

Muralidhar Singh, Vs. State of Bihar

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Court : Patna

Decided On : Jan-22-2007

Judge : Chandramauli Kumar Prasad and Rekha Kumari, JJ.

Acts : Arms Act - Sections 27; Indian Penal Code (IPC) - Sections 34, 302, 307 and 324; Code of Criminal Procedure (CrPC) - Sections 154(2)

Appeal No. : Criminal Appeal (DB) Nos. 57, 103 and 149 of 2001

Appellant : Muralidhar Singh, Sohan Singh and Sunil Singh

Respondent : State of Bihar

Advocate for Def. : Lala Kailash Bihari Prasad, APP

Advocate for Pet/Ap. : Radhey Shyam Prasad, Janardan Prasad No. 2, Manohar Pd. Singh and Shambhu Sharan Singh, Advs.

Disposition : Appeal allowed

Prior history : Rekha Kumari, J. 1. The above appeals are directed against the same judgment dated 19.1.2001 passed by Sri P.N. Yadav, Sessions Judge, Munger in Session Trial No. 423 of 1992 and as such they have been heard together and are being disposed of by this common judgment. The learned Sessions Judge by the above judgment has convicted appellant Sunil Singh under Section 302 of the Indian Penal Code and all the three appellants under Section 302/34 of the Indian Penal Code, and has further convicted

Judgement :

Rekha Kumari, J.

1. The above appeals are directed against the same judgment dated 19.1.2001 passed by Sri P.N. Yadav, Sessions Judge, Munger in Session Trial No. 423 of 1992 and as such they have been heard together and are being disposed of by this common judgment. The learned Sessions Judge by the above judgment has convicted appellant Sunil Singh under Section 302 of the Indian Penal Code and all the three appellants under Section 302/34 of the Indian Penal Code, and has further convicted appellants Sohan Singh and Murlidhar Singh under Section 307 of the Indian Penal Code and sentenced appellant Sunil Singh to undergo imprisonment for life under Section 302 of the Indian Penal Code and all the three appellants to undergo imprisonment for life under Section 302/34 of the Indian Penal Code and further sentenced appellant Sohan Singh and Murlidhar Singh to undergo rigorous imprisonment for seven years under Section 307 of the Indian Penal Code with a direction that the sentences against each appellant Would run concurrently.

2. The prosecution case, as disclosed from the Fardbeyan (Ext. 3) of the, informant Doman Singh, who is the deceased in this case, is that on 24.5.1992 at about 8.00 p.m. the informant (deceased) after taking his meal came out to his door and after washing his hand was about to return inside, when appellant Sunil Singh fired with the Pistol on his abdomen, appellant Sohan Singh fired with his Pistol which hit him (informant) on his right buttock and appellant Murlidhar Singh fired with his Pistol, but the shot did not hit him. He raised alarm and witnesses came and took him to Referal Hospital. Tarapur for treatment.

3. The A.S.I. of Tarapur Police station recorded the Fardbeyan of the informant on the same day at 10.15 P.M. at Tarapur Referal Hospital. On the basis of that Fardbeyan. formal F.I.R. (Ext. 2) was registered under Sections 324. 307/34 of the Indian Penal Code and Section 27 of the Arms Act.

4. The informant thereafter was taken to Bhagalpur Medical College & Hospital, where he died of the injuries sustained by him.

5. The police after usual investigation submitted chargesheet against the appellants.

6. All the three appellants were charged under Section 302/34 of the Indian Penal Code and Sunil Singh was further charged under Section 302 of the Indian Penal Code for causing death of the informant. Appellant Sohan Singh and Murlidhar Singh were further charged under Section 307 of the Indian Penal Code. The appellants pleaded not guilty to the charges. Their defence, as gathered from the trend of cross examination, is that they are innocent and have been falsely implicated out of enmity.

7. The prosecution examined 11 witnesses to prove the charges. Among them P.W. 1 Munshi Singh has been tendered for cross examination. He has not stated anything about the occurrence. P.W. 3 Mahesh Prasad Singh has simply stated that on the sound of firing he went to the house of the informant and saw him injured. He has been declared hostile. P.W.2 Bipin Kumar Singh, P.W. 4 Anath Bandhu Singh, P.W. 6 Amresh Kumar Singh are witnesses, in whose presence, the deceased is said to have given out the names of his assailants. P.W. 5 Tekan Singh claims to be the eye witnesses. P.W. 7 Parsuram Singh, an Advocate Clerk, is a formal witness who has proved the formal F.I.R. (Ext.2) and Fardbeyan (Ext. 3). P.W. 8 is Dr. Haidar Imam Ansari who had performed the post mortem examination on the dead body of the deceased. P.W. 9 Anandi Singh is a witness of inquest report. He has proved his signature and the signature of Amresh Singh (Exts. 5 & 5/1) on inquest report. P.W. 10, Pradip Kumar Singh is another formal witness, who has proved his signature, and signature of Arvind Kumar (Exts. 5/2 & 5/3) on seizure, list and has stated that in his presence, the. I.O. had seized the earth, clothes etc. P.W. 11 is Dr. Reyazul Mustafa who had examined the informant at Referral Hospital, Tarapur. The. I.O. of this case, A.S.I. Ishwar Chandra Sharma, has been examined as court witness.

8. The appellants did not examine, any witness but filed certified copy of depositions of witnesses of G.R. Case. No. 23/83 (Ext. A & A/1) and certified copy of the ordersheet (Ext. B to B/2) of Title Suit No. 85 of 1991 to prove enmity.

9. The learned Sessions Judge after considering the Fardbeyan of the deceased and the evidence of the witnesses and the documents filed by the appellants found the appellants guilty for the murder of the deceased and convicted and sentenced them as mentioned above.

10. The point for determination for this Court is whether the learned Sessions Judge was justified in holding the appellants guilty for the murder of the deceased.

11. Learned Counsel for the appellants submitted that the learned Sessions Judge has treated the Fardbeyan as dying declaration and has based his findings mainly on the said dying declaration, but the dying declaration cannot be said to be genuine and voluntary. He further submitted that the post mortem report also does not corroborate the statements made in the dying declaration inasmuch as the doctor conducting the post mortem examination found that the deceased received only one shot, whereas according to the Fardbeyan, he had received two shots and further according to the doctor (P.W. 8) the victim must have, taken meal three hours before the assault, whereas according to the Fardbeyan he had taken meal just before the assault. His submission then is that all the witnesses who have come to support the prosecution case are inimical to the appellants and that the parents of the deceased who were very important witnesses and who would not have concealed the real culprits, have not been purposely examined. There has been delay in sending the F.I.R. to the Magistrate making the F.I.R. suspicious. The A.S.I. was also not competent to investigate the case.

12. In order to appreciate the above submissions I had gone through the entire evidence.

13. P.W. 11, the doctor who had examined the informant at Tarapur Referral Hospital has stated that on 25.5.1992 (wrongly for 24.5.1992) at 10.10 p.m. he examined Doman Singh, the informant, and found the following injuries on his person:

i) One lacerated wound about 1/4' x 1/4' x 1/2' on the left buttock admitting tip of little, finger.

ii) One lacerated wound $1/3' \times 1/3' \times 1/2'$ on the hypogastic region slightly towards right side of iliac region of abdomen.

14. He opined that the injuries were caused by fire arm and within six hours. He had reserved his opinion regarding nature of injuries till the report was received from Bhagalpur Medical College & Hospital where the patient was referred.

15. Thus, from the evidence of this doctor it appears that the informant (deceased) had received gun shot injuries on the date of occurrence and at about the alleged time.

16. P.W. 8, the other doctor of the Forensic Science Department, Bhagalpur has stated that on 25.5.1992 at 2.30 p.m. he performed the post mortem examination on the dead body of Doman Singh, aged about 25 years, and on external examination found following injuries:

i) Stitched wound obliquely on right side of abdomen $1/2' \times 1/4'$ x abdominal cavity deep which was directed downward with inverted margin and abraded margin having impressions of fibrous filament on upper abdomen.

ii) Fire arm injury, wound of exit in right glutial region (buttock) 1 c.m. diameter with everted margin.

17. On dissection, he found lungs congested, right chamber of heart with blood, liver, spleen, kidney congested. Pelvic cavity contained plenty of blood. Gall Bladder was full. On tracing the track of the wound he found that the projectile had entered abdominal and pelvic cavity through injury No. (i) with rupture of small intestine, mesentry blood vessel had entered into pelvic cavity. It passed through the psychro iliac joint and came out through injury No. (ii). Stomach contained almost digested food, bladder was empty and Colon contained some gas. Brain and Menanges were congested.

18. According to the doctor the injuries were ante mortem and communicating each other caused by fire arm and that the cause of death was shock and haemorrhage following injury to abdominal and pelvic blood vessels. He opined that the time elapsed since death was within 6-12 hours.

19. The evidence of this doctor thus also shows that the informant (deceased) had received a fire arm injury on his abdomen which ultimately passed through the right buttock and he died of the injuries sustained by him sometime on 25.5.1992.

20. The important question, however, is whether the appellants had fired the shot causing the death.

21. In this connection it appears that the trial court has relied on the Fardbeyan which has been treated as dying declaration and the oral dying declaration before P.Ws. 2, 4 and 6 and the evidence of P.W.5.

22. In the Fardbeyan (Ext. 3), as already mentioned, the statement of the deceased is that on the alleged date at about 8.00 p.m. after taking his meal he went out at his door to wash his hand and was about to return inside when appellant Sunil Singh fired with his Pistol on his abdomen. Appellant Sohan Singh fired hitting him on his buttock and appellant Murlidhar Singh fired with his Pistol but the shot did not hit him and he was then taken to referral Hospital, Tarapur.

23. P.W. 1 has stated that on 24.5.1992 at 8.00 p.m. he was in his house when he heard the sound of firing and went near the house of Doman Singh and he saw him lying and blood was coming out from the body. He was speaking that Sunil Singh, Murlidhar Singh and Sohan Singh had shot him. He has further stated that Doman Singh was taken to Tarapur Hospital for treatment from where he was referred to Bhagalpur Hospital, where he died.

24. P.W. 4 has deposed that on the alleged date at about 11.00 p.m. he was on the roof of his house when he heard the sound of firing. He came down and was going out when he saw Doman Singh being taken to the hospital, He (deceased) had received gun shot injuries and was speaking that Sunil Singh, Murlidhar Singh and Sohan Singh had fired at him. The evidence of this witness then is that Doman Singh was alive at Tarapur Hospital and he was taken to Bhagalpur Hospital where in course of treatment, he died. The witness has identified his signature. (Ext. 1) on the Fardbeyan. In cross examination he has stated that on his query Doman Singh had spoken the names of the assailants before him and that at 3.30 a.m. Doman Singh had reached Bhagalpur Hospital.

25. P.W. 6 has deposed that on 24.8.1992 at 8.00 p.m. he was sitting in the Baithka of the village and on the sound of firing he went to the house of Deepan Singh and saw Doman Singh lying down with fire arm injuries and was telling that Sunil Singh, Sohan Singh and Murlidhar Singh had shot him. He had further stated that he had also seen these three persons fleeing with Pistol in their hands. The evidence of this witness then is that Doman Singh died at Bhagalpur Hospital and he had also gone there.

26. P.W. 5 has stated that on the alleged night at 8.00 p.m. he was sitting on a cot outside his house when he saw appellants Sunil Singh, Sohan Singh and Murlidhar Singh armed with Pistols, went to the house of Deepan Singh. An earthen lamp was burning there. Murlidhar Singh called Deepan Singh for repairing the roof of his house in the morning. There was no response from the side of Deepan Singh as Deepan Singh was not in his house at that time. Deepan's son Doman Singh was washing his hand by coming out of the house when Sunil Singh fired at him and when Doman Singh moved towards his house, there was another firing. Doman Singh fell down. He went and bandaged the wound of abdomen by Gamchha. He has further stated that later on Ramdeo Paswan his brother Deepan Singh, mother of Doman Singh and others came and Doman Singh told that appellants Sunil Singh, Sohan Singh and Murlidhar Singh had shot at him. Thereafter Doman Singh was carried on a cot to the hospital and he died at Bhagalpur Hospital in course of his treatment. In cross examination he has stated that his house is at a distance of 4-5 cubits from the house of the deceased.

27. The I.O. (court witness) has stated that on 24.5.1992 he was posted as A.S.I, of Tarapur police station and on information received from Tarapur hospital, he recorded the fardbeyan of Doman Singh and also obtained the signature of Anath Bandhu Singh (P.W.4) on it. He has then stated that he prepared the injury report (Ext. 7) of the informant and also recorded his further statement. His evidence further is that on the same night he went to the P.O. but as it became late and dark, he did not inspect the place of occurrence on that night but searched the house of the accused persons but they were found absent. On the next day he inspected the place of occurrence which was in front of the entrance door of the

house of the informant. He found blood on the ground and blood stained Gamchha, Chadar, lungi kept there and he seized the blood and blood stained clothes and prepared the seizure, list (Ext. 8) and on 27.5.1992 after receiving information of the death of Doman Singh he prayed to the court to add Section 302 of the Indian Penal Code in the F.I.R. and then after completing investigation submitted chargesheet.

28. Thus, from the above, evidence it appears that the deceased in his Fardbeyan has stated the circumstance under which he was shot at, which ultimately resulted in his death. The Fardbeyan, hence, can be treated as dying declaration and the statement made by the deceased therein shows that the deceased had named the appellants as his assailants and that they had fired at him causing injuries in the manner as alleged.

29. The evidence of the two doctors also show that they had found fire arm injuries on the abdomen and on the buttock. The medical evidence, hence, corroborates the dying declaration. Of course, the evidence of P.W. 8, the doctor who had performed the post mortem examination shows that both the injuries found on the dead body were caused by single, shot, whereas according to the dying declaration the deceased had received two shots, one on abdomen and the other on buttock. But this discrepancy is not very material. The statement shows that besides the first shot fired by appellant Sunil Singh at abdomen, he saw appellant Sohan Singh immediately thereafter firing at him. The statement also shows that at that time he was turning towards his house to go inside. Hence, as there, was injury on the buttock also, he might have thought that the shot fired by appellant Sohan Singh caused that injury, when in fact that shot did not hit him. Therefore, this discrepancy is not very material. Then as regards the opinion of the doctor that the deceased must have taken food three hours before the assault the same appears to be based on stomach content. But the contents of the stomach of the deceased is not always indicator of time of death or assault. So, on the basis of this discrepancy also, it cannot be said that the dying declaration is not corroborated by the medical evidence.

30. The evidence of P.Ws. 2, 4, and 6 which is in the nature of oral dying declaration also corroborates the above statement of the informant made in the Fardbeyan. The dying declaration also finds corroboration from the evidence of P.W. 5 who claims to be an eye witness to the occurrence. The evidence of the I.O. also shows that he had found blood at the alleged place of occurrence. Hence, his evidence also corroborates the dying declaration recorded by him that the occurrence alleged had taken place in front of the main door of the house of the deceased.

31. Learned Counsel for the appellants, however, as already mentioned, has assailed the dying declaration recorded by the I.O. His submission is that the document is a fabricated one. There is no certificate of any doctor that the deceased was in a fit mental and physical condition to give any statement. The evidence of the doctors, on the other hand, is that the deceased was not in a position to give any statement. The statement is also ante dated which is evident from the fact that the F.I.R. was sent to the Magistrate after an abnormal delay and no explanation for the delay has been given.

32. Leaned A.P.P., on the other hand, submitted that certificate of the doctor is not a necessary ingredient in accepting the dying declaration. Moreover, since the A.S.I, had recorded the Fardbeyan in a routine manner as a complaint and not as a dying declaration, the lapse on the part of the A.S.I, in not obtaining signature of the doctor with respect to the mental condition of the informant would not go in favour of the accused, and for this, the learned A.P.P. has relied on the decision of the Supreme Court in the case of Paras Yadav and Ors. v. State of Bihar : 1999 CriLJ1122 .

33. It has now been settled by the Supreme Court in the case of Laxman v. State of Maharashtra : 2002 CriLJ4095 that the doctor's certificate as to mental fitness of the declarant is not a sine qua non for the credibility of the dying declaration. The certificate of the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise. Hence, simply because there is no certificate of the doctor in this case that is ipso facto no ground to disbelieve the genuineness of the dying declaration.

34. It is, however, also settled that in the absence of the doctor's certificate there must be material to satisfy the court that it is safe to rely on such declaration. In this case P.W. 4 is said to have been present at the time of recording the Fardbeyan. But, he has not stated a word that the informant was in a fit state of mind to give statement or he gave any statement before, him. There is no other evidence that when the Fardbeyan was recorded, the injured was in a fit mental condition. The submission of the learned A.P.P. is that the I.O. had recorded it in a routine manner. But from the injury report of the doctor (Ext. 6) it appears that the injured was referred to Bhagalpur Medical College & Hospital. The evidence of the doctor also is that injury No. (ii) was serious. The doctor had examined the injured on the same night at 10.10 p.m. on the requisition of the I.O. and, hence, the I.O. had knowledge when he was recording the Fardbeyan at 10.15 p.m. that the condition of the injured was serious. But it is strange that he did not obtain the certificate of the doctor, when the evidence of the doctor is that doctor and nurses were available in the hospital. In the case of Paras Yadav (Supra) relied on by the learned A.P.P. it has also been observed that on occasions such negligence or omission may give rise to a reasonable, doubt which may obviously go in favour of the accused.

35. Besides this, P.W. 11, the doctor who examined the deceased at Tarapur referral has stated that 'injury No. (ii) was very serious. The injured must have bled profusely from this wound. The injured may be unconscious. The injured made no statement before him since the, question of his ability to state does not arise.' P.W. 8 the other doctor has also deposed that the victim must have become, unconscious in quite some time and such victim cannot make statement. Therefore, in view of the categorical statement of the two doctors it is also doubtful that the statement of the deceased recorded by the I.O. is genuine.

36. Then, the Fardbeyan shows that the same was received by the Chief Judicial Magistrate on 27.5.1992 when according to the formal F.I.R. the same was sent to the Chief Judicial Magistrate on 25.5.1992. There has been thus, abnormal delay in the receipt of the F.I.R. by the Chief Judicial Magistrate. Though, it is settled that the delay in despatch of F.I.R. or its receipt by the court alone is not fatal to the prosecution case, but as observed by the Supreme Court in the case, of Maharaj

Sigh v. State of U.P. : 1995 CriLJ457 if the F.I.R. is received by the local Magistrate late it can give rise to an inference that the F.I.R. was not lodged at the time alleged to have been recorded unless, of course, the prosecution can offer satisfactory explanation for this delay. But in this case no explanation has been given by the prosecution as to why the F.I.R. was received by the Chief Judicial Magistrate so late.

37. In the case of Maharaj Singh (Supra) another external check has been mentioned to determine the authenticity of the F.I.R. and that is whether copy of the F.I.R. has been sent to the Medical Officer along with the dead body for post mortem and whether there is reference of F.I.R. in the inquest report. Failure to send copy of the F.I.R. along with the dead body and absence of its reference in the inquest report creates doubt about the authenticity of the F.I.R.

38. In this case, the inquest report has not been proved by the prosecution though the signatures of the witnesses, namely, Amresh Kumar Singh and Anadi Sigh on it have been proved. But from the post mortem report (Ext. 4) it appears that in it, Barari P.S. case No. nil is mentioned instead of Tarapur P.S. Case number, and no explanation has been given as to why Tarapur P.S. case number was not mentioned. It is, therefore, evident that there was no reference of Tarapur P.S. case in the inquest report which had accompanied the dead body for post mortem. A copy of the F.I.R. must also be given, in terms of Section 154(2) Cr. P.C. to the informant when the F.I.R. is lodged and hence, a copy of the F.I.R. must have been with the informant when he was taken to Bhagalpur Hospital. So, when instead of Tarapur P.S. case number, Barari (Bhagalpur) P.S. Case number is mentioned in the post mortem report, it creates a doubt that actually the Fardbeyan was in existence till the post mortem examination report was prepared.

39. The evidence of the I.O. is that he had visited the houses of the appellants on the night of occurrence and had searched them. But this evidence is not corroborated by any other evidence. So, on this evidence of the I.O. alone, it is not proved that actually the I.O. had visited the houses of the appellants as the Fardbeyan naming them as assailants was recorded as alleged.

40. Therefore, when there is no certificate of any doctor or any other evidence to show that the deceased was in a fit mental, physical condition to give any statement and the evidence of the two doctors, on the other hand, shows that the deceased was not in a condition to give any statement; and there has been long delay in receipt of the F.I.R. by the Chief Judicial Magistrate and no explanation has been given by the prosecution for this delay, and in the post mortem report there is no reference of Tarapur P.S. case number and instead of it Barari P.S. case no, nil is mentioned, a reasonable doubt is created that the Fardbeyan is actually a genuine, document and recorded at the time as mentioned therein.

41. Hence, it would not be safe to rely on the written dying declaration of this case and on that basis to hold the appellants guilty.

42. As regards the oral dying declaration and the eye witnesses account of the occurrence, though P.Ws. 2, 4 and 6 have stated that in their presence the deceased took the names of the appellants as his assailants, and the evidence of P.W. 6 further is that he saw the appellants fleeing and P.W. 5 has stated that he saw appellant Sunil Singh firing on the deceased and the other two appellants were with him, P.W. 2 has admitted in his evidence that he was a witness in G.R. case No. 23/83 against Gore Lal, father of appellant Sohan Singh and others, in which the accused were acquitted. He further admitted that there is title suit between his father and Gorelal. According to P.W. 2, P.W. 4 is his uncle and P.W. 4 has admitted that since 1973 civil and criminal cases are going on between him and Gore Lal, father of appellant Sohan Singh. P.W.6 has also admitted that he had litigation with father of appellant Sohan Singh. P.W. 5 has also admitted that he is agnate of the above P.Ws. Thus, all these witnesses are highly inimical against appellant Sohan Singh and no independent witness has been examined to prove the oral dying declaration.

43. The evidence of P.W. 5 also is that the parents of the deceased had come to the place of occurrence. They were thus very important witnesses as being parents of the deceased, they would not have concealed the names of the real culprits. But they have not been examined.

44. Then, as already stated the evidence of the doctor is that the deceased must have become unconscious in quite short time. Therefore, it is doubtful that he was in a position to speak the names of the assailants.

45. Apart from these, the case of the appellants as it appears from the cross examination of P.W. 5, is that there was tension between the Binds of his village and Yadavas of neighbouring village Rangaon and P.W. 4 has admitted that when he came down from his roof, he heard hulla that the Yadavas had assaulted the deceased. But if the assailants of the deceased would have been identified, it is doubtful that such a rumour could be spread in the village.

46. Hence, from the above facts and circumstances a doubt is also created whether actually the deceased spoke the names of the assailants or any body had seen the appellants.

47. It has been submitted on behalf of the appellants that under Rule 88 of the Bihar Police Manual, an A.S.I. is not competent to investigate a murder case. But as held by the Supreme Court in the case of H.N. Risbud v. State of Delhi : 1955 CriLJ526 and Allah Rakha K. Mansuri v. State of Gujrat 2002 SCC (Criminal), 519, a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. Such an investigation does not vitiate the trial unless there has been miscarriage of justice. Hence, even if it be assumed that the A.S.I, was not competent to investigate the case, as there is nothing to show that there has been miscarriage of justice, the trial would not be vitiated on this around.

48. But though the trial is not vitiated in this case, considering the other facts, circumstances and evidence on record, it appears that the prosecution has not been able to prove, beyond reasonable doubt, that actually any of the appellants was responsible for the death of the deceased. It is a case in which atleast benefit of doubt should be given to the appellants and the conviction and sentence passed against them should be set aside.

49. In the result, the appeals are allowed. The order of conviction and sentence passed by the learned trial court is set aside. The appellants are acquitted. Let the

appellant Sunil Singh, who is in custody, be released from custody forthwith in this case.

Chandramauli Kumar Prasad, J.

50. I agree.

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