

Dharm Nath Ram and ors. Vs. the State of Bihar

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Court : Patna

Decided On : Nov-26-2009

Judge : C.M. Prasad and; Dharnidhar Jha, JJ.

Acts : Evidence Act - Section 32; ;Indian Penal Code (IPC) - Sections 149 and 302; ;Code of Criminal Procedure (CrPC) - Section 311

Appeal No. : Criminal Appeal No. 411 of 2003

Appellant : Dharm Nath Ram and ors.

Respondent : The State of Bihar

Advocate for Def. : Ashwini Kumar Sinha, A.P.P

Advocate for Pet/Ap. : Kanhaiya Prasad Singh, Sr. Adv.,; Atal Bihari,; Chandra

Disposition : Appeal allowed

Judgement :

C.M. Prasad and Dharnidhar Jha, JJ.

1. The eleven appellants before us were put on trial by the Additional Sessions Judge, Saran at Chapra in Sessions Trial No. 380 of 1989 for charges under Sections 302 and 149 of the Penal Code and, by the judgment of conviction dated 14.8.2008, were held guilty of committing the above offences. While passing

sentences against the appellants on 18.8.2003 the learned Presiding Officer of the Fast Track Court-III, Saran at Chapra directed each of the appellants to suffer rigorous imprisonment for life. No sentence of fine was imposed on any of the appellants. The appellants have questioned their conviction and the quantum of sentence before us through the present appeal.

2. The deceased of the case, namely, Smt. Ram Kali Devi is also the informant of the case. She appears making a statement in a field, which appears a bone of contention between the parties. The deceased stated in her fardbayan recorded on 2.12.1988 at 16 hours (4 P.M.) that she was getting her field ploughed at 1.30 P.M. when all the accused persons, armed variously, came there and forbade her to plough the field. The deceased replied that she was tilling the land since last seven generations. The accused persons, thereafter, surrounded the informant/deceased seeing which her son Suresh Ram (P.W.4) fled away. It was alleged by the deceased that appellant No. 1, namely, Dharm Nath Ram dealt a farsa blow to her with intention to kill which fell upon her right temple and her temple and right cheek were cut. She further alleged that the same appellant dealt another farsa blow by the side of the first injury. The deceased fell down on the ground whereafter, it is alleged, appellant No. 11 Manshi Ram, in order to killing her, dealt a farsa blow which she wanted to ward off by both her hands resulting into her fingers of her hands being cut. It was alleged by her that the remaining accused persons also dealt blows and caused injuries to her by means of lathi, danda, farsa and bhala. Witnesses like Deepan Ram (P.W.1), Marai Ram (not examined), Muni Ram (P.W. 2), Suresh Ram (P.W.4), Fulwa Devi (not examined) and others came there and they also saw the occurrence.

3. This fardbayan, as pointed out by us earlier, was recorded by the I.O. at the very field where the assault was given to the deceased. The fardbayan has been marked Ext.-3. It appears that the officer who recorded the document sent it to the police station for institution of a case and, accordingly, FIR Ext-4 was drawn up on the same day, i.e., 2.12.1988. The police investigated into the case and during that course, collected evidence and finding materials sufficient for putting the appellants on trial, forwarded them by submitting a chargesheet. This was how the case appears put on trial, which ultimately resulted in the conviction and sentence

as indicated at the very outset and lastly into this appeal.

4. The defence of the appellants was of innocence and also of being implicated falsely on account of chronic litigation existing much prior to the occurrence.

5. The prosecution examined six witnesses, Krishna Sharma being examined twice as P.W.6 and 7, which we believe, was an error of procedure adopted by the learned trial Judge. He, at best, could have been recalled for further cross-examination for whatever purposes it had been felt necessary by the court below. The court below appears examining its own witness also in the form of Hardeo Prasad (C.W.1). On the basis of the above evidence the verdict of guilt was recorded in terms as indicated above in spite of the fact that the investigating officer of the case was not examined and a question of prejudice was raised not by the learned senior counsel appearing for the appellants but by the learned Public Prosecutor appearing in this appeal which we will be dealing with at an appropriate stage of the present judgment.

6. Sri Kanhaiya Prasad Singh, learned senior counsel appearing for the appellants has castigated the findings recorded by the learned trial Judge on various grounds besides on the ground that the very story which has been narrated by the deceased appears improbable inasmuch as the medical evidence coupled with the evidence of her son P.W.2 makes it inherently unacceptable that the deceased would be in a fit state of mind and health so as to making such a detailed and meticulous statement. While taking us through the statement of the four witnesses, i.e., P.Ws. 1 to 4, Sri Singh criticized the individual evidence of each and every witness and pointed out as to how those witness could never be held to be trustworthy on many grounds besides on one that their presence on and around the place of occurrence appears doubtful. It was contended in the above context that two star witnesses of the prosecution, i.e., P.W.2 Muni Lal Ram and P.W.4 Suresh Ram have given reasons for their presence at the place of occurrence but if the court examines those reasons in the light of the other circumstances available on record of the case, the court would not feel any hesitation in branding them as not acceptable witnesses on account of their presence being doubtful. Sri Singh further submitted that the story of the deceased making statement about the

cause of her death also appears not established and the attempt of the prosecution to place it before the court in the form of oral dying declaration appears not in conformity with the settled principles of law. While castigating the prosecution case that the deceased would have been in a fit state of health and mind to make the statement, Sri Singh has drawn our attention towards the statement of P.W.5 Dr. Ramesh Kumar Sinha and has pointed out to us that the injury which were recorded by him on the dead body at the time of holding postmortem examination makes it utterly unacceptable, besides making it improbable also, that the lady would be conscious enough to tell the whole of the story with such meticulous details. It was, as such, contended that the learned trial Judge erred heavily in appreciating the facts of the case and recording a finding of guilt against the appellants.

7. Sri Ashwini Kumar Sinha, the learned Additional Public Prosecutor has rued the very manner in which the prosecution was conducted in the court below and was fair in submitting that the best evidence which could have been brought in support of the charges like the dying declaration recorded by the doctor was not produced before the court below. It was contended that the Public Prosecutor appears taking a circuitous route in establishing the factum of dying declaration by examining a formal witness like C.W.1 and P.W.6 to state that the fardbeyan was recorded by a particular police officer. Sri Sinha was fairly conceding that the law on proof of dying declaration, written or verbal, appears not complied with and as such the prosecution appears suffering set back on that account.

8. The fardbeyan is the statement of a dead person, Ram Kali Devi. It might be relevant under Section 32 of the Evidence Act but it could not be read in evidence unless the very officer who had recorded it could have come into the witness box to say that Ram Kali Devi had made the statement to him and he had recorded it verbatim and that record was the fardbayan. The above position of law appears completely ignored in the present case. Instead, an attempt was made by the prosecution while examining P.W.6 Krishna Sharma to bring on the record the document Ext-3 when he was being examined on the 3rd of March, 2003 in the court below. The witness stated that he was acquainted with the writings and signature of A.S.I. Rana Pati Singh. It is true that the writings and signature could

be admitted in evidence but the court could not go into it unless A.S.I. Rana Pati Singh would have been brought into the witness dock and would have testified in terms as we have just indicated. There would not have been any compliance with the legal position unless A.S.I. Rana Pati Singh could have reproduced on oath the very words which were spoken to him by the deceased and which were reduced by him into writing. Mere statement even of the above named A.S.I. that he recorded the fardbeyan would never have been the complete compliance on the point of law. We find that the court below had probably picked up the difficulty faced in proof of charges and in order to administer justice fully and completely it had invoked its own powers under Section 311 of the Cr.P.C. by ordering examination of a witness so as to proving a part of the case diary through him. This is how an Advocate's Clerk Hardeo Prasad was examined as C.W.1. We appreciate the attempt made by the learned trial Judge, but we still record our opinion by noting down that the evidence of C.W.1 was also not sufficient to make the evidence of oral or written dying declaration admissible in evidence as recorded by the police officer. This witness C.W.1 has stated that the deceased had made her statement during investigation before a particular police officer, i.e., Rana Raghu Ram Singh and he noted it down and thereafter copied it in one of the paragraphs of the case diary in his presence. We have already pointed out that unless the officer who had recorded the fardbeyan had appeared before the court to say and produce the exact words of the deceased earlier stated to him and which were recorded by him as fardbeyan, the document or any of the copies of it in any paragraph of the case diary would never be treated as a dying declaration.

9. This brings us to consider the evidence of oral dying declaration which comes through P.W.1 Deepan Ram and P.W.3 Manturni Devi. Before we go into the evidence of the two witnesses we want to make it very clear that mere reproduction of some jumble of words by scribing the same to a dead person would never make the statement admissible under Section 32 of the Evidence Act, unless the words are same which have been heard by the witnesses while the same were spoken by the deceased. What we mean to say is that the consistency in reproduction of the statement has to be looked into and if there is any inconsistency in the central theme of the statement then in that case it would never be safe to expect the reproduction of the statement of a dead person as dying

declaration. The reason behind the same is very simple that a dying declaration could be sufficient in itself to convict a person of the charge. This is the reason that the precaution has to be always kept into mind while considering the evidence of oral dying declaration. This Court had the occasion of considering the oral dying declaration in Vivekanand Mishra v. State of Bihar reported in 2008 (2) PLJR 764 and while reiterating the law on the position it was pointed out 'that consistency is a hallmark for accepting such an evidence when it is reproduced orally by witnesses'.

10. P.W.1 Deepan Ram has not claimed himself to be an eye witness to the occurrence and he has stated that he came to the disputed plot on hearing the hulla and he was told by the deceased that appellant Dharm Nath Ram and Manshi Ram has dealt farsa blows to her while appellant No. 3 Lorik Ram had given a bhala blow to her. The remaining appellants had assaulted her with lathi. We want to point out that if this could be treated as an oral dying declaration which could be taken to be made to P.W.1 by the deceased, then we shall have to revert back to the fardbeyan of the informant which was made to the police officer. Ext-3 does not contain any statement made by the deceased alleging any assault given to her by bhala by appellant No. 3 Lorik Ram. As regards the other appellants they are in general terms alleged to have also assaulted the deceased. But, if we consider carefully we could find that the deceased stated that the blows were dealt to her by four weapons, i.e., lathi, danda, farsa and bhala. Thus, these two variance which appear between the statement recorded as Ext-3 and the evidence of P.W.1 constrain us not to accept the statement of P.W.1 treating it to be the oral dying declaration of the deceased. The evidence of P.W.3 Manturni Devi in the form of dying declaration also appears not acceptable to us because she has stated that the single weapon, lathi, was used by the other appellants than Dharm Nath Ram and Manshi Ram who dealt blows to her by farsa. There are other reasons for us not to place reliance on the statement of P.W.3, the most important being that she has stated that she was making bundles of harvested paddy crops in the field of Awadh Singh and the landlord was not present in the field. However, she has admitted that her daughter Amrawati was with her. Her presence thus appears per chance. This could be acceptable to us if either Awadh Singh would have given evidence in the court that she harvested paddy crop in his field with her

daughter Amrawati or Amrawati would have given evidence that indeed her mother was making bundles of paddy in the field of Awadh Singh. None of them has come. So the very presence of the witness in the field of Awadh Singh which she claims just three or four plots away from the place of occurrence field appears not acceptable to us. She could not, as such, even be treated as chance witness. These are the reasons on which we have discarded the evidence of oral dying declaration and the evidence of two witnesses also, i.e., P.Ws.1 and 3.

11. P.W.2 Munilal Ram is the son of the deceased. He is a convict in a case of murder and it is admitted by him that appellant No. 1 Dharm Nath Ram, appellant No. 11 Manshi Ram and appellant No. 7 Mahabir Ram have deposed against him and his other convicted brother Suresh Ram in that particular trial. This was not the end of litigation and enmity. There were a series of cases which were fought by the parties much prior to the date of occurrence. These facts were admitted in the evidence of the witnesses in paragraphs, 5, 6 and 7. This is not the case only with P.W.2. Similar is the case with P.W.4 Suresh Ram. He was a convict and the conviction was passed by a court on the strength of the evidence given by appellants Dharm Nath Ram and others as pointed out just now. Besides, the evidence of P.W.4 in paragraphs 5, 6, 7 and 8 speaks of other litigations in the form of criminal cases in which he and other brothers were accused. All the cases were lodged by either one of the family members of the appellants or by some one in which the appellants had deposed. When the witnesses are class enemies to the appellant and the background is of serious enmity, then the court has always to be cautious in placing reliance upon their evidence. This is the reason that we have very closely scrutinized the very reasons assigned by them for their presence at the place of occurrence.

12. P.W.2, as per the FIR, does not appear present at the time of incident. The deceased informant had stated that her cries and hulla attracted P.W.2. P.W.2 claims being present at the scene of occurrence and that claim appears not acceptable to us on many reasons, besides the one that he did not inspire confidence to us. As regards P.W.4, he has stated that he was tilling the very field and the accused persons forbade his mother from getting the field tilled. The evidence of P.W.2 Muni Lal Ram in paragraphs 10 and 13 as also that of P.W.3

Manturni Devi in paragraph 6 clearly indicates that the paddy crop was standing over it. It hardly requires to be mentioned that if the paddy was standing on the field of occurrence, the very story of the field being ploughed has to be rejected. If we reject the very story of the field being ploughed then the very presence of P.W.4 has also to be rejected inasmuch his very claim of remaining at the scene of occurrence at the time of ploughing appears doubtful. Besides, the other reason for discarding the evidence of P.W.4 is that he has stated in paragraph 17 of his evidence that he carried his mother to the hospital and reached there at 4 P.M. as per his statement and that the statement of his mother was recorded by the police in the hospital, itself. It is supposed that P.W.4 would have remained present with his injured mother in the hospital, but he did not give any statement before the police for as many days as pointed out by the witness in the last line of the same paragraph. It is stated by P.W.4 that he gave his statement to the I.O. of the case after 20 to 25 days. We have not been able to get any satisfactory explanation for this belated statement by P.W.4 before the I.O. of the case. It always flashed into our minds that if at all he was present at the scene of occurrence as also at the hospital where he was supposed to be, then what was the reason for him to make a statement before the police so belatedly. We could get one simple reason coming to us that he could not have been present at the place of occurrence which appears more a probability on account of the fact of the paddy crop standing in the field about which we have spoken just a bit earlier.

13. This is the status of the witnesses. We want to add up one more reason for not accepting the dying declaration as a trustworthy piece of evidence. It was contended by Sri Singh by referring to the medical evidence that the number of injuries, the propensity of the same and their effect cumulatively would have been such as making the lady unconscious. This is not that Sri Singh was not making the argument from the record. P.W.2 the son of the deceased has stated in paragraph 11 of his evidence that his mother was assaulted continuously for ten minutes and that rendered his mother unconscious and that continued till she died. This is not that P.W.2 was making the above statement out of his imagination. If we consider the evidence of the doctor, P.W.5 we could find that as many as six injuries were recorded by him during the course of holding postmortem examination. The seriousness of the injuries could be viewed from any injury found

by him on the dead body. We want to reproduce the injuries found on the dead body.

(a). Stitched wound 4' two in number present on the Rt. Side of cheek 1/4' apart.

(b). Stitched wound 3' on Rt. Shoulder.

(c). Incised injury 6'x3' x muscles deep present on the Rt. Fore arm with complete chopping off of the wrist along with all the fingers of Rt. hand.

(d). Fracture of Rt. leg.

(e). Chopping off of ring and little fingers of Rt. hand with stitched wound 2' on the remaining fingers.

(f) Fracture of all the ribs of both sides of chest.

14. The face was smashed, the ribs were pulverized, the fingers of both the hands were chopped off, including the right wrist of the lady. There were fractures of leg also. If the lady was aged about 60 years as appears from Ext-1, the postmortem report, then she must not have remained conscious after having received those injuries. As such, the evidence of P.W.2 that the lady became unconscious and died in unconscious appears to us a true statement. If the lady was unconscious as we have to hold, then she could never had given a dying declaration.

15. The other defect in the prosecution case is about recording of the fardbeyan. Injuries as many as six of the description as just noted down by us were found by the doctor on the old lady. She was beaten up around 1.30 P.M., but her fardbeyan was recorded at 4 P.M. No one come to pick her up or to give a drop of water. Ext-3, the fardbeyan, points out that the same was recorded at the very field. We have quite some serious reservations in accepting the official record of reaching the place of occurrence and recording the statement at 4 P.M. inasmuch as the deceased-mother had three grown up sons and as many daughters-in-law. She appears also having grand children. She could not have been left alone by her family members with such a serious injuries in the field and must have been picked up just after the occurrence so as to be nursed. Attempts must have been

made to take her to some medical institute for treatment. This is the reason that P.W.4 has stated in paragraph 17 that he took her to the hospital where the police recorded the fardbeyan. On this reasoning, we reject the claim of the prosecution that Ext.3 was recorded at the place of occurrence.

16. These are the telling circumstances we have picked out of the evidence on record which in our opinion was sufficient for the court below to record a finding of the charges not being proved. The case appears suffering from many infirmities. Many suspicious circumstances do not appear explained satisfactorily by the prosecution. We, as such, set aside the judgment of conviction and the sentence passed against the appellants by allowing the present appeal. We acquit the appellants. All appellants except appellant No. 1, Dharm Nath Ram, are on bail. They shall stand discharged from the liabilities of their respective bonds. As regards appellant No. 1 Dharm Nath Ram he shall be released forthwith from custody if not wanted in any other case.

17. In the result, the appeal is allowed.

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