

Nathuni Yadav Vs. State of Bihar

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SooperKanoon Citation : sooperkanoon.com/139821

Court : Patna

Decided On : Jul-11-2005

Judge : Aftab Alam and Sadanand Mukherjee, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395 and 396; Code of Criminal Procedure (CrPC) - Sections 428

Appeal No. : Cri. Appeal (DB) No. 635 of 1987

Appellant : Nathuni Yadav

Respondent : State of Bihar

Advocate for Def. : G.P. Jayswal, Addl. P.P.

Advocate for Pet/Ap. : Arun Kumar Tripathi, Adv. Amicus curiae

Judgement :

Sadanand Mukherjee, J.

1. The instant appeal is directed against the judgment and order dated 24-11-1987 passed in Sessions Trial No. 300 of 1985 by Shri Narendra Narayan Singh, 3rd Additional Sessions Judge. Ara wherein and whereunder the appellant Nathuni Yadav had been convicted under Section 396 of the Indian Penal Code and further had been sentenced to undergo rigorous imprisonment for life under the aforesaid section, stating therein that the period undergone by him, as under-trial prisoner,

would be set-off as provided under Section 428 of the Code of Criminal Procedure.

2. Case of the prosecution relates to an offence occurred on 22-05-1984 at about 11 p.m. Ram Pravesh Ojha (deceased) was sleeping at Sahan i.e., open space outside his house, where his sons Barmeshwarnath Ojha (PW-6), Gore Ojha (PW 8) and Rinku Ojha were also sleeping, whereas the informant, brother of the deceased, Brijlal Ojha was sleeping in the courtyard (Sahan) in the house and the ladies were sleeping inside the rooms. The deceased Ram Pravesh Ojha raised alarm and thereafter there was a firing upon which the aforesaid Rampravesh Ojha again raised alarm. The inmates of the house opened the main door whereupon 10-15 dacoits armed with 'lathi', 'Bhala' and guns, entered in the house by force. Two of them remained near the informant. The rest dacoits entered into the house and looted away the articles of the house. The voice of one of the accused was identified by the informant which was the voice of accused, Nathuni Yadav (appellant) when the miscreants were enquiring whether Shankara had come outside shouting in colloquial dialect 'Shankara Nikalal Ki na re' Thereafter they retreated from the house. It was found that Rampravesh Ojha was lying in injured condition. There was bleeding from wounds of his head and chest, Rampravesh Ojha was said to have stated that Nathuni Yadav (the appellant) son of Paras had assaulted him.

3. The fardbeyan of the informant was recorded on 23-05-1984 at 22 am in the Referral Hospital Shahpur, where Rampravesh Ojha in injured condition, had been taken for treatment. The dying declaration of Rampravesh Ojha was said to have been recoded by the Sub-Inspector of Police. Birendra Singh (PW 13) who had also recorded the fardbeyan (Exhibit-3) of the informant at the referral hospital, Shahpur. The dying declaration of Rampravesh Ojha is at Exhibit-8, recorded in presence of Dr. S.K. Pandey (PW-12) and Dr. Satyaram Singh (not examined) who certified the recording of dying declaration in their presence.

4. On the basis of the aforesaid fardbeyan (Exhibit-3), a case was instituted being Brahmpur PS. Case No. 65 of 1984 which was initially registered under Section 395 of the Indian Penal Code against the appellant, Nathuni Yadav, and 10-15 other accused persons but after the death of Rampravesh Ojha the case was

converted into Section 396 of the Indian Penal Code.

5. The charge was framed only against two accused persons, namely, Kariman Yadav and Nathuni Yadav (appellant). As many as 13 prosecution witnesses were examined. In course of trial accused Kariman Yadav was acquitted of the charge levelled against him and Nathuni Yadav stood trial under Section 396 of the Indian Penal Code.

6. The case of the appellant was that the appellant was the co-villager of the deceased. Both the deceased and the appellant were working together as Bus Agents. There had been enmity in that connection. Hence the appellant has been falsely implicated in the case and as a matter of fact, he had not taken any part in the alleged occurrence.

7. In this appeal earlier Mrs. Binita Singh, Advocate, was appointed as Amicus curiae as she was so willing to argue on behalf of the appellant but she did not appear when the case was called out. Mr. Arun Kumar Tripathi, Advocate, volunteered to appear on behalf of the appellant and he was appointed as amicus curiae, and he argued the case on behalf of the appellant.

8. On behalf of the appellant the judgment and order has been assailed at the time of hearing of the appeal on the following promises :

(i) There was admitted enmity between the deceased and the appellant.

(ii) The prosecution improved his case at the trial stage.

(iii) The case of voice identification by the informant in the fardbeyan is weak.

(iv) The dying declaration of the deceased Rampravesh Ojha is a suspicious document.

(v) None of the independent witnesses had been examined.

(vi) At the first instance during the first visit of the place of occurrence, S.I. was not informed that the deceased had identified the appellant.

(vii) The trial Court has not appreciated the improbability of a close door neighbour being made accused as in the fardbeyan the identification of the appellant had not come to light.

9. In course of trial, as stated above, as many as 13 witnesses have been examined. The trial Court has discussed thereadbare about the statements of the witnesses on the point of occurrence.

10. PW 1 is the informant, Brajraj Ojha. His evidence clearly delineates the sequence of the occurrence, looting of properties and gun shot injury on the person of the deceased. He had stated that after retreat of the dacoits from the house, he saw the injured Bampravresh Ojha. He supports the statement in the fardbeyan (Exhibit-3) over which he proved his signature (Exhibit-1). In his evidence he had stated that he also identified the appellant Nathuni Yadav by voice, confirming the version as in the fardbeyan. His evidence further indicates that injured Rampravesh Ojha was taken on a Bus to Shahpur Hospital and fardbeyan was recorded at Shahpur Hospital, so far as FIR (Ext. 3) is concerned, no vital contradiction appears to have occurred. It is worthwhile to point out that the voice identification remains intact. His evidence further confirms involvement of the appellant by stating that the injured Rampravesh Ojha took the name of appellant having caused gunshot injury. PW 11 in his evidence confirmed the details as stated by the informant, PW 1.

11. PW 2, Hiralal Yadav a villager in his evidence stated that he heard the sound of firing, when he came out from his house, somebody threw a bomb which caused minor injury which seems to have been treated. An injury report was also prepared. Later on he found the deceased Rampravesh Ojha in injured condition. His evidence also was found to be reliable in course of examination. In his evidence he has stated that Rampravesh Ojha had told him about injuries caused by Nathuni Yadav (appellant). PW 3 also rushed to the place of occurrence on hearing the sound of firing and found Rampravesh Ojha in injured condition. Rampravesh Ojha appears to have told him about the injury caused by Nathuni Yadav (appellant). PW 4 is Chowkidar of the village. At the time of occurrence PW 4 was doing night duty in the village. He told that 3-4 dacoits had caught him and

taken him back towards the house of Rampravesh Ojha where 15 to 20 miscreants came and one of the daboits remained near him keeping him under guard and rest of the dacoits went near the door of the victim. Rampravesh Ojha. He also stated in his evidence that the dacoit who was on his guard also went away and then he fled towards village and raised alarm. In his evidence he further indicates that Rampravesh Ojha was lying in his courtyard by the side of the wall with gunshot injury in his chest, abdomen, injury at his head and nose. They had gone to the police station but they could not meet the S.I. but he was informed by a constable on duty that the S.I. has got information about the incident and had proceeded to the place of occurrence. His evidence confirms the incident of dacoity in the house of Rampravesh Ojha, the deceased Rampravesh Ojha had told him that the appellant Nathuni Yadav had caused gunshot injuries on him. His evidence does not indicate any inconsistency regarding his statement before the police.

12. PW 5, Sukanti Devi, wife of the deceased, heard the alarm raised by Rampravesh Ojha, deceased, about the assault by the miscreants. When she reached near him she found him in injured condition with injury in the chest and head. The brother-in-law (Dewar), PW 1 and her son (PW6) told her that they had identified Nathuni Yadav. The injured husband of this witness had also told her that Nathuni Yadav caused injury to him. It appears that she had not told the I.O. (PW 11) that injured Rampavesh Ojha had told her that Nathuni Yadav had caused him injury which appears to be an omission. Her evidence supports the case of the prosecution.

13. PW 6, Barmeshwar Nath Ojha, the son of the deceased, who was sleeping with his father, stated about the arrival of the dacoits and looting away of properties. He saw his father in injured condition. Although he has stated that in the light of lantern he identified Nathuni Yadav, appellant, when he was confronted with his statement before PW 11 (I.O.). Although on the point of eye-witness account of identification, there appears to be inconsistency, this does not discredit the prosecution case on the whole.

14. PW 7, Suraj Kumari Devi and PW 8, Rameshwarnath @ Gore were tendered for cross-examination. PW 9 is a seizure list witness of blood stained earth collected by the Investigating Officer (PW 11). His signature has been proved on the seizure list of lantern. PW 10 Dr. Kamta Prasad Rai in the postmortem examination of the deceased found the following ante-mortem injuries on the person of the deceased :

'1. One incised wound 1' x 1/2' x 1 on the nose, on its right side communicating with mouth.

2. One punctured wound almost round in shape of 2.1/2 diameter through which omentum had come out on chest right side at the level of right nipple.

3. One incised wound 1' x 1/2' x 1/2' on head or right side of parietal bone. He further stated that on dissection, lungs and pleura of the right side was found damaged extensively and the whole lung cavity was full of blood clots. Stomach was also found punctured by pillets and it contained partly digested rice. He opined that injuries No. 1 and 3 were caused by sharp cutting weapons and injury No. 2 was caused by gunshot. Six pillets were also taken out from the lungs and were sent to police. In his opinion these injuries were sufficient to cause death, in ordinary course of nature, and he opined that the death was due to shock which was caused due to damage of lungs and stomach. Time elapsed since death was about 24 hours. In cross-examination he stated that as partly digested food was ' found in the abdomen, the food must have been taken by the deceased 2 or 3 hours before his death. The medical evidence fits in with the prosecution story.'

15. The evidence of this witness only indicates that the deceased died of gunshot injuries. Before above post-mortem report, injury report was prepared in the pen of Dr. Satyaram Singh which was proved by PW 12, Dr. S.K. Pandey (Exhibit-9) which shows multiple gunshot injury in the chest and abdomen of Rampravesh Ojha as a result of which intestine was found peeped through the wound and the patient succumbed to the injuries within an hour. Dying declaration was recorded (Ext. 5) by SI P.W. 11 in presence of Dr. S.K. Pandey (PW 12) and Dr. Satyaram Singh.

16. PW 11, Investigating Officer of this case, Officer-in-charge of Behiya Police Station received fardbeyan and dying declaration Exhibit 3 and 5 respectively, recorded by S.I. Birendra Singh of Sahpur PS. The evidence of PW 11 clearly shows that on rumour about commission of dacoity he had proceeded to the place of occurrence and on the way at Brahmpur Chourasta, the aforesaid Exts. 3 and 5 were handed over to him. He inspected the place of occurrence, seized blood stained earth and prepared the seizure list which also have been witnessed by Chandradeo Ojha and Jawhar Prasad. In his evidence he has given the description about the place of occurrence. He found blood on the northern wall and also in the Sahan of the house. He had also found the signs of broken of boxes in the room. He also obtained injury report of the deceased and one Lal Mohan Paswan. His evidence in cross-examination on the point of earlier statements of the witnesses does not in any way discredit the prosecution case on the point of identification of the appellant.

17. PW 12 Dr. Srikant Pandey in his evidence stated about recording of dying declaration of the deceased in his presence which has been proved as Exhibit-8, PW 12 certified the same and it has been proved by PW 12, Dr. Srikant Pandey himself as Exhibit 8/1. PW 13, S.I. recorded the statement of the informant, P.W. 13, had also recorded dying declaration in presence of Dr. B.K. Panddey (PW 12) and Dr. Satyaram Singh, Exhibit 5 clearly indicates that the deceased had put his signature after he had made the statement. The dying declaration clearly establishes the identification of Nathuni Yadav as the person who had caused fatal injuries.

18. From the aforesaid discussion and evidence the dying declaration is corroborated by the fact that the informant in his fardbeyan (Exhibit-3) and other witnesses have stated that the deceased had told that the appellant Nathuni Yadav had caused gunshot injury. On the point of manner of identification the trial Court rightly came to a finding of the veracity of identification of the appellant.

19. The dying declaration confirms the sole basis of conviction, it seems that the same has been corroborated by circumstances and the version of the witnesses regarding the previous statement of the deceased. The testimony regarding the

dying declaration by the doctor and a police officer who recorded the same inspires confidence. Thus, on scrutiny of the evidence of the witnesses, the prosecution having satisfactorily proved the dying declaration as reliable as there is no inconsistency between declaration and evidence on record. It was held by the Apex Court that when there was no inconsistency between declaration and evidence on record, the Court below was justified in relying upon the dying declaration in convicting the accused : 1998 CriLJ1102 .

20. Thus the trial Court, as discussed above, had come to the finding of conviction and sentence, as stated above on the basis of cogent and reliable evidence.

21. The plea of defence is that the deceased and the appellant worked as bus agents there was enmity. However, the evidence on record on the aforesaid fact does not in any way affect the merit of the prosecution case. On the face of the cogent and reliable evidence as discussed above, even if the evidence relating to identification by PW 6 is discarded, the evidence adduced on the whole coupled with dying declaration establishes the case of the prosecution. Hence, there does not appear to be any infirmity in the judgment and sentence of the trial Court. The defence case regarding non-production of lantern being the means of identification and the improbability of occurrence having been committed by a known person does not in the way of the prosecution case.

22. On careful consideration of the submission made on behalf of the parties and on examination of the materials on record, we find no merit in this appeal. We find that the trial Court has rightly passed the judgment of conviction and sentence and accordingly, do not interfere with the trial Court judgment in the appeal. The appeal is thus dismissed. Bail bond of the appellant is cancelled. He is directed to surrender, undergo the sentence without any delay and not later than one month from today. In case he failed to surrender within one month, the trial Court shall take all steps taking him in custody so that he undergoes the sentence.

Aftab Alam, J.

23. I agree.