

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.240 of 1995

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Balmiki Prasad Chourasia, son of Late Baldeo Prasad Chourasia, Resident of
Vilage-Jhikatia, P.S. Maheshkhut, District-Khagaria.

... .. Appellant.

Versus

The State of Bihar

... .. Respondent.

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Appearance :

For the Appellant : Mr. Amish Kumar, Amicus Curiae.
For the State : Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 09-12-2021

The appellant/accused by this appeal is challenging the Judgment and order dated dated 03.07.1995 passed by the learned Additional Sessions Judge-VII, Munger, in Sessions Case No.562 of 1993 thereby convicting him of the offence punishable under Section 302 of the Indian Penal Code and sentencing to suffer him for imprisonment for life.

2. For the sake of convenience, the appellant shall be addressed in his original capacity as an accused.

3. The facts leading to the prosecution of the appellant/accused as projected from the police report can be summarized thus:

(a). Accused Balmiki Prasad Chourasia is second



husband of Mira Kumari alias Shakuntala Devi (since deceased). This couple was staying at the portion of house of P.W. 4 Devansu Prasad Chourasia which is situated at Chhoti Kelabari area under jurisdiction of Police Station-Kotwali District-Munger, by taking it on rent. It is averred by the prosecution that the accused is a man of short tempered nature and he used to quarrel with his wife Mira Kumari alias Shakuntala Devi (since deceased) frequently.

(b). The incident in question allegedly took place in the night intervening 13th and 14th August 1993 at the residential house of Mira Kumari alias Shakuntala Devi which she was sharing with the accused. The accused started beating Mira Kumari alias Shankuntala Devi at about 08.00 P.M. of that night. Thereafter he had taken an axe from the house and gave a blow of that axe on the neck of Mira Kumari alias Shakuntala Devi. That blow caused bleeding injury on the neck of Mira Kumari alias Shakuntala Devi. She then went to Sadar Hospital, Munger, in an injured condition for medical treatment. At that Hospital, at about 01.30 A.M. of 14th August 1993, her statement came to be recorded by P.W.8 Sushil Kumar Khanna Assistant Police Inspector of Police Station-Kotwali. Accordingly, the subject crime came to be registered at about 01.30 A.M. on



14.08.1993. Mira Kumari alias Shakuntala Devi ultimately succumbed to the injury suffered by her on the very same day.

(c). After death of Mira Kumari alias Shakuntala Devi, Section 302 of the Indian Penal Code was added to the case diary of the crime. Inquest notes were prepared after inspecting the dead body of Mira Kumari alias Shakuntala Devi. The dead body of Mira Kumari alias Shakuntala Devi was then sent for autopsy. P.W.6 Dr. H.N. Mandal, Civil Assistant Surgeon performed the post-mortem examination on the dead body.

(d). The Statement of the witnesses came to be recorded and on completing investigation, the accused came to be charge-sheeted.

(e). Charge for the offence under Section 302 of the Indian Penal Code was framed and explained to the accused. He pleaded not guilty and claimed to be tried. In order to bring home the guilt of the accused, the prosecution examined in all 9 witnesses. The defence of the accused was of total denial.

(f). After hearing the parties, the learned trial court by the impugned Judgment and Order was pleased to convict the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code and he is sentenced to suffer life



imprisonment.

4. We have heard Sri Amish Kumar, learned Advocate, appointed to represent the appellant at the cost of the State. He argued that the entire case of the prosecution is based on a single piece of evidence and that is the dying declaration of the deceased made by her and recorded by P.W.8 Sushil Kumar Khanna, Assistant Police Inspector. It is argued that the said dying declaration is not trustworthy and reliable to convict the appellant/accused. The same was not recorded after getting the medical condition of the deceased examined from the attending Medical Officer. The injury was on the neck and the deceased succumbed to the injury within a short period of time. Therefore, it cannot be said that the deceased was in a position to make the statement.

5. Learned appointed Advocate further argued that the evidence of P.W.3 Bishwa Nath Mandal casts a serious doubt on the case of the prosecution. Other witnesses such as P.W.4 Devansu Prasad Chourasia and P.W.5 Deoki Devi have turned hostile to the prosecution and therefore the appeal deserves to be allowed.

6. As against this learned Prosecutor supported the impugned Judgment and order of conviction and sentence by



contending that the dying declaration of the deceased is showing the complicity of the appellant/accused in the crime in question. The deceased was in the company of the appellant/accused at the time of the incident and, therefore, the appeal deserves to be dismissed.

7. We have considered the submissions so advanced and we have also perused the record and proceeding including the oral as well as documentary evidence adduced by the parties.

8. Upon perusal of record, we have noticed that the case of the prosecution rests on the dying declaration of deceased Mira Kumari alias Shakuntala Devi recorded at 01.30 A.M. on 14.08.1993 at Sadar Hospital by P.W.8 Sushil Kumar Khanna. Section 32 of the Evidence Act deals with admissibility of such statement in evidence. When a statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, such statement becomes relevant in cases in which the cause of that person's death comes into question. Section 32 of the Evidence Act as such is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicidal or suicidal, provided such statement is



relevant to the cause of death or exhibits circumstances leading to the death. The dying declaration stands on a same footing as any other piece of evidence and has to be judged in the light of the surrounding circumstances with reference to the principles governing the weighing of evidence. The dying declaration can form the sole basis for conviction provided that the same is found to be truthful and reliable. In order to pass the test of reliability, a dying declaration is required to be subjected to a very close scrutiny, keeping in mind the fact that such statement has been made in absence of the accused who had no opportunity of testing the veracity of such statement by means of cross-examination. If the dying declaration fails to pass the test of reliability and truthfulness, then the same is required to be ignored from consideration. There is no rule of law that the dying declaration must be recorded by a particular authority. What is required to be seen is, whether the declarant was in a position to make a declaration and whether such declaration is truthful and trustworthy.

9. Sri Amish Kumar learned Appointed Advocate has rightly placed reliance on the Judgment of the Supreme Court in the matter of **Jayamma & Anr. Versus State of Karnataka** along with **Lachma s/o Chandyanika & Anr.**



Versus State of Karnataka decided on 07.05.2021 and reported in **(2021) 6 SCC 213**. Hon'ble Supreme Court in that matter had taken a review of the entire case law on the subject of appreciation of dying declaration. In that ruling, relevant paragraph from the Judgment in the matter of Sham Shankar Kankaria Vs. State of Maharashtra reported in (2006) 13 SCC 165 is reproduced which lays down the principles of appreciation of evidence regarding the dying declaration found in several Judgments of the Hon'ble Supreme Court. It reads thus:-

- “(i). There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P. [(1976) 3 SCC 104]);
- (ii). If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 and Ramawati Devi v. State of Bihar [(1983) 1 SCC 211]);
- (iii). The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See 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. (See 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. (See 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. (See 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. (See 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. (See Surajdeo Ojha v. State of Bihar [1980 Supp SCC 769]);
- (ix). Normally the court in order to satisfy whether the 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 the dying declaration, the medical opinion cannot prevail. (See 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. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390]);



(xi). Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700]).”

10. Fate of the prosecution case hinges on the officially recorded dying declaration of the deceased Mira Kumari alias Shakuntala Devi by P.W.8 Sushil Kumar Khanna Assistant Police Sub Inspector. This witness deposed that on receipt of O.D. slip he went to the Sadar Hospital and recorded the statement of Mira Kumari alias Shakuntala Devi at 01.30 A.M. of 14.08.1993. As per his version, he treated that statement as the First Information Report and registered the crime in question. This F.I.R. is at Ext.3. After the death of Mira Kumari alias Shakuntala Devi, this F.I.R. at Ext.3 is elevated to the status of dying declaration of Mira Kumari alias Shakuntala Devi.

11. Now, we will have to see whether the declarant was in a position to make the declaration Ext.3 and whether such declaration is truthful and trustworthy. For this purpose, let us see what is the declaration Ext.3 made by the deceased.

12. The F.I.R. at Ext.3, which is declaration of the deceased is a full page hand written document. Perusal of this



declaration shows that deceased Mira Kumari alias Shakuntala Devi has stated her full name with the name of her husband. She further stated that she is presently residing with her husband Balmiki Prasad Chourasia in the rented house of Devansu Prasad Chourasia. In that declaration, she has stated the location of that house. The declaration then contains a recital to the effect that she is making a statement on that day in the night at 01.30 A.M. while being admitted at the Sadar Hospital. She is stated to have said that she is making statement in front of Jamadar Saheb of Kotwali Police Station. Thereafter she is stated to have given all details of location of her parental house with the name of the jurisdictional police station and the district where her parental house is situated. In a similar way details in respect of her matrimonial house is also stated to have given by her in her statement. Then the deceased is stated to have declared that her husband used to beat her in an angry mood and she used to oppose him. It is stated in the declaration that she was beaten at 08.00 P.M. Then she is again stated to have given the details of the house and full name of her husband. Then she is stated to have said that he took axe from the house and gave a blow on her neck. The declaration further states that then the declarant was injured and blood



started flowing from the wound. It is further stated in the declaration that at that time there was no body at the house except the husband of the declarant. It is further stated that then anyhow, the declarant managed to come to the Hospital. The declarant is further stated to have said that with an intention to commit her murder, her husband has assaulted her. The declaration further contains the statement of the declarant that her statement was read over to her, she understood it and then she put her thumb impression on it.

13. The question which falls for consideration is whether the Statement Ext.3 was really made by the deceased, whether such statement contains truthful account, whether the declarant was in a position to make statement and whether such statement can be the solitary foundation for convicting the accused.

14. On perusal of the declaration at Ext.3, we note that it is containing the minute and elaborate details which is not even expected from a person having normal state of mind. Repeatedly the details of the rented house are coming in the statement. The statement is giving all details of matrimonial and parental house of the deceased. It is also containing the statement that the declarant was assaulted with an intention to



cause her murder by the accused. The declaration is not in question answer form. Bare perusal of the declaration at Ext.3 makes it clear that it is written mechanically in the format in which police usually records the statement of the victim or the witnesses. Narration of the declaration that the declaration is being given at about 01.30 A.M. at Sadar Hospital in front of Jamadar Saheb of Kotwali Police Station and the declarant was assaulted with an intention to commit her murder indicates that P.W.8 Sushil Kumar Khanna had direct influence over the declarant while recording her statement at Ext.3. These recitals make the declaration at Ext.3 doubtful and suspicious. A reasonable doubt lurks in a judicial mind as to whether it is a statement given by the deceased or whether the same is the description of the incident written by P.W.8 Sushil Kumar Khanna by his own surmises and conjunctures. Such a detailed and elaborate declaration cannot be expected from a person suffering serious injury on the vital part of the body after suffering heavy blood loss.

15. Deceased Mira Kumari was a rustic villager. It does not stand to reason that she was able to narrate the minute details of the incident and referring the intention of the assailant to commit her murder. Bare look at her statement shows that it



is artificial in nature and has no resemblance of a statement of a dying person.

16. Now, let us examine whether the deceased was in a position to make a coherent statement running into full page as claimed by P.W.8 Sushil Kumar Khanna Assistant Police Inspector. As stated, he is claimed to have attended the Hospital on receipt of the information and then recorded the statement of the deceased. Undisputedly, evidence of P.W.8 Sushil Kumar Khanna shows that the dying declaration of the deceased was recorded when the deceased was admitted in the Hospital and was taking the medical treatment. Cross examination of this witness unerringly points out that he has not even approach the attending Medical Officer who was treating the deceased at that time. This witness has not requested the Medical Officer to examine the patient in order to ascertain whether she is in a position to give statement or whether she is conscious, well oriented in time and place and is in a position to speak particularly in the light of the fact that the victim had suffered a blow of an axe on her neck. P.W.8 Sushil Kumar Khanna has not gone through the papers of medical treatment of the declarant in order to ascertain whether sedatives were administered to her during the course of her



treatment. He has not even recorded the declaration in question answer form by initially asking few questions to ascertain whether the declarant is mentally and physically fit to make a statement. It is seen from the evidence of autopsy Surgeon P.W.6 Dr. H.N. Mandal, Civil Assistant Surgeon of the Sadar Hospital that the injury suffered by the deceased was very serious in nature and looking at it, even a lay man would say that it will certainly cause death of the victim. This Statement of P.W.6 Dr. H.N. Mandal in his cross examination certainly casts shadow of doubt of the dying declaration of Mira Kumari alias Shakuntala Devi when the same was not recorded after ascertaining fitness of the declarant to make a statement. It seems that this Police Officer had shown his over enthusiasm in getting the statement of the deceased Mira Kumari alias Shakuntala Devi prepared without getting her examined to ascertain her fitness from the attending Medical Officer from the Government Hospital where she was taking medical treatment.

17. Evidence of Autopsy Surgeon P.W.6 Dr. H.N. Mandal shows that Mira Kumari alias Shakuntala Devi died on the very same day i.e. 14.08.1993 and he had performed the autopsy on that day itself. During the course of post-mortem



examination, this autopsy Surgeon has noted that the dead body of Mira Kumari alias Shakuntala Devi was having incised wound size 2" x 1" x sharp deep to soft tissues on right side of neck in the middle. He also noticed that the blood and blood clots were present at that injury. During the course of internal examination, this Medical Officer noticed that blood vessels and soft tissues beneath the injury were cut in circle. As stated in the foregoing para, as per version of this autopsy Surgeon, the injury found on the dead body was very serious injury which could surely cause the death of a human being.

18. Thus because of wound to neck which has caused deep internal damage to the vital part of body of the deceased, there was loss of lot of blood. Blood vessels of neck of the deceased were cut due to blow of an axe. Even during autopsy, despite medical treatment to the deceased, the autopsy Surgeon noted blood as well as clots of the blood over the wound. In such fact situation it is very difficult to infer that the deceased was in a fit and conscious state, physically as well as mentally to make such an elaborate dying declaration. The prosecution has not adduced evidence of the expert i.e. Medical Officers treating the deceased to show that at 01.30 A.M. on 14.08.1993 when her dying declaration was recorded, Mira



Kumari alias Shakuntala Devi was in a position to make a coherent and lengthy statement as to the circumstances of transactions leading to her death.

19. As according to the dying declaration, it was the accused who caused death of Mira Kumari alias Shakuntala Devi by a blow of an axe at their residential house, let us see whether in order to corroborate this dying declaration, other evidence is forthcoming on record to show presence of the accused on the scene of occurrence. Prosecution has examined a neighbourer who is P.W. 3 Bishwa Nath Mandal. This witness is an Advocate by profession. He is also a Panch witness to the seizure body from the spot of the incident. He is residing in the neighbourhood of the rented house of the deceased where the incident had happened. Though it is case of the prosecution that the accused is the second husband of Mira Kumari alias Shakuntala Devi, this witness has stated that the accused is brother of deceased Mira Kumari alias Shakuntala Devi by relation. P.W. 3 Bishwa Nath Mandal further deposed that name of husband of the deceased is Nanhe Prasad Chourasia. As per his version, he saw the accused visiting the tenanted house of the deceased. However he clarified that on the day of the incident, he did not see the accused at the place



of the deceased. He further stated that in his presence a footwear and the earth mixed with blood was seized from the tenanted house of the deceased. Thus evidence of P.W. 3 Bishwa Nath Mandal does not show presence of the accused at the scene of the offence at the time of the incident or on the day of the incident. Thus his evidence is not helpful to corroborate the dying declaration.

20. P.W. 4 Devansu Prasad Chourasia, the land lord has turned hostile and stated that he is not knowing how his tenant Mira Kumari alias Shakuntala Devi died. He further stated that she was not staying with the accused. Evidence of this hostile witness is not supporting the case of prosecution.

21. P.W. 5 Deoki Devi who happens to be wife of P.W. 4 Devansu Prasad Chourasia has also not supported the prosecution in any manner. Except this there is no evidence to connect the accused to the crime in question.

22. It is thus clear that the dying declaration of the deceased Mira Kumari alias Shakuntala Devi is forming the solitary piece of evidence against the accused. No doubt the conviction can rest upon solitary evidence in the form of the dying declaration but for that purpose the same must be trustworthy and reliable. For the reasons stated in foregoing



transactions we are unable to hold so, in the instant case. Therefore we are not in a position to make the dying declaration of deceased Mira Kumari alias Shakuntala Devi as a sole basis for conviction of the accused. We have noted that the learned trial Court has completely misread the material evidence and has failed to consider the legal position in respect of appreciation of evidence concerning the dying declaration. The learned trial Court totally erred in placing explicit reliance on the dying declaration by giving a reason that P.W. 8 Sushil Kumar Khanna might not have anticipated immediate death of Mira Kumari alias Shakuntala Devi and therefore it was natural on his part not to take aid of the Doctor or the Magistrate in recording her statement. This observation is totally perverse because P.W. 8 Sushil Kumar Khanna, the police officer has not spoken so before the Court.

23. In the result, the appeal succeeds and therefore the orders.

(I). The appeal is allowed.

(II). The Judgment and Order dated 03.07.1995 passed by the learned Additional Sessions Judge-VII, Munger, in Sessions Case No. 562 of 1993 in between the parties thereby convicting the appellant/accused of the offence



punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life is quashed and set aside. The appellant/accused is acquitted of the offence alleged against him. His bail bond stands discharged.

24. We record our appreciation for strenuous efforts taken by Mr. Amish Kumar the learned Advocate appointed to represent the appellant at the costs of the State, in assisting us for arriving at the correct conclusion in the matter. We quantify the fees payable to him at Rs.5,000/- and direct the High Court Legal Services Authority to pay the said amount to Mr. Amish Kumar, the learned appointed Advocate.

(A. M. Badar, J)

Sunil Kumar Panwar, J:-

(Sunil Kumar Panwar, J)

P.S./-

AFR/NAFR	AFR
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