

Babloo Rajak Vs. State of Jharkhand

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Court : Jharkhand

Decided On : Apr-06-2016

Appellant : Babloo Rajak

Respondent : State of Jharkhand

Judgement :

1 IN THE HIGH COURT OF JHARKHAND, RANCHI (Against the judgment of conviction and order of sentence dated 4th April, 2006 and 7th April, 2006 respectively, passed by the Additional Sessions Judge, F.T.C., Sahibganj in connection with Sessions Case no. 48 of 2004 corresponding to G.R. Case no. 224 of 2003, Sahibganj (T) P.S. Case no. 92 of 2003) Cr. Appeal (D.B.)No. 792 of 2006 with Cr. Appeal (D.B.)No. 803 of 2006

1. Bablu Yadav @ Bablu Kumar Yadav S/o Ram Nath Yadav R/o Talbanna P.S. Sahibganj, Distt. Sahibganj

2. Kanchan Sinha S/o Mohan Sinha, R/o Shobhanpur Bhattan, P.S. Sahibganj (M), Distt., Sahibganj (Petitioners in Cr. A. No. 792 of 2006)

3. Babloo Rajak S/o Laldeo Rajak R/o Village Dahla Gulli Bhatta P.S. Sahibganj Town Distt. Sahibganj (Petitioner in Cr. A. No. 803 of 2006) Vrs. The State of Jharkhand Opposite Party in both cases CORAM: HON'BLE MR. JUSTICE D.N.UPADHYAY HON'BLE MR. JUSTICE RATNAKER BHENGRA For the Appellants : Mr. Rajesh Kumar, Amicus Curiae (In Cr. A. No. 792 of 2006) Mr.

Peeyush Krishna Choudhary, Advocate (In Cr. A. No. 803 of 2006) For the Respondent : Mr. Pankaj Kumar, A.P.P. By Court: (D.N.Upadhyay,J) These Criminal Appeals have been preferred against the judgment of conviction and order of sentence dated 4 th April,2006 and 7th April, 2006 respectively, passed by the Additional Sessions Judge, F.T.C., Sahibganj in connection with Sessions Case no. 48 of 2004 corresponding to G.R. Case no. 224 of 2003, arising out of Sahibganj(T) P.S. Case no. 92 of 2003, whereby the appellants have been held guilty for the offence punishable under sections 302,120(B)/34 of the Indian Penal Code and Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for life under section 302/34 and 120B of the IPC and further sentenced to undergo R.I. for five years for the offence u/s 27 Arms Act. 2

2. The fact emerges from the fard-beyan of Arun Kumar (deceased), recorded on 16.8.2003 at 21:30 hrs. at Sadar hospital, Sahibganj is that on 16.8.2003 at about 9 p.m. the informant returned home along with his brother Anant Kumar from his shop on motorcycle. No sooner the informant was going to change his dress, appellant Kanchan Sinha called him and told that forget the previous incidents which had taken place and accompany him for smoking. The informant then proceeded along with appellant Kanchan Sinha. It is alleged that after covering some distance when they reached near the garage of Israil, the informant noticed presence of five to six persons and out of them identified the appellants Bablu Yadav and Babloo Rajak. It is further alleged that appellants and their associates who were present near the garage, started dragging the informant to nearby alley approaching to Priya Hotel. It is further alleged that Bablu Yadav of Talbanna opened fire causing injury to the informant on his abdomen and after sustaining injury he fell down. Thereafter, another shot was fired by appellant Kanchan Sinha which also caused injury to him on his abdomen. Babloo Rajak opened fire too, from his pistol. The appellants after causing injuries to informant, fled away towards vegetable market. Thereafter, family members of informant reached to the place of occurrence and took him to Sadar Hospital, Sahibganj for treatment. On the way, the informant disclosed names of appellants before his family members. It is disclosed that on 14.8.2003 the appellants had been to the shop of informant and hurled threat and abused for not providing vehicle to them. On the basis of fard-beyan of informant Arun Kumar (deceased), Sahibganj (T) P.S. Case no. 92

of 2003 dated 16.8.2003 U/s 307/34 I.P.C. was registered. After death of informant Section 302 I.P.C. was added. Some sorts of treatment were provided to the injured informant in Sadar Hospital, Sahibganj but, for better treatment he was removed to Silliguri but, could not survive and died. The Police after due investigation submitted charge sheet and accordingly cognizance of the offence was taken and the case was committed to the Court of Sessions and registered as Sessions Case no. 48 of 2004.

3. The appellants stood charged for the offence punishable under sections 302/34,120B Indian Penal Code and 27 of the Arms Act to which they pleaded not guilty and claimed to be tried. To substantiate the charges the prosecution has examined altogether nine witnesses and proved documents like fard-beyan, inquest report, post-mortem report, seizure list etc. The learned Additional Sessions Judge placing reliance on the evidence and documents available, held the appellants guilty for the offence punishable under section 302,120B,34 I.P.C. and 27 Arms Act and sentenced them as indicated above.

4. Learned counsel for the appellants have assailed the impugned judgment mainly on the ground that conviction and sentence has been recorded, considering the fard-beyan as dying declaration after death of informant. As a matter of fact, the deceased after sustaining injuries was not in a position to speak at all. No certificate from the doctor, who attended him at Sadar Hospital, Sahibganj has been taken to the effect that the informant was mentally fit, fully conscious and capable of giving statement. The so called dying declaration does not find attestation from doctor J.Khan who had examined him and provided first aid. The fard-beyan has been marked Ext.1. Archana Devi (PW-1) happens to be the wife of deceased and she has stated in Para 8 of her cross-examination that her husband had given written report signed by him to police officer who arrived at Sadar hospital, Sahibganj. The prosecution has suppressed that written report and prepared a fard-beyan on their own. Therefore, the fard-beyan on the basis of which this case has been instituted, is not the statement of deceased Arun Kumar. Archana Devi (PW-1), Barun Kumar Das(PW-2),Anant Kumar Das (PW-3),Milan Kumar Gupta (PW-5), Rajeev Kumar(PW-6) are all relatives of the deceased and they are highly interested witnesses. They have gone to the extent of saying, when

they reached to the place of occurrence they had seen the appellants fleeing from the place. The admitted 4 evidence on record is that, there was darkness in the alley in which the occurrence alleged to have taken place. There was no source of light available. Furthermore, if the miscreants were fleeing after committing the offence, the witnesses had no opportunity to see their face. Thus, it is apparent that they all have deposed lie before the court that they had seen the appellants fleeing from the place of occurrence. There are vital contradiction in the statements of aforesaid witnesses and, therefore, testimony of those witnesses are not reliable. It is submitted that conviction can be recorded solely on the dying declaration if it is free from doubt and manipulation. The court has to be cautious while placing reliance on dying declaration for holding the accused guilty. In the case at hand, the police officer who had recorded fard-beyan had never consulted any doctor of Sadar hospital, Sahibganj before recording fard-beyan of injured Arun Kumar Das. Manoj Kumar Sinha(PW-7) had recorded the fard-beyan and he is investigating officer too. He says that after receiving information regarding occurrence he went to Sadar Hospital, Sahibganj and found the informant in the operation theater. Some people were also present in that operation theater. He did not feel it desirable to seek permission from the doctor before recording the fard-beyan. Doctor Bhagat Marandi (PW-8) has stated that on 16.8.2003 he was posted as CAS at Sadar Hospital, Sahibganj and at about 9:10 p.m. Arun Kumar Das in injured condition was brought to the hospital. At about 9:45 p.m. injured was referred to Bhagalpur Medical College and hospital. Surprisingly enough, instead of taking the injured to Bhagalpur, the family members had taken him to Silliguri for further treatment. In Para 3 he says that condition of Arun Kumar Das was precarious when he was referred to BMCH, Bhagalpur. In para 2 he says that he had seen the injured in the operation theater and public was not allowed to enter. At that point of time, no outsider was present in the operation theater. If the version of PW-8 is correct then statement of investigating officer PW-7 is incorrect that many persons were present in the operation theater in whose presence fard-beyan of Arun Kumar Das (deceased) was recorded. As a matter of fact, the investigating officer in order 5 to justify his action obtained signatures of two attesting witnesses on the fard-beyan. The investigation done by PW-7 is also perfunctory. He did not collect blood stained soil from the place of occurrence and

without any forensic examination he says that blood fallen on the ground was fresh and that is why he presumed it to be human blood. He did not make effort to recover the weapon used in the offence. The place of occurrence is situated within heart of the town. Vegetable market, shops and hotels were situated near the place of occurrence but, the investigating officer did not take pain to examine those persons. No independent witness has come forward to support the occurrence. Learned counsel has relied on the judgment reported in 2007 (15) SCC465 Nallapati Sivaiah Vs. Sub Divisional Officer, Guntur A.P. By referring judgment cited above, it is submitted that all precautions are required to be taken before placing reliance on the dying declaration for holding the accused guilty. It is submitted that all attending circumstances should be considered before placing reliance on the dying declaration. Needless to mention, PW-1 wife of deceased did not admit that her husband had given statement to the police and it was reduced to writing rather, she says that her husband had given written report signed by him. The ocular version of the witnesses does not find support from the post-mortem report. The witnesses who had reached to the place of occurrence have stated that injuries were caused by fire arm on abdomen but, doctor Saibal Gupta PW-9 who had conducted post-mortem examination on the dead body of deceased Arun Kumar has opined that injury no.1 was caused to right gluteal region. Therefore, the injuries were not caused to the deceased on his abdomen rather, shots were fired from behind. Had it been so, the informant had no occasion to identify the persons who fired upon him. The impugned judgment is highly erroneous and liable to be set-aside.

5. Learned A.P.P. has opposed the arguments and submitted that prosecution has proved its case beyond shadow of all reasonable doubts and the learned trial judge has rightly held the appellants guilty placing reliance on the dying declaration. According to statement of deceased, at about 9 p.m. he returned home from his shop and was just going to change his dress, at about 9:15 p.m. somebody called him. When he came out of the house, he saw the appellant Kanchan Sinha who requested him to accompany to enjoy smoking and further told to forget the previous incident. The deceased accompanied by Kanchan Sinha proceeded and after covering some distance he saw five to six persons standing near the garage of Israil and out of them he identified Bablu Yadav and Babloo

Rajak. Before he understand the situation, he was dragged by the miscreants to nearby alley approaching to Priya Hotel and shots were fired on him by appellants Kanchan Sinha, Bablu Yadav and Babloo Rajak. He sustained injuries and raised alarm. Immediately, family members and the other witnesses reached there and took him to nearby Sadar Hospital, Sahibganj. He was taken to operation theater where his statement was recorded at about 9:30 p.m. By referring it, it is submitted that there was no opportunity for tutoring the deceased. Within no time, police also arrived at the hospital and recorded statement of Arun Kumar and that fard- beyan after death of Arun Kumar has been considered as dying declaration. At the time, fard-beyan was recorded it was not expected that Arun Kumar (deceased) would succumb to his injuries. As per statement of PW-8 Dr. Bhagwat Marandi, first aid was provided to injured and this witness has clearly stated that the informant was conscious and he was mentally fit to give statement. So far statement of PW-1 is concerned, she has admitted in her deposition that after Arun Kumar was taken to operation theater, she had left the hospital. Therefore, she does not know how the fard-beyan of Arun Kumar was recorded by the police. Two attesting witnesses namely Anant Kumar Das (PW-3) and Rajendra Prasad Yadav (PW-4) have supported the prosecution case and they have confirmed that fard-beyan of Arun Kumar was recorded in their presence and it was duly signed by Arun Kumar and also by them. The contention made by informant further find support from the statements of these two witnesses. The witnesses as well as investigating officer have stated that blood was fallen on the ground at the place of occurrence, only because blood stained soil was not seized the place of occurrence can not be disbelieved. There are witnesses 7 who had immediately reached to the place of occurrence and removed the injured to the hospital and these witnesses are PW-1, PW-2 and PW-6. It is not the case in which conviction has been recorded only on the dying declaration rather, the dying declaration find support from statement of other witnesses who had reached to the place of occurrence and removed the injured to hospital. The prosecution has well proved its case and there is no merit in these appeals and the same are liable to be dismissed.

6. Heard rival submissions and perused the case record, evidence recorded by trial court and impugned judgment. No doubt on different interval while dealing with admissibility of dying declaration the Hon'ble Apex Court has given guidelines

and the guidelines given by their lordships in the case of Paniben Vs. State of Gujarat (1992) 2 SCC474 find reference in the judgment reported in 2007 (15) SCC465 Nallapati Sivaiah Vs. Sub Divisional Officer, Guntur A.P. relied upon by the appellants. The Hon'ble Apex Court has laid down in several judgments the principles governing dying declaration which are as under: (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. (1976) 3 SC 104. (ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552 Ramawati Devi v. State of Bihar (1983) 1 SCC 211 (iii) This Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor (1976) 3 SCC 618 (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. (1974) 4 SCC 264 (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P. 1981 Supp SCC 25 (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. (1981) 2 SCC 654 (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu 1980 Supp SCC 455 (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar 1980 Supp SCC 769 (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanhau Ram v. State of M.P. 1988 Supp SCC 152 (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan (1989) 3 SCC 390 The judgment reported in the case of Paniben Vs. State of Gujarat (Supra) has also been referred in the judgment

reported in (2010) 6 SCC566Puran Chand Vs. State of Haryana relied upon by the prosecution.

7. In view of the guidelines given by their lordships in various judgments, we have examined the facts and evidence available in the case at hand, we do agree with the submissions of learned A.P.P. that without having any opportunity of tutoring and without giving time to the author even to think or to implicate any person falsely, the fard-beyan of deceased Arun Kumar was recorded in the Sadar hospital Sahibganj. It is reiterated that the deceased was called from his house at about 9:15 p.m. he was taken by the appellants in the nearby alley and shots were fired upon him. After Arun Kumar sustained injuries he was immediately removed to Sadar Hospital, Sahibganj which is situated at stone through distance. The police station is also 9 closure to the place of occurrence. Immediately, the police arrived at the hospital and recorded fard-beyan of Arun Kumar(deceased) at 9:30 p.m. So within fifteen minutes everything was over and therefore, statement of Arun Kumr recorded by the police within fifteen minute of the occurrence was certainly uninfluenced and untutored. He had had an opportunity to see the appellants and they were known to him from before. He was not expecting that due to previous incident he would be murdered and reference of previous incident find place in the fard-beyan and the statements of witnesses. The bullet pumped in the body came out by creating exit wound in his abdomen near umbilical area and that was the reason he thought that shots were fired in his abdomen. Since, exit wound appearing in the abdomen were larger in size nobody noticed that shots were fired from behind from gluteal region. It was only noticed by PW-9 Saibal Gupta who conducted post-mortem examination on the dead body of Arun Kumar. The fard-beyan of deceased find support from evidence of two attesting witnesses Anant Kumar Das (PW-3) and Rajendra Prasad Yadav (PW-4) and they have fully supported the prosecution case as narrated in the fard-beyan. The informant had been disclosing names of appellants from the very beginning after he sustained injuries, to the witnesses who reached to him and the statement was finally reduced to writing in the shape of fard-beyan at the hospital. Only because Dr. Khan who had attended the informant first, has not been examined, we can not deny statement of Dr. Bhagwat Marandi PW-8 who was also present at the hospital at the relevant point of time and he had also seen Arun Kumar when he

was brought to the hospital in injured condition. This doctor has supported the fact that Arun Kumar was conscious and he was mentally capable of giving statement so recorded by the police officer. Because of the contradictions as to who were present at the operation theater and who were not, the fard beyan of Arun Kumar which was recorded in the hospital cannot be thrown away. Again we would like to observe that it is not a case in which the deceased was brought to hospital by unknown persons and his statement was recorded and that statement later considered as dying declaration rather, it is a case in which 10 the informant was immediately rescued after he was shot at. It will not be out of place to mention that the deceased had disclosed names of the appellants to those witnesses and the statement so given before them was again given by the deceased before the police. The aforesaid witnesses in whose presence fard-beyan was recorded, the witnesses who helped Arun Kumar in removing hospital, have fully supported the prosecution case and nothing material contradiction has been taken from their mouth. Learned Amicus Curiae has repeatedly submitted that no independent witness has been examined in this case and the fard-beyan of the deceased which has been considered as dying declaration to record the conviction is not attested by the doctor who was present at the hospital. To answer these questions we have again examined the statements of witnesses and we find that they have specifically stated that in the town of Sahibganj the life goes to stand till after sunset, normally before 8 p.m. It is clearly stated that shops which were located at that alley were closed at that point of time. It has not come in the evidence that independent witnesses had assembled at the place of occurrence after the assault caused to informant(deceased). Furthermore, statements of two of the witnesses namely Anant Kumar Das and Rajendra Prasad Yadav were also recorded u/s 164 Cr.P.C. on 24.8.2003 i.e. within a week from the date of occurrence and those statements so recorded have been exhibited and proved by those two witnesses. Therefore, it is not a case in which the judgment of conviction and sentence has been recorded only placing reliance on the dying declaration rather, the fard-beyan which has been considered as dying declaration after death of the informant find support from the statements of other witnesses too. Dr. Bhagwat Marandi PW-8 has proved this fact that the deceased was brought to the hospital in injured condition and his statement was recorded by the police and he was in fit state of

mind to give statement. We can not ignore evidence of Dr. Bhagwat Marandi.

8. Four defence witnesses have been examined to prove this fact that Bablu Yadav is handicapped and he is unable to walk properly. The defence witnesses also tried to prove this fact that 11 Bablu Yadav was not present at the place of occurrence at the relevant point of time. But after going through the cross-examination of those witnesses we find that they did not stand to their statements given in their examination-in-chief. Besides above we have already discussed in detail that fard-beyan of the informant which has now been considered as dying declaration, is accepted as truthful statement, without being influenced and tutored and we have no reason to discard or disbelieve the same. We do not feel inclined to reject the dying declaration merely because it is not attested by the doctor who attended him in the hospital. We have considered all other attending circumstances in which fard-beyan of Arun Kumar was recorded by the police. Again we would like to bring it on record, at the time fard-beyan of Arun Kumar was recorded, it was not expected that he would die and therefore, fard-beyan was not recorded initially keeping in mind the requirement of recording dying declaration. Since, the dying declaration find support from the evidence of other witnesses including doctor in whose presence it was recorded, we do not feel inclined to reject it. Further we find that PW-8 in his cross-examination has stated all these things that the injured was speaking, he was conscious and cooperative and at the time of recording of his statement this witness as well as Dr. Jawahar Khan were present.

9. Once the court is convinced that the dying declaration so recorded is acceptable and may be acted upon, conviction can be recorded on the basis of such dying declaration.

10. In view of the discussions made above, the evidence available on record and considering the attending circumstances, we do not feel inclined to interfere with the findings of the learned trial court and, accordingly, the judgment of conviction and order of sentence dated 4th April, 2006 and 7th April, 2006 respectively, passed by the Additional Sessions Judge, F.T.C., Sahibganj in connection with Sessions Case no. 48 of 2004 corresponding to G.R. Case no. 224 of 2003,

arising out of Sahibganj(T) P.S. Case no. 92 of 2003 is hereby upheld. 12 11. Accordingly, Cr.Appeal (DB) no. 792 of 2006 and Cr.Appeal (DB) No. 803 of 2006 are hereby dismissed.

12. Bail bond of appellant namely Babloo Rajak is hereby cancelled. He is directed to surrender before the convicting/successor court to serve out the sentence, failing compliance the convicting/successor court shall take all effort to secure his attendance by issuing processes against him. (D.N.Upadhyay, J.) (Ratnaker Bhengra, J.) Jharkhand High Court, Ranchi Dated:

06. 04.2016 Nibha / A.F.R.

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