further, admitted that he reached at the hospital within 45 minutes of the alleged occurrence. It is prosecution case that within half an hour of the occurrence, the fard-e-beyan of deceased was recorded by P.W. 10 and before recording the statement of deceased, some treatment was given to the deceased but this witness claimed that when he reached at the hospital, he saw that the condition of deceased was serious and no treatment was given to him till that time. Therefore, it appears that the fard-e-beyan of deceased was not recorded in presence of this witness. Had the fard-e-beyan of deceased recorded in presence of this witness, he would have certainly signed the fard-e-beyan of deceased.

29. Admittedly, P.W. 5 had put his signature on the fard-e-beyan of deceased. P.W. 5 has only identified his signature on fard-e-beyan of the deceased and this witness has, no where, stated that the fard-e-beyan of deceased was recorded in his presence. However, this witness admitted in his cross-examination that he put his signature on fard-e-beyan of the deceased at 11.00 P.M. but P.W. 10 claimed that he recorded fard-e-beyan of deceased at 9.30 P.M. on 19.11.1988. Therefore, it appears that the fard-e-beyan of deceased was not recorded in presence of P.W. 5 and after recording the fard-e-beyan of deceased, the signature of P.W. 5 was taken on fard-e-beyan of the deceased.

30. P.W. 10 claimed that having got information from emergency ward when he reached to emergency ward to take statement of deceased, he saw that the treatment of deceased was going on and the doctor was present there. This witness, further, claimed that he sought permission from doctor to record the fard-e-beyan of deceased but doctor asked him to wait and after sometime when doctor completed the treatment of deceased, he permitted him to take fard-e-beyan of deceased and, thereafter, he started recording the fard-e-beyan of

deceased which was completed within half an hour. This witness admitted that he did not take signature of the concerned doctor on the fard-e-beyan of deceased. The bare perusal of statement of this witness goes to show that before recording the fard-e-beyan of deceased, he did not take any step to get satisfied himself about the mental and physical condition of the deceased and only on the basis of permission given by concerned doctor, he recorded the fard-e-beyan of deceased. Admittedly, the doctor, who gave permission to P.W. 10 to record the fard-e-beyan of deceased, was not examined by the prosecution before the trial court and non-examination of the aforesaid doctor by the prosecution appears to be fatal for prosecution case because it was the said doctor, who was competent to say as to whether deceased was in fit state of mind to make statement or not. P.W. 10, further, claimed that he took the signature of witnesses, immediately, after recording the fard-e-beyan of deceased but as I have already stated that P.W. 5 admitted in his cross-examination that he put his signature on fard-e-beyan of deceased at 11.00 P.M.

31. The bedhead ticket of deceased was brought by prosecution on record and the same was exhibited as Ext. 3. The perusal of bedhead ticket of deceased goes to show that the deceased was admitted at hospital on 19.11.1988 at 9.30 P.M. and at the time of admission, he was conscious but the doctor could not record his blood pressure and the pulse of deceased was in a very low volume. Furthermore, at the time of admission, firearm injuries were found on the person of the deceased. Furthermore, Ext. 3 goes to show that again the deceased was examined by the doctor, who found the deceased in conscious state but pulse was feeble and the blood pressure was not recordable. Again the deceased was examined on the same day at 11.20 P.M. and doctor observed that deceased was in shock and pulse was feeble and on 11.40 P.M. the deceased was found restless and pulse was very feeble and again B.P. could not be recorded. However, on 20.11.1988 at 12.10 A.M., deceased was declared dead. Ext. 3 goes to show that when deceased was brought to the hospital, he was in conscious state but his condition was very serious. Moreover, Ext. 3 goes to show that deceased was brought to hospital at 9.30 P.M. on 19.11.1988 in a very critical condition and within 1 and ½ hour, he went in shock. P.W. 12 also admitted that the deceased had sustained firearm injury on his back which passed through his body damaging several organs of the deceased. Therefore, all the above stated facts go to show that the condition of deceased was precarious and though he was in conscious state but there is nothing on the record to show as to whether he was in fit state of mind to make his statement or not. As I have already stated that the presence of P.W. 1, P.W. 5 and P.W. 8 at the time of recording the fard-e-beyan of the deceased appears to be doubtful and the doctor, who had permitted P.W. 10 to record the statement of deceased, was not examined and, therefore, in the aforesaid circumstance, the fard-e-beyan of deceased appears to be doubtful and, in my view, it would not be safe to place reliance upon the so-called fard-e-beyan of deceased.

32. As I have already stated that P.W. 1, P.W. 5 and P.W. 8 claimed themselves to

be eye witnesses of the alleged occurrence but P.W. 8 has admitted that his statement was recorded by police after 4-5 days of the alleged occurrence and, furthermore, the Investigating Officer admitted that P.W. 8 had not claimed himself to be eye witness of the alleged occurrence before him and, therefore, no reliance can safely be placed upon the statement of P.W. 8.

33. P.W. 1 and P.W. 5 claimed that alleged occurrence took place at 9 P.M. near Chowk and, admittedly, just after the alleged occurrence, P.W. 13 inspected the place of occurrence but he did not find any blood on the place of occurrence. P.W. 13, further, admitted that he also did not find any blood inside the house of P.W. 5 or in front of house of P.W. 5. P.W. 13 admitted that he had found only one shoe of the deceased, which was seized by him. The prosecution has proved the aforesaid seizure list as Ext. 5 but not a single witness was produced by the prosecution to prove that the seized shoe was of the deceased. P.W. 13, further, admitted that he inspected the place of occurrence in the light of torch. P.W. 1 has, no where, stated about the source of light and, similarly, the deceased had also not claimed in his fard-e-beyan about source of light but P.W. 5 claimed that he identified the appellant and others in electric light. It is surprising enough that when there was electric light over the place of occurrence, why the P.W. 13 inspected the place of occurrence in the light of torch. Moreover, P.W. 13 has, no where, stated about the electric light over the place of occurrence. Admittedly, the alleged occurrence took place at about 9.00 P.M. and the deceased sustained injury from his back side. Although, the firing was made from close range but except P.W. 5, none of the prosecution witness disclosed about the source of light and so far as P.W. 5 is concerned, his statement is contradicted by P.W. 13.

34. Admittedly, the statement of appellant was recorded under Sections 313 of the Code of Criminal Procedure but prosecution did not ask any question about so-called statement made by deceased before his death and only claim of P.W. 1 and P.W. 5 was put before the appellant in course of recording his statement under Section 313 of the Code of Criminal Procedure. Although the present case was initiated on the basis of so-called fard-e-beyan of deceased but the aforesaid fard-e-beyan must be put before the appellant at the time of recording his statement under Section 313 of Code of Criminal Procedure because the prosecution was intended to use the aforesaid so-called fard-e-beyan of deceased as his dying declaration. Therefore, in my view, when prosecution failed to put the so-called dying declaration of the deceased before the appellant at the time of recording his statement under Section 313 of the Code of Criminal Procedure, a serious prejudice was caused to the appellant.

35. On the basis of above stated overall discussion of the prosecution evidence as well as materials available on the record coupled with circumstances, I am of the view, that the prosecution failed to prove its case beyond all shadow of reasonable doubts and the appellant is entitled to get benefit of doubt. Accordingly, this criminal appeal is allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellant is acquitted

of the charges framed against him giving benefit of doubt. The appellant is on bail. He is discharged from the liabilities of his bail bonds.

32. Let copy of the first page and last page of this judgment be handed over to Ms. Surya Nilambari, learned Amicus Curiae, so that she could make claim for her remuneration before the appropriate authority.