

(2015) 4 AJR 141 : (2015) CriLJ 4722 : (2016) 1 Crimes 489 : (2015) 3 JLJR 362

Jharkhand High Court

Case No: Criminal Appeal (DB) No. 93 of 2007

B.N. Singh and Others

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: July 1, 2015

Acts Referred:

- Arms Act, 1959 - Section 27
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 65(c)
- Explosive Substances Act, 1908 - Section 3, 4, 5
- Penal Code, 1860 (IPC) - Section 120-B, 147, 148, 149, 302

Citation: (2015) 4 AJR 141 : (2015) CriLJ 4722 : (2016) 1 Crimes 489 : (2015) 3 JLJR 362

Hon'ble Judges: Rakesh Ranjan Prasad, J; Ravi Nath Verma, J

Bench: Division Bench

Advocate: B.M. Tripathi, Nutan Sharma, Naveen Kumar Jaiswal and O.P. Singh, for the Appellant; Shekhar Sinha, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Ravi Nath Verma, J

The appellants call in question the legality of the judgment of conviction dated 19.12.2006 and order of sentence dated 4.1.2007 passed by the 1st Additional Sessions Judge, Palamau at Daltonganj in Sessions Trial No. 209 of 2004, whereby and whereunder the three appellants have been convicted under Section 302 read with Section 120-B of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for life. Though the appellants have also been convicted under Section 148 of Indian Penal Code but no separate sentence has been awarded for the said offence. The background facts, as projected by prosecution, in a nutshell, are as follows:--

"At the instance of the injured-informant Bihari Singh, his Fardbeyan (Ext.-2) was recorded by Sub-Inspector R.S. Tiwari, Officer-in-charge of Town P.S., District-Palamau on 24.10.2000 at 5:20 P.M. at Sadar Hospital, with the allegation that on 24.10.2001 at about 4.00 P.M., while he was sitting on a chair outside his shop situated in Private Bus Stand and his companion Ajay Singh was standing there, suddenly, Nagendra Choubey, Mukesh Choubey, Pradeep Vishwakarma, Shrawan Vishwakarma, Suraj Singh, nephew of Madhu Singh and B.N. Singh came on a Marshal Jeep and one Maruti Van and both the vehicles stopped there and all the accused persons came out of the vehicles. The informant saw that they were armed with Bomb and pistol and they began to fire on the informant and Ajay Singh and also hurled bombs on them with an intention to kill both. As a result of firing and hurling of bombs, both received injury and fell down on the ground. Hearing the firing sound and sound of bombs, several persons began to collect there and seeing them, the assailants fled away from there on their vehicles. The persons assembled there took them to Sadar Hospital but during treatment, Ajay Singh succumbed to his injuries. The reason, as disclosed in the fardbeyan, appears to be the past enmity due to murder of one Jagdeo Sharma in which this informant and Ajay Singh have been made accused."

2. At the bottom of the fardbeyan, it is recorded that the informant after going through the contents of his fardbeyan, which was read over to him, put his L.T.I. because he was seriously injured and was not in a position to put his signature. On the basis of the aforesaid fardbeyan, Sadar (Town) P.S. Case No. 381 of 2000 was instituted under Sections 147, 148, 149, 307 and 302 I.P.C. and also under Section 27 of Arms Act and 3, 4 and 5 of Explosive Substances Act. It would be pertinent to mention here that the injured-informant Bihari Singh after his fardbeyan recorded at Sadar Hospital was shifted to Ranchi for his better treatment but he died during the treatment and in the said circumstance, the trial court treated the said fardbeyan as dying declaration of the deceased Bihari Singh.

3. The Investigating Officer after due investigation of the case submitted the charge-sheet against the appellants and after commitment of the case, charges were framed against the appellants under Sections 148, 302 read with Section 120-B of I.P.C. and also under Section 27 of the Arms Act and 3/5 of Explosive Substances Act. The defence put up by the appellants was that they have been falsely implicated in this case due to political rivalry at the instance of one Jogender Singh, who was close relative of Videsh Singh against whom the appellants had campaigned in the last election.

4. In course of trial, the prosecution examined altogether 12 witnesses. Of them, P.W. 1-Sunil Singh, P.W. 2-Uday Kumar Singh--are seizure list witnesses but P.W. 1 has also testified about the incident. P.W. 3-Lalmuni Ram, P.W. 4-Pappu Banarasi, P.W. 5-Umakant Singh, P.W. 6-Jogendra Singh, P.W. 8-Santosh Ram, P.W. 10-Vidya Singh @ Uday Kumar Singh are all independent witnesses but not eye-witnesses of the occurrence, P.W. 7-Karu Singh and P.W. 12-Manoj Singh are the two sons of deceased Bihari Singh, P.W. 11-Shree Niwas Kumar, S.I. of Police was the first Investigating Officer

of this case.

P.W. 9 is Dr. Umesh Prasad Sinha of Sadar Hospital, Daitonganj, who had conducted autopsy of the dead body of Ajay Singh, another deceased on 24.10.2000 and on his evidence, post mortem report of deceased Ajay Singh was marked as Ext.-3. This witness found the following ante mortem injuries on the dead body of the deceased Ajay Singh:--

"External Examination:--

(i) Blackening and tattooing mark is found on his face and both arms.

(ii) Lacerated wound below the left scapular region size 6" x 3" x cavity deep with loss of skin and soft tissue. Blackening and tattooing mark is found around the injuries with blood stains.

On Dissection:--

(a) Chest:--Cavity was full of blood and clots. Pleura and left lung was lacerated. There was fracture of 7th, 8th and 9th ribs of left side.

(b) Dissection of abdomen:--abdominal cavity was full of blood and clots. Peritonium was lacerated and also the lacerated spleen was found."

In the opinion of the doctor, the death was due to shock and haemorrhage caused by abovementioned injuries, which were due to explosive and the injuries were sufficient to cause instantaneous death.

5. Another aspect of the case is that the second Investigating Officer and the doctor, who conducted autopsy of the dead body of Bihari Singh, could not be examined in this case. However, on perusal of the judgment of the trial court, it appears that there is an explanation by the prosecution side that even after taking all possible steps for the examination of those two witnesses, prosecution failed to procure their attendance in court. It is also pertinent to mention here that one Dr. G.K. Chaudhary, who had conducted autopsy of the deceased-informant, has also not been examined by the prosecution, however, a photocopy of the post mortem report of the deceased Bihari Singh was produced in court at the instance of his son Manoj Singh (P.W. 12) and on his statement during trial as P.W. 12 that when the photocopy of the said post mortem report was done he was present there, the post mortem report was marked as Ext.-3/1 without any objection from the defence side and it appears from Ext.-3/1 that the doctor had found the following injuries:--

"Firearm injury having (1) wound of entrance 1 x 1/2 cm. on the left chest lateral side with abraded collar and stitched. The projectile passes through left 10th inter-costal space lacerating the spleen, perforates the stomach, intestine at two places, mesentery and a

bullet has been found lodged in the soft tissues near right iliac fossa.

(2) Wound of Entrance 1 x 1/2 cm. on upper part front of chest in the midline with abraded collar and stitched. The projectile passes through the sternum in between 1st and 2nd ribs level, perforates the right lung, liver and a bullet has been found in the soft tissue near 8th inter-costal space lateral side.

(3) Wound of entrance 1 cm. diameter on the under surface of upper part with abraded collar. The projectile passes through soft tissue and makes an exit wound 1 cm. diameter on under surface of chin lower part then the projectile again makes an entrance wound 1 x 1/2 cm. on right clavicular region medial side. The projectile passes through right 1st inter costal space, perforates the right lung and a bullet has been found lodged in the soft tissue at right. 4th inter-costal space lateral side. The track of the above noted firearm injuries are contused and lacerated with process of blood and blood clot in right chest and abdominal cavity. The internal organs are pale."

In the opinion of the doctor, all the injuries were ante mortem caused by firearm and death was due to haemorrhage and shock and the time of death was 3 to 18 hours prior to the post mortem examination. The post mortem was conducted on 25.10.2000.

6. The trial court, mainly relying upon the dying declaration of the deceased and evidence of P.W. 7, wherein this witness had testified that when his father was being shifted from Sadar Hospital, Daltonganj to Ranchi in vehicle, was in his sense and had narrated the entire occurrence to him and to other persons sitting in the vehicle, convicted and sentenced the appellants as indicated above.

7. Before us, Mr. Tripathi, learned senior counsel appearing for the appellants vehemently contended that there are several loopholes in the case of prosecution, which make it unworthy of acceptance and the main challenge of Mr. Tripathi was the fardbeyan of the deceased-informant, which was subsequently treated as dying declaration. It was also contended that there is no proper explanation for non-examination of the two vital witnesses; the Investigating Officer and the Doctor, who had conducted autopsy of the deceased-informant and also the Doctor, who had treated the deceased at Sadar Hospital, Daltonganj, Palamau and the Police Officer who had recorded the fardbeyan of the deceased and due to their non-examination, the alleged dying declaration becomes unworthy of credence. A comment was also made on Ext.-2 (the fardbeyan of the deceased-informant) that neither there is any signature of any witness nor of any doctor or any employee of the hospital or any member of the family and in the said circumstance, the same cannot be treated as dying declaration rather at best, it can be treated as the statement of a dead person to show as to how he and his companion had received injury. In support of his contention, learned senior counsel relied on a case [Panchanand Mandal @ Pachan Mandal and Another Vs. State of Jharkhand](#), (2013) 10 AD 592 : (2013) 3 DMC 551 : (2013) 4 JCC 2515 : (2013) 13 JT 222 : (2013) 4 RCR(Criminal) 591 : (2013) 12 SCALE 356 : (2013) 9 SCC 800 wherein it has been held

that non-appearance of the A.S.I., who was the author of dying declaration, prejudicially affected the interest of the accused as they were denied opportunity to cross-examine and that the Ext.-2, which was subsequently treated as dying declaration, was not even certified by any medical expert and even the person, who had recorded the statement has nowhere mentioned the mental condition of the person and the fact that he was medically fit for making such statement. According to the learned counsel, there is no eye witness of the occurrence and the evidence of P.W. 7 appears also not to be trustworthy. Hence, it was contended that the judgment of conviction and order of sentence are not sustainable in the eye of law. Learned counsel Mr. Sinha, appearing for appellant Nos. 2 and 3, submits the Court to allow him to adopt the argument of Mr. Tripathi.

8. Opposing the contentions advanced on behalf of the accused-appellants, learned counsel representing the State has vehemently contended that the dying declaration is true and voluntary account of the circumstances in which the deceased had died and the said dying declaration has been corroborated by P.Ws. 6, 7 and 10 in whose presence, the deceased had narrated the incidence and the said dying declaration does not suffer from any infirmity in view of the judgments delivered in the cases of [Paras Yadav and others Vs. The State of Bihar](#), AIR 1999 SC 644 : (1999) CriLJ 1122 : (1999) 1 JT 25 : (1999) 1 SCALE 26 : (1999) 2 SCC 126 : (1999) 1 SCR 55 : (1999) AIRSCW 296 : (1999) 1 Supreme 2 , [Balbir Singh and Another Vs. State of Punjab](#), AIR 2006 SC 3221 : (2006) CriLJ 4646 : (2006) 2 DMC 813 : (2006) 12 JT 316 : (2006) 9 SCALE 537 : (2006) 6 SCR 636 Supp : (2006) AIRSCW 4950 : (2006) 7 Supreme 442 and in the case of [Atbir Vs. Govt. of N.C.T. of Delhi](#), AIR 2010 SC 3477 : (2010) 4 Crimes 148 : (2010) 8 JT 372 : (2010) 9 SCC 1 : (2010) 9 SCR 993 : (2010) AIRSCW 5461 : (2010) 7 Supreme 8 . It was further contended that there is no law, which makes a dying declaration recorded by a Police Officer either inadmissible or in any way, lesser in evidentiary value and the trial court has weighed the evidentiary value of the dying declaration on its merit.

9. This is a case where the basis of conviction of the accused-appellants, under Section 302 I.P.C., is the dying declaration. The Hon'ble Apex Court in catena of decisions enumerated and analysed the issue of dying declaration and held that great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is, not likely to tell lie or to concoct a case so as to implicate an innocent person but the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is for this reason that the requirement of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye witness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence. In the instant case, the fardbeyan of Bihari Singh, which was treated as a dying declaration, was recorded by a Police Officer. In the case of Balbir Singh v. State of Punjab (supra), the Hon'ble Supreme Court has held that a dying declaration would not lose its efficacy merely because it was recorded by a Police Officer and not by a Magistrate. In another case Atbir v. Government (NCT of Delhi)

(supra), the Hon"ble Supreme Court in paragraph 22 of the judgment after considering a catena of decisions laid down the following propositions with regard to the admissibility of a dying declaration:--

"22. The analysis of the above decisions clearly shows that:--

- (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
- (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
- (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
- (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
- (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
- (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
- (viii) Even if it is a brief statement, it is not to be discarded.
- (ix) When the eye witness affirms that the deceased was in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
- (x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

So, from the above propositions laid down by the Hon"ble Supreme Court, it is clear that the rule requiring corroboration of dying declaration is merely a rule of prudence and when the eye witness affirms that the deceased was in conscious state of mind, when making dying declaration, even medical opinion cannot prevail and merely because a dying declaration was not recorded by a Magistrate, the same by itself may not be a ground to disbelieve the entire prosecution case.

10. Now, we would like to discuss the evidence of the prosecution witnesses to see as to in which condition, the fardbeyan of the deceased, which was considered by the trial court as dying declaration, was recorded by a Police Officer. The fardbeyan was marked as Ext.-2 and on perusal of the same, it appears that it was recorded at 5:20 P.M. on 24.10.2000 at Sadar Hospital, Daltonganj, Palamau and at the bottom of the fardbeyan, it is clearly mentioned that the statement of the injured deceased was read over to him and explained whereafter he put his thumb impression only because he was seriously injured and not in a position to put his signature. The prosecution has examined 12 witnesses, but for the proper appreciation, we would like to divide the prosecution evidences in two parts. The first part relates to the evidence of witnesses to show as to how the deceased received injury at the place of occurrence and the second part relates to evidence of those witnesses, who were present in hospital when the fardbeyan of the deceased was recorded.

11. P.W. 1 is though a witness of seizure but he has given a vivid picture of the occurrence by testifying that he is an agent of private bus and on 24.10.2000 i.e. on the date of incident at about 4:30 P.M., he was at the Bus Stand and saw 6-7 persons coming on two vehicles; one Marshal Jeep and another Maruti Van and they came out of vehicles and hurled bomb upon the deceased Ajay Singh. In his presence, two seizure lists were prepared showing seizure of four bombs and one cartridge. The witness during cross-examination has also stated that the said cartridge was seized from a place near the office of Bihari Singh but this witness has nowhere whispered in his evidence about the injury of Bihari Singh.

P.W. 3 has only testified that while he was taking meal in his house at about 4.00 p.m., he heard the sound of bomb explosion and when came out of his house, found three persons fleeing away from there and on the next day, he came to know that Ajay Singh, who had sustained injury, died in hospital and another injured Bihari Babu, who was shifted to Ranchi for treatment, also died in Ranchi, but this witness denied to identify the persons, who were fleeing away from there.

Similarly, P.W. 4, a shop owner near the Bus Stand, has stated that he heard the sound of firing and explosion of bomb and found persons trying to flee away and in the evening, he came to know that Ajay Singh died in hospital and Bihari Singh also died in Ranchi during treatment.

P.W. 6 Jogender Singh while confirming the time and date of occurrence has testified that he was going to the Bus Stand when he saw a Marshal vehicle going towards the court side from Munsif road and in that vehicle, Pradeep Vishwakarma, Shrawan Vishwakarma, B.N. Singh-the present appellants and other accused persons were sitting but when he reached at the Bus Stand, he found Ajay Singh and Bihari Babu in injured condition and after lifting those injured in his own vehicle, he immediately rushed to Sadar Hospital, Daltonganj, but Ajay Singh died during treatment. This witness has further stated that when he was going to hospital along with two injured, Bihari Babu was in a conscious

position and in hospital, Ram Sagar Tiwari of Town Police Station had recorded his fardbeyan and had also explained the contents of the fardbeyan, whereafter the deceased had put his thumb impression. This witness during cross-examination has admitted that Bihari Babu is the cousin brother of Videsh Babu, who is his Samadhi.

P.W. 10 Vidya Singh @ Uday Kumar Singh, who has his own garage behind the Bus Stand, has also confirmed that he heard the sound of firing and explosion of bomb and when he enquired, he came to know that Bihari Singh has received firearm injury and then he came to the place of occurrence and found Bihari Singh lying on the ground. On enquiry, he came to know that the appellants along with other accused have assaulted him with firearm and bomb. Ajay Singh was also lying on the ground whereafter he along with other persons took them to Sadar Hospital and in the hospital, Ajay Singh was declared dead. Bihari Singh was referred to Ranchi where he was admitted in RMCH, but on the next day, he received a call at about 5.00-6.00 p.m. that Bihari Singh also died. The witness has further testified that when he came near Bihari Singh after the said occurrence, he was in a conscious stage and when the Officer-in-Charge was recording his fardbeyan in hospital, at that time also, he was conscious. The witness during cross-examination has explained that at the time the Officer-in-Charge was recording the fardbeyan of the injured Bihari Singh, the doctor, compounder and nurse were all present there besides several family members.

12. On perusal of the evidence of the above witnesses, it is apparent that though P.Ws. 1, 3, 6 and 10 are not the eye-witnesses of the occurrence but they have all testified that they came to the place of occurrence immediately after hearing the sound of fire and explosion of bomb. P.W. 6 and P.W. 10 thereafter took both the injured to Sadar Hospital, Daltonganj, Palamau. It is true that there are few contradictions and discrepancies in the evidence of the above witnesses but those contradictions are minors and does not lead to any inference that there was any suppression of truth in regard to the actual incident as well as the accused who perpetrated the crime. It has to bear in mind that witnesses to a serious crime and that too when the crime has been committed at a busy bus stand, may not react in a normal manner. The horror stricken witnesses of a dastardly crime may react differently.

13. Now, we would like to discuss the evidence of those prosecution witnesses in whose presence, the deceased had recorded his fardbeyan. The evidence of P.W. 6 and P.W. 10, have already been discussed above but as they are also the witnesses of recording the fardbeyan of the deceased by the Officer-in-Charge in Sadar Hospital. Besides the above, the evidence of P.W. 7-Karu Singh, one of the son of the deceased, is also important as he was also present when the fardbeyan of the deceased was recorded. This witness has stated in his evidence that he was in his house when he received the information about the occurrence and thereafter he came to hospital where he found his father and Ajay Singh lying on bed but immediately thereafter Ajay Singh succumbed to his injuries. The statement of his father was recorded by Ram Sagar Tiwari wherein his father had disclosed the names of the appellants and other accused, who had assaulted

him. This witness has confirmed that after recording the fardbeyan, Daroga Ji had read over and explained the contents of the fardbeyan whereafter his father gave his thumb impression as he was not in a position to put his signature and on the same day, his father was referred to Ranchi for better treatment and he along with other family members accompanied his father but during treatment, his father also died on the very next day of the occurrence. The witness has further confirmed that his father was admitted in hospital in Daltonganj in conscious stage and he was shifted to Ranchi also in the same position. During cross-examination, the witness has stated that in the vehicle while he along with his father and other members were going to Ranchi, his father had narrated the entire occurrence. Undoubtedly, this part of the evidence of the witness is not admissible in evidence.

Manoj Singh (P.W. 12) another son of the deceased has only confirmed that his father was admitted in Sadar Hospital, Daltonganj after the occurrence and from there, he was referred to Ranchi but during treatment at Ranchi, his father died. He has also testified that he had proceeded for Ranchi at about 4:30-5.00 P.M. from his own car, which was driven by his brother Dharmendra Singh and the post mortem of the dead body of his father was conducted by Dr. G.K. Choudhary. The photocopy of the report prepared by the said doctor was given to him by the Investigating Officer and the I.O. got the photocopy of the original in his preset, On the attestation of the witness, the said photocopy of the post mortem report of the deceased Bihari Singh was marked as Ext.-3/1 without any objection from the defence. It appears that this witness produced the photocopy of post mortem report as secondary evidence without proving the circumstances entitling him to give secondary evidences but no objection was raised by the defence. The Supreme Court in the case of [Kaliya Vs. State of Madhya Pradesh](#), (2013) 3 DMC 405 : (2013) 10 JT 414 : (2013) 3 RCR(Criminal) 958 : (2013) 9 SCALE 661 : (2013) 10 SCC 758 and in the case of [M. Chandra Vs. M. Thangamuthu and Another](#), AIR 2011 SC 146 : (2010) 10 JT 315 : (2010) 9 SCC 712 : (2010) 11 SCR 38 : (2010) AIRSCW 6362 in a similar situation has held as follows:--

"47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

14. Section 65(c) of the Evidence Act clearly stipulates that secondary evidence can be adduced relating to a document when the original has been either destroyed or lost or when the party offering evidence of its contents cannot, for any other reason, not arising

from his own fault or neglect produce it in reasonable time, the court is obliged to examine the probative value of document produced in the court. When the party gives in evidence any such document without proving the circumstances entitling him to give secondary evidence, the opposite party has an opportunity to raise objection at the time of its admission but in the case at hand, no such objection was raised and the photocopy of the autopsy report of the deceased Bihari Singh was marked as exhibit.

15. One of the contention of the learned counsel for the appellants was that neither the I.O. of this case nor the doctor, who had either treated the deceased Bihari Singh at Sadar Hospital, Daltonganj nor the doctor, who had conducted the autopsy of the deceased, has been examined by the prosecution, even there is no endorsement of any doctor or hospital staff on the fardbeyan and no proper explanation to that extent has been given by the prosecution. Even then, the court below treated the fardbeyan as dying declaration. We would like to say that the trial court in paragraph 26 of the impugned judgment while dealing with the submissions of the learned counsel for the prosecution has considered the explanation given by the prosecution that the Investigating Officer of the case was transferred and in spite of all steps, his attendance could not be procured. Similarly, the doctor, who had conducted the post mortem of the dead body of the deceased at Ranchi, could not be examined even after his efforts to procure his attendance. The witnesses P.Ws. 6, 7 and 10 have in clear words stated that the fardbeyan of the deceased was recorded by the Police Officer when his condition was serious but he was in conscious stage and fit to make statement. Admittedly, he expired almost after 24 hours.

In preceding paragraphs, we have already discussed the ratio decided in several judgments of the Hon"ble Supreme Court that even without corroboration by the author, the conviction can be based relying upon the dying declaration if the witnesses affirm that the deceased was in fit and conscious state to make the dying declaration.

It appears that seeing the condition of the injured, at that particular time, the author of fardbeyan, did not feel necessary to get the statement of the injured either recorded by a Magistrate or to get the endorsement of the attending doctor on the said statement. Even there is no denial from the defence side that no such occurrence ever took place or any suggestion contrary to the above was given by the defence to the witnesses during their examination in court. Merely because, there is no endorsement of a doctor on the fardbeyan, the same cannot be said to be not trustworthy. Similarly, as because the scribe of the fardbeyan has not been examined in court, the same cannot be thrown out when several witnesses have testified that the fardbeyan was recorded in their presence by the Officer-in-Charge of Sadar Police Station. No justifiable reason is pointed out to disbelieve the evidence of those witnesses. Their evidence does not suffer from any infirmity which would render the dying declaration as doubtful or unworthy of evidence. In such a situation, even if there is any lapse on the part of investigation or prosecution, the same should not be considered in favour of the accused persons.

16. On perusal of the evidences of the above prosecution witnesses, the following facts emerge:--

"(a) Several witnesses like P.Ws. 1, 3, 6 and 10 assembled near the place of occurrence after hearing the sound of bomb and firearms and found Bihari Singh and Ajay Singh lying in injured condition. Whereafter, P.Ws. 6 and 10 brought both the injured to Sadar Hospital, Daltonganj.

(b) P.Ws. 7 and 12 the two sons of the injured Bihari Singh after hearing about the incident and that their father and Ajay Singh have been shifted to the hospital rushed to the hospital. Where the Officer-in-Charge of Sadar Police Station Ram Sagar Tiwari was recording the fardbeyan of the injured Bihari Singh in presence of P.Ws. 6, 7, 10 and 12.

(c) The Officer-in-Charge recorded the fardbeyan and not as a dying declaration.

(d) For better treatment, the injured Bihari Singh was shifted to Ranchi but died on the very next day of the occurrence.

(e) During trial, the court treated the fardbeyan of Bihari Singh as dying declaration."

17. In *Paras Yadav v. State of Bihar* (supra) in exactly similar situation and circumstances, the Hon"ble Supreme Court held as follows:--

"Para-9. In this view of the matter with regard to *Paras Yadav*, in our view, there is no reason to disbelieve the oral dying declaration as deposed by the number of witnesses and as recorded in the fardbeyan of the deceased Sambhu Yadav. The fardbeyan was recorded by the Police Sub-Inspector on the scene of occurrence itself, within few minutes of occurrence of the incident. Witnesses also rushed to the scene of offence after hearing hulla-gulla. The medical evidence as deposed by P.W. 11 also corroborates the prosecution version. Hence, the courts below have rightly convicted *Paras Yadav* for the offence punishable under Section 302 I.P.C."

The Supreme Court in the above case has also held that the lapse on the part of the Investigating Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused and further held that the statement of the deceased recorded by a Police Officer in a routine manner as a complaint and not as a dying declaration, can also be treated as dying declaration after the death of the injured if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make a statement.

18. On analysis of the entire circumstances, we have no hesitation in saying that there is negligence on the part of the Investigating Officer as well as on the part of prosecution and such negligence may give rise to a reasonable doubt. The Hon"ble Supreme Court in the case of [Ram Bihari Yadav Vs. State of Bihar and Others](#), (1998) 4 AD 154 : AIR 1998 SC 1850 : (1998) CriLJ 2515 : (1998) 2 Crimes 254 : (1998) 3 JT 290 : (1998) 3 SCALE

200 : (1998) 4 SCC 517 : (1998) 2 SCR 1097 : (1998) AIRSCW 1647 : (1998) 4 Supreme 178 , in a similar situation observed as follows:--

"In such cases, the story of the prosecution will have to be examined de hors. such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice."

19. Mr. Tripathi while relying upon the case Panchanand Mandal v. State of Jharkhand (supra) seriously contended that in the said case also, the author, who recorded the dying declaration of a lady with third degree burn, was not examined by the prosecution and almost a similar explanation was given by prosecution, as in the instant case, the Court held that it was not a convincing explanation and non-explanation of the author A.S.I, has prejudicially affected the accused"s interest as they were denied the opportunity to cross-examine him.

Here, we would like to say that the facts and circumstances of both the cases are different. In the said case, the Hon"ble Court has explained the circumstance in paragraph-14 that particularly when the case was of a third degree burn which could lead to death, there is no certificate of any medical expert on dying declaration that the deceased was in a medically fit condition for giving the statement. However, the Court has further held that such certificate is not mandatory. In the case at hand, the deceased was first shifted to the Sadar Hospital in Daltonganj where his fardbeyan was recorded and seeing his serious condition, he was shifted to Ranchi for better treatment and almost after 24 hours of occurrence, he died at Ranchi. Normally, the court in order to satisfy itself whether the deceased was in a fit mental condition to make the dying declaration looks to the medical opinion but where the eye-witness has stated that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

20. From the rival contentions, one thing is clear that there is no eye witness of the occurrence. The prosecution has mainly relied upon the statement of the deceased Bihari Singh recorded in Sadar Hospital where he was lying injured. The trial court relying upon the evidence of prosecution witnesses as we have already discussed above recorded the finding that when the statement of the deceased was recorded in hospital, Bihari Singh was in conscious position and only after shifting to Ranchi, he died almost after 24 hours.

In view of the above discussion, we do not find that the dying declaration suffers from any infirmity and cannot form the basis of conviction rather we are of the opinion that the deceased, when he was in conscious position, had an opportunity to observe and identify the assailants.

21. We have also gone through the statement of the appellants recorded under Section 313 of the Code of Criminal Procedure and find that they have only taken the defence that they have been falsely implicated in this case due to political rivalry. It has not been disputed either by giving any suggestion by the defence during cross-examination that the alleged occurrence never took place nor the two deceased died in the alleged occurrence after sustaining firearm and explosive injuries. In the said circumstances simply because there was some political rivalry they have been falsely implicated in this case, cannot be relied upon.

22. The above discussions lead us to the conclusion that the conviction and sentences of the accused-appellants as recorded by the trial court in the impugned judgment do not call for interference which is upheld and affirmed. In the result, the instant appeal fails and is dismissed.

Rakesh Ranjan Prasad, J.

I agree.