

(2010) 02 PAT CK 0008
In the Patna High Court

Sukhdeo Sah and Shambhu Rai

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Citation : (2010) 02 PAT CK 0008

Final Decision : Allowed

Judgement

Dharnidhar Jha and Rakesh Kumar, JJ.—The two appellants, Sukhdeo Sah and Shambhu Rai, were put on trial for charges under Sections 328/34 and 302/34 of the Indian Penal Code by 1st Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 210 of 1994. By judgment dated 12th August, 2003, the learned judge found the two appellants guilty of committing both the offences in furtherance of their common intention and while hearing on sentence on the 13th of August 2003, directed both the appellants to undergo rigorous imprisonment for life as also to pay a fine of Rs. 1,000/- each for committing offence u/s 302 read with Section 34 of the Indian Penal Code. As regards conviction of the appellants u/s 328/34 of the Indian Penal Code each of them were directed to suffer rigorous imprisonment for eight years as also to pay a fine of Rs. 500/- each. The learned judge did not prescribe any alternative sentence in case the appellants had not paid the fine imposed upon each of them. The two appellants bring in question the finding of the guilt recorded by the learned trial Judge and also appropriateness of the sentence passed upon each of them through the present appeal.

2. The prosecution story comes through P.W.9, who happens to be father of the deceased, Shiv Chandra Rai which is contained in the fardbeyan of P.W.9. It was stated by the informant in that document which has not been brought on record of the case even by tendering it in evidence, that his son, the deceased Shiv Chandra Rai, aged about 25 years had gone to Sarsanda Chowk in the previous evening at about 6 P.M. He came back to his house at about 10 P.M. when P.W.9, his wife (P.W.7) and his daughter-in-law (P.W.8) were all sitting together and was

discussing some domestic matters. As soon as the deceased came to his house he started vomiting. The informant and others thought that the deceased had taken ill and enquired about his health from the deceased, upon which it was stated by the deceased that he was not ill rather the two appellants had administered some liquid substance out of a bottle in the hotel of Sukhdeo Sah and soon thereafter he felt ill and started vomiting. P.W.9 further stated that the deceased divulged to him that bottle containing liquid had been fetched by appellant Shambhu Rai after purchasing it.

3. After learning the above facts from his son the informant got suspicious that the two had acted in tandem and possibly they had administered poison to his son. The informant was, thereafter, deeply absorbed in attending to his ailing son and started a search for a vehicle so that he could be shifted to Sadar Hospital, Muzaffarpur for specialized treatment. It was stated by the informant that on account of the night being quite dead, there was some delay in finding out a vehicle. As soon as he got it, he with the help of his villagers started with his son for Sadar Hospital, Muzaffarpur but unfortunately his son died on way to the hospital.

4. The informant stated that when the deceased was narrating to him the fact of being administered some poisonous substance by the two appellants, there was none except himself, his wife and his daughter-in-law in the house who had also picked up the statement of the deceased. The informant further alleged that they individually also learnt subsequently from the villagers about the occurrence who may testify to the above facts as well.

5. So far as motive for the commission of offence was concerned, the informant narrated police that a few days prior to the occurrence there had been a ceremony of worshiping a particular deity and there had been an altercation between his son on the one hand and the appellants on the other and the appellants threatened him to settle the scores with the deceased subsequently. The informant, as such, alleged that it was on account of earlier threatening that his son had been administered poison and killed.

6. On the basis of fardbeyan of P.W.9 the first information report of the case was drawn up. It appears that investigation was taken up and the dead body was sent for postmortem examination which was conducted by Dr. Manoranjan Kumar Srivastava (P.W.11), who did not find any internal or external injury on the dead body of the deceased, Shiv Chandra Rai and, as such, preserved some part of viscera which was forwarded by the police to the Forensic Science Laboratory for being chemically analyzed. The evidence of P.W.12 (Dr. Pramod Kumar Jha) indicated that that the viscera which was sent to the Forensic Science Laboratory was found containing highly poisonous substance "Indo-Sulphan" which according to P.W.12 was a Chloro-organic insecticide used in agriculture for killing pests and insects and it was highly poisonous. In spite of the fact the investigating officer who conducted the most parts of investigation has not been examined, but we could record a finding that after completing investigation what

was left to be done, P.W.10, Sub.Inspector of Police, Ram Briksh Rai was to lay charge sheet before the Magistrate sending up the two appellants for trial after having recorded the statement of only one witness Ram Chandra Pandey (P.W.6) on 17.10.1989.

7. The prosecution examined as many as twelve witnesses in support of the charges. P.W.9 Ram Briksh Rai and his wife, P.W.7 Phool Kumari Devi gave evidence on the material facts of the case along with P.W.8 Raj Banshi Devi that the deceased had gone out of his house with the appellants to Narsanda Chowk from where he was brought by one of the appellants, namely, Shambhu Rai to his house by a bicycle and was left there. The deceased was found not within his normal health as he started vomiting and he was making incoherent statement and that too with difficulty and further that he vomited and lost his consciousness. Thereafter, the informant with the help of his co-villagers started for hospital and he died on the way to the hospital. In addition to above fact the three witnesses, P.Ws.7, 8 and 9 appeared making a statement as if the deceased had made an oral dying declaration that it were the two appellants, who had administered poison to him out of a bottle. So far as the other witness like P.W.9 is concerned he turned hostile on account of not supporting any fact of the prosecution case. Other witnesses like P.Ws. 2, 3, 4, 5 and 6 are the persons who claimed coming to the house of the informant and gave evidence on various facts.

8. P.W.2 (Ram Sagar Rai) gave evidence on the fact that when he was coming back to his house after selling Parwal in the village market, he found the two appellants along with the deceased sitting on a bench and eating and drinking together. He stated that there was a bottle also and subsequently he learnt that the deceased had been poisoned to death. P.W.3, Baiju Rai, stated that at about 6.30 P.M. he saw the two appellants and the deceased going together and further found them at the tea shop of appellant, Sukhdeo Sah, and from there he went away to his relative's place. P.W.4 and also P.W.5, are witnesses who have given evidence that they came to the house of the informant to find out that the deceased was vomiting and they were told by the parents of the deceased as to how he had been administered poison by the two appellants at the tea shop of appellant, Sukhdeo Sah. P.W.6, Ram Chandra Pandey is a village quack and he stated in his evidence that at about 10 P.M. in the night the informant came to him to request him to check his son up, who had fallen ill and when he came to the house of the informant he found that the deceased was unconscious and had vomited which was giving out bad odour and that the mother and wife of the deceased were stating that the appellants had taken the deceased to Narsanda Chowk and had administered something to him

9. The defence of the appellants is that they had not committed the offence and that, probably on account of suspicion or for whatever reason they were falsely implicated in this case. The other defence was that the wife of the deceased, Raj Banshi Devi (P.W.8) had developed some relationship with his younger brother

and had put the deceased into a state of depression and, ultimately, he killed himself by swallowing some poisonous substance.

10. The trial judge, after considering the evidence on record and the defence of the appellants, came to the conclusion that the charge had been established beyond all shadow of reasonable doubts and convicted the two appellants and sentenced each of them as set out at the very outset of this judgment.

11. We have heard learned senior Counsel appearing on behalf of the appellant, Sukhdeo Sah. It was contended by citing *Ram Gopal Vs. State of Maharashtra*, that in a case of death by poisoning, three questions have to be affirmatively answered by the prosecution by leading acceptable and cogent evidence. The prosecution, firstly, has to establish that the accused persons had acquired the particular poison which caused death of the deceased and were in possession thereof. The second ingredient which was required to be established by the prosecution was that the accused had an opportunity and indeed had administered the said poison to the deceased and, lastly, for killing the deceased by poisoning, the accused person was moved by a particular motive. It was contended that as may appear from evidence that oral dying declaration testified to by P.Ws. 7, 8 and 9 does not appear credible and, as such, the same cannot be used for recording proof of all or of any of the three ingredients which are required to be established towards the proof of the charge. It was next contended that first information report appears to be ante dated and a spurious document. Learned senior Counsel pointed out the reason to us from the same documents, i.e., fardbeyan and the first information report as to how it was belatedly created so as to foisting incredible story implicating the appellants. We are taken through the evidence of the witnesses on other aspects of the matter specially for showing the probability that the deceased was not in a state of health as to make statement as is claimed made by the witnesses like P.Ws. 7, 8 and 9. It was next contended that as regards the proof of motive the less said, the better inasmuch as while the farbdyan contained a single motive, the prosecution while producing evidence introduced an additional motive and the evidence indicates as if either of the motives had not been established. It was next contended that it was sufficient on the above scores for this Court to hold that the charge had not been proved, but the worst was that none examination of the investigating officer has prejudiced the defence case. Three witnesses, i.e., P.Ws. 7, 8 and 9 appeared having not made any statement during the course of investigation that any statement was made by the deceased to any of them. Besides, cross-examination of other witnesses on some other material facts also could not be corroborate and tested by cross-examining the investigating officer, specially the fact on the belated despatch of the first information report to the Magistrate. On the above ground, it was contended that the appellants deserve to be acquitted.

12. Shri Ansul, learned Counsel for another appellant, Shambhu Rai, had adopted the submissions made by Shri Kanhaiya Prasad Singh appearing on behalf of

appellant Sukhdeo Sah.

13. Responding to the contentions and criticism of the learned senior Counsel for the appellants, Shri Ashwini Kumar Sinha, learned Additional Public Prosecutor, submitted that no where in the cross-examination of the witnesses specially that of P.W.9 even a mere suggestion was given to the witnesses that first information report was a spurious document. The veracity of fardbeyan was not challenged and that document contained oral dying declaration of the deceased. It was, as such, submitted that oral dying declaration of the deceased remained intact and the same appears narrated by P.Ws. 7, 8 and 9, who are the family members of the deceased who could be presumed to have enquired from him about his pathetic state of health. Sri Sinha submitted that cross-examination of the witnesses was confined only to the subsequent development made by the witnesses in court, leaving the material aspect of the evidence and also of the oral dying declaration. We must refer to the fairness of Sri Sinha in conceding that cross-examination was not the only mode of testing the prosecution evidence and that the circumstances appearing from the evidence may be utilized by the defence to point out improbabilities so as to make the evidence unacceptable.

14. In a case of present nature, we, first, want to discuss the contentions of Shri Kanhaiya Prasad Singh, the learned senior Counsel on non-proof of motive as may appear from the case of Ramgopal (supra). This case was relied upon by the Supreme Court in one of the leading cases Sharad Birdhichand Sarda Vs. State of Maharashtra, . In all cases of death by poisoning, the motive for administering poison and causing death thereby has to be established. In the fardbeyan P.W.9 stated that on the occasion of worship of some particular deity there was altercation between the deceased and the appellant, Shambhu Rai, and threat was held out to the deceased by appellant, Shambhu Rai, of settling the scores with him. When he was deposing in court what he stated in paragraph 4 of his evidence was that it was appellant, Sukhdeo Sah, who denied giving Prasad to his son on occasion of worship of Bhuiya and, as such, altercation ensued between them. In his evidence he has attributed the name of Shambhu Rai so as to replacing him by appellant, Sukhdeo Sah. This is one aspect. What we find further is that only the above fact was stated as motive for administering poison and causing death of the deceased. Fardbeyan did not contain any additional fact on that, but in paragraph 4 P.W.9 appears stating another fact also that eight days prior to the occurrence the sister of Sukhdeo Sah was found in a compromising position with Shambhu Rai and the two were seen by the deceased. Some other witnesses have given evidence that the deceased had pointed out that fact to P.W.7, Raj Banshi Devi. Raj Banshi Devi in her evidence at page 41 of the paper book has, of course, stated that this fact was stated by the deceased besides stating to her that when the two were seen by the deceased in such a compromising position both requested him in various ways not to speak out and the deceased forgave them and dropped the matter. As regards the evidence of P.W.9 he appears changing his statement in his cross-

examination in paragraph 11 while negating some suggestions on the above fact and during that course he named Shambhu Rai being found in compromising position with the sister of appellant, Sukhdeo Rai. The above denial of P.W.9 prompted the court to put a question to P.W.9 as may appear from page 51 of the paper book and P.W.9 admitted that he was making incorrect statement on the above fact which was alleged as a motive for commission of the offence. As a result of the above conduct of P.W.9, the court was recording the demeanour of the witness at the end of his deposition which indicates that the witness was answering the question and again changing the answer while it was yet to be completed. If we have such a witness who is ever changing his statement while giving evidence, we will always be inclined not to act upon his evidence. Besides, if we are going to accept the prosecution claim, there was some bad blood or a threat to the deceased on the above account that the appellant shall settle their scores with him, then why the deceased would be venturing out with the appellants. A serious doubt lingers in our minds on the veracity of the story on motive. In addition to the above, we are inclined to take a view that the evidence which has been adduced and the two stories on account of which the appellants were alleged to be impelled to commit the offence simply does not find favour with us and we do not feel any hesitation in ourselves to hold that motive has not satisfactorily been established by the prosecution.

15. When making submissions on the merits of the oral dying declaration, Sri Sinha, learned A.P.P. may not be much off the mark that the factum of dying declaration was existing right from the time, P.W.9 was giving his fardbeyan. The defence might not have set up a direct challenge to the dying declaration that it was false, concocted or a subsequent introduction for heightening the situation, so as to making evidence acceptable and getting a conviction against the appellants. But, that is not the only hallmark of accepting the dying declaration. In a case of the present nature what we wanted to know and what was submitted before us as well was that the deceased was really in a fit state of mind and health as to making declaration or any statement. This is one of the conditions on the acceptability of dying declaration. The other is that the deceased had the opportunity of seeing his assailants and identifying them correctly. Other circumstance, which could be looked into, may be that if the statements was made by the deceased to a number of persons a string of consistency must appear in all such statements. We are not concerned about the other aspects as regards the features, which are required to get a dying declaration accepted as evidence in the case. We are only concerned with one of the most important features and that is in the state of health and mind of the deceased. Some of the independent persons who came into the witness box for deposing to the dying declaration are P.Ws.2, 4, 5 and 6 who claimed to have reached the house of the informant as soon as they learnt about the state of health and mind of the deceased. P.W.2 in paragraph-2 of his evidence has stated that when he reached there he found the deceased unconscious and making an incoherent statement. P.W.4 in paragraph 8 of his evidence has stated that he

found the deceased unconscious and was not making any statement. P.W.5 in his examination-in-chief has stated that when he reached there, he found that the deceased had already vomited and that on being asked something he was not replying to those questions. The cross-examination of P.W.5 at page-27 of the paper book indicates that P.W.5 had picked up hulla that Shiv Chandra had been poisoned by some one and when he reached there at his door he found him unconscious. P.W.5 was not an alien to the family of the deceased. He has stated in paragraph 9 of his evidence that the informant was, by relation, his uncle. If there was a hulla that "some one" had poisoned his cousin then how it could be believed that there were names of two appellants in connection with poisoning the deceased. That apart, the most important witness, Ram Chandra Pandey (P.W.6) was admittedly contacted by P.W.9 as he had made also such statement in his evidence that he requested P.W.6 to attend to his ailing son. When P.W.9 contacted P.W.6, the evidence of Ram Chandra Pandey (P.W.6) shall indicate, that he was informed by P.W.9 that his son had taken ill and, as such, he could move fast with P.W.9. This evidence appears in paragraph 10 of the evidence of P.W.9. Prior to that evidence, P.W.6 stated that when he reached the house of P.W.9, the clock was striking 10.30 P.M., he found the deceased lying unconscious and the material which had been vomited was giving out foul smell, and further that the mother and wife of the deceased were giving out that it were the two appellants who had taken the deceased to Narsanda and, probably, administered something to him. Thus, the statements of the deceased does not appear narrated to P.W.6 by either his mother or his wife. Whatever was being stated by two ladies to P.W.6, in our opinion, was the fact as they had perceived it. On consideration of the above evidence what we find is only one inference coming out the evidence of the above witnesses that the deceased was lying unconscious and was not in a state of health of making any statement. Not only that the statement which was made either by P.W.9 or by others of the family to any of the witnesses and especially to P.W.6 does not indicate that the deceased had pointed out to his family members that any of the appellants or both of them had administered poison to him. Thus, we do not feel any hesitation in recording a finding that the deceased may not have been in a state of mind and health of making any statement, as has been claimed by the informant or by any of the witnesses. We, thus, find that it is not prudent for us to accept the oral dying declaration of the deceased as a viable evidence, so as to act on it for convicting the appellants.

16. This brings us to consider as to whether the document, the fardbeyan, was an ante-dated or spurious document, as was submitted by the learned Senior Counsel for the appellants. For buttressing his submission, it was contended before us that the fardbeyan was recorded on 9.6.1989 at 10.30 A.M. and the F.I.R. on that basis was drawn up on the same day at 1.00 P.M., but the Magistrate received the copy of the F.I.R. and the fardbeyan on 12.6.1989, as may appear from the endorsement and the signature appearing in that behalf on the copy of the fardbeyan, which is available to us at page No. 1 of the paper book. It was contended that Jaldhar Rai, who was witness to the fardbeyan, has

not been examined nor Ram Naresh Rai was brought into the witness box to say as to when the document indeed was brought into existence. P.W.5 who is also a witness, appears accompanying the informant to the Police Station does not say as to on what date the fardbeyan was recorded by the police or the F.I.R. was drawn up and thereafter copies of the documents were sent to the Magistrate. The Police Officer or the I.O. was not produced in the court creating a handicap to the defence as it could not get an answer to many questions including as to when he despatched the F.I.R. to the Court, by whom and under what command and why it was received by the Magistrate on 12.6.1989. It was contended, in the above context, that the evidence of P.W.9, the informant, indicates that he went to the Police Station with P.Ws 2, 3, 4, 5 and Jaldhar Rai, a witness who attested to the recording of the fardbeyan and who has not been examined and also with one Rudal Rai. It is categorically admitted by P.W.9 in paragraph 7 of his evidence that he along with several persons went to the Police Station along with the Chowkidar and gave his statement there which was reduced into writing and which was signed by him also. It was contended by drawing our attention to the evidence of P.W.7 in paragraph 20 of her evidence, and evidence of P.W.2 in paragraph 8 that it was not the evidence of P.W.9 that he had gone to the Police Station and had given his statement there which was reduced into writing. The contention was that, in fact, the statement which was given by P.W.9 in presence of so many persons at the Police Station on the very day of the occurrence was containing other story and probably the prosecution suppressed the document as it was not favouring its idea and substituted the same by creating the present spurious document and that could be the reason that it was so belatedly sent to the Magistrate.

17. We have perused the document and we have also considered the evidence. In the light of argument just recorded above, we find that the evidence is really on that line that the informant and others went to the Police Station where his statement was reduced into writing by the Officer Incharge, who accompanied them. P.W.9 came to his place and remained there from 10.30 A.M. to 1.00 P.M. and for what reason it is quite unknown to the Court. Not only that why the document was received by the Magistrate on 12.6.1989 though it was sent by a special peon, as may appear from column No. 3 of the document which appears at page 1 of the paper book, though the distance of the place of occurrence from the Police Station was 10 Kilometer and the Police Station, Kanti where the case was registered is well connected both by road and rail to the Head quarters, Muzaffarpur. This remains a mystery for us as to why the F.I.R. was reaching the Magistrate after three days.

18. When we were being taken through the evidence of P.Ws 7, 8 and 9 and some other witnesses we came across that they were suggested that they had not made such statements that the deceased had made an oral statement to P.Ws.7 and 8 that he had been poisoned by the present set of appellants. It was a vital improvement, in our opinion, made by the witnesses. The non-examination of the Investigating Officer, who had investigated the case and who

had drawn up the F.I.R., in our opinion, was greatly prejudicial to the defence as we have discussed above. While considering the evidence of different witnesses we came across the evidence of P.W.2, who stated in his examination in chief that the two appellants along with the deceased were sitting together and eating and drinking from a bottle. The evidence of P.W.9 in paragraph 10 at page 50 of the paper book may indicate that the prosecution alleged that it was a forcible administration of a poisonous substance to the deceased. The deceased became unconscious after taking some drink which was being drunk by the two appellants as well. This defies reasonings that the appellants will also subject themselves to such a great risk of losing their lives by taking some poisonous substance which were intended to be taken by the deceased. It was poison and was administered to the deceased, we have given doubt about it. We could not reach that conclusion by any stretch of imagination and on standard of appreciating the evidence. We find that the ingredients of Section 328 of the Indian Penal Code of acquiring and possessing poison and then administering the same to the deceased appears not established to the hilt. There are many inherent improbabilities in the prosecution case rendering it highly unsafe to be accepted. In our opinion, the prosecution has not succeeded in proving the charges to the hilt. We feel that it was a case which entitled the appellants to the benefit of doubt. Accordingly, we allow the present appeal, set aside the conviction and sentence recorded against the two appellants. The two appellants are in custody. They shall be released from custody forthwith if not wanted in any other case.