
(2000) 4 PLJR 773

Patna High Court

Case No: Criminal Appeal (DB) No. 522 of 1993

Shankar Kharhougi

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Aug. 11, 2000

Acts Referred:

- Evidence Act, 1872 - Section 32
- Penal Code, 1860 (IPC) - Section 302

Citation: (2000) 4 PLJR 773

Hon'ble Judges: Narayan Roy, J; M.L. Visa, J

Bench: Division Bench

Advocate: Ajay Kumar, for the Appellant; G.P. Jaiswal, for the Respondent

Final Decision: Dismissed

Judgement

Narayan Roy, J.

Heard counsel for the parties. The sole appellant Shankar Kharhougi has been convicted u/s 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life for committing murder of Awadhesh Yadav.

2. Prosecution case, briefly stated, as per the Fardbeyan (Exht. 2) given by the deceased Awadhesh Yadav is that in the night of 11.11.1991 about 10/11 P.M. while Awadhesh Yadav was sleeping on a cot in the Veranda of his house, his wife along with the children was also sleeping there on a separate cot, on hearing some human voice he woke up and sat on the cot. In the meantime, he saw three persons standing before him who questioned him as to whether he is identifying them, the answer was in affirmative and immediately thereafter Shankar Kharhougi, the appellant who was holding a pistol in his hand, pointed the pistol on his back and opened fire as a result of which he sustained pistol injury. It is also the case of the prosecution that Padu Mandal and Lodi Mandal of village Bohara were also standing there along with the appellant. On halla being raised by the wife of the deceased the assailant and other two persons fled away and some of the

villagers came there and the injured Awadhesh was taken to Godda hospital for treatment where his Fardbeyan was recorded. On the basis of the Fardbeyan (Exht 2) a formal F.I.R. (Exht. 3) was drawn up and a case was registered against the appellant and other accused persons.

3. After completion of investigation, charge sheet was submitted against the appellant and one Rubia Devi and after taking cognizance of the offence, the case was committed to the court of Sessions where they were tried and ultimately the appellant alone was found guilty and Rubia Devi was acquitted of the charge levelled against her.

4. The defence of the accused appellant is total denial of the charges levelled against him and they have taken a plea of false implication.

5. The prosecution, in all, examined 8 witnesses in support of its case; out of them P.W. 3, Kankayee Devi is the wife of the deceased and an eye witness of the occurrence. P.Ws 1 and 2 namely Sarju Mahamari and Thakur Manjhi are witnesses on the point that on halla they reached the place of occurrence and they had seen the appellant armed with a pistol and there they came to know from the deceased that appellant Shankar Kharhougi had opened fire upon him with the pistol. P.W. 4 Sanad Raut is a hear say witness who had seen the injured deceased in Godda hospital. P.W. 6 Dr. Satyendra Mishra is the Medical Officer, Godda who had firstly examined the injured deceased and had prepared the injury report. P.W. 5 Dr. Pradeep Kumar Sinha is the Civil Assistant Surgeon, Godda who held autopsy over the dead body. P.W. 7 Gajadhar Nath Mishra is the Police Officer who submitted chargesheet in the case. P.W. 8 Dilip Kumar Toppo is the B.D.O., Godda who recorded dying declaration (Exht. 8) of the deceased.

6. Learned Trial Court, on the basis of the evidence, held the appellant guilty for committing murder of Awadhesh Yadav and accordingly sentenced him to undergo rigorous imprisonment for life. At the same time, the learned trial court having found no evidence against Rubia Devi, acquitted her.

7. Learned counsel for the appellant submitted that the appellant was not concerned either with the deceased or with Lodi Mandal and he has falsely been implicated in this case on account of land dispute. Learned counsel further submitted that there is solitary eye witness of the occurrence and the testimony of P.W. 3, therefore, should be taken into consideration with care and caution. It is further submitted that voluntariness of the dying declaration (Exht 8) is not manifest at the face of the same and the dying declaration has not been attested by witnesses nor it seems to have been recorded in presence of the doctor P.W. 6 who was present at that time in the hospital. Learned counsel, therefore, submitted that no reliance can be placed at the testimony of dying declaration (Exht 8).

8. P.W. 3 Kankai Devi, wife of the deceased in her evidence has stated that on 11.11.1991 at about 10 O"Clock she was sleeping in veranda of her house along with her

husband and children and the appellant came there in company of other accused persons namely Lodi Mandal and Rubia Devi and asked the deceased as to whether he recognize them. When her husband told that he recognised him, the appellant opened fire from his pistol which he was holding at the back of the deceased and when she raised halla, all of them retreated. P.W. 3 in her evidence, has further stated that at the place of occurrence a lantern was already burning and she could identify the accused persons in the light of the lantern. This witness, in categorical terms in her evidence, has stated that she identified this appellant holding a pistol and it was he who opened fire from pistol upon the back of her husband.

9. P.Ws 1 and 2 Sarjoo Mahamari and Thakur Manjhi, in their evidence, have stated that on the fateful night at about 11 O'Clock they heard the sound of firing and they rushed to the place of occurrence with torch and in the flash of torch light they identified the accused appellant and others. These witnesses have further stated that the appellant was holding a pistol in his hand.

10. P.W. 4 Sanad Raut, in his evidence, has stated that on 12.11.1991 at about 5 A.M. he heard about the injured deceased as he was already in the hospital with regard to the treatment of his daughter and he went to the injured deceased and there he came to know from the deceased that the appellant had assaulted him with a pistol. P.W. 4. in his evidence, has further stated that the B.D.O., Godda, had recorded the dying declaration of the deceased in his presence. P.W. 4 happens to be co-villager of the appellant.

11. P.W. 6 Dr. Satyendra Mishra, his evidence, has stated that on 12.11.1991 at 4 A.M., he had examined Awadhesh Yadav, the deceased who was forwarded to the hospital by the police and he had found a circular wound 1/4" in diameter with inverted margin and having blackened area skin around 1/2" in diameter on the right side of back. In his evidence he has further stated that the bullet was stuck in his body which was taken out after due operation and thereafter the injured succumbed to his injuries. This witness has further stated his evidence that before the operation was performed, the patient was in a conscious state and his dying declaration was recorded by the B.D.O., Godda

12. P.W. 5 is doctor who had performed the autopsy over the dead body of the deceased. In his evidence he has stated that on 12.11.1991 he was posted at Godda Hospital as Civil Assistant Surgeon and on that day he had performed the autopsy over the dead body and has found following antemortem injuries;

(I) A circular wound with inverted margin 1/2" in diameter with surrounded blackening of the skin 1/2" diameter on the right side of the back just away from vertebral spine at the level of thoracic 12 vertebra communicating into the interior of abdomen cavity (wound of entry).

(II) Incised wound (stitched) over left upper half of abdomen 5" in length.

In the opinion of P.W. 5 the death was caused due to shock and haemorrhage due to fire arm injury. He has further opined that in ordinary course of nature the fire arm injury was sufficient to cause death.

13. P.W. 7 Gajadhar Nath Mishra is the Police officer who had submitted chargesheet only and has proved the Fardbeyan (Exht 2) and F.I.R. (Exht 3).

14. P.W. 8 Dilip Kumar Toppo is the Block Development Officer of Godda who recorded the dying declaration (Exht 8) of the deceased on 12.11.1991 at 5.30 A.M. P.W. 8, in his evidence, has stated that on 12.11.1991 he was posted as B.D.O. Godda and had received requisition from Godda hospital for recording statement of injured Awadhesh, he accordingly went to the hospital and recorded the statement of Awadhesh Yadav and his L.T.I. was taken on the same and he signed. This witness has further stated that at the time of recording of the statement of Awadhesh Yadav he was fully conscious.

15. From the evidence as discussed above, it appears that P.W. 3, wife of the deceased is an eye witness of the occurrence and she had seen the occurrence from a very close range in the lantern light. Her evidence is very clear on the point that it was the appellant who opened fire from his pistol on the back of her husband and before firing her husband had recognised him as Shankar Kharhougi. She has been cross examined at length but she could not be discredited of her testimony. From her evidence, it appears that she is a trustworthy witness and she has spelt out the truth. At the same time, the evidence of P.Ws 1 and 2 is suggestive of the fact that when they reached the place of occurrence on hearing the sound of firing they had recognised the appellant and other accused persons in the flash of torch light which they were already having and the appellant as holding a pistol and they came to know from the injured deceased at the spot that it was the appellant who assaulted him. The presence of the appellant stands proved by P.Ws 3, 1 and 2.

16. The evidence of the doctor P.W. 6 and 8 is also corroborative of the evidence of P.Ws 1, 2, and 3. The medical evidence fully supports the prosecution version of the case as gun shot injury was found on the person of the deceased and the bullet was taken out after due operation. It further appears that the Fardbeyan of the deceased itself was recorded by the earliest possible and there he had disclosed the name of the appellant as the assailant. Exht. 8 the dying declaration of the appellant is further suggestive of the fact that it was the appellant who opened fire on him. The manner and genesis of the occurrence are also reflected from the Fardbeyan and also the dying declaration (Exht 8) couple with the evidence of P.W. 3, wife of the deceased.

17. P.W. 6 Dr. Satyendra Mishra who first attended the injured deceased, had found only one gun shot injury whereas P.W. 5, the another doctor, had found two injuries. Thus the evidence of P.W. 5 fully corroborates the evidence of P.W. 6 that gun shot injury was there and bullet was taken out after due operation.

18. So far dying declaration (Exht 8) is concerned, much has been said about its voluntariness. Learned counsel for the appellant has stated that dying declaration was recorded in presence of the doctor P.W. 6 in the hospital itself but his signature was not obtained on the same nor the signature of the I.O. was obtained. Learned counsel further submitted that due formalities were not observed as required in law before recording the declaration.

19. It is true that dying declaration is not in a format rather it is on a blank paper. The purpose of recording of dying declaration is to take the immediate version of the dying person and if due to some circumstances, the formalities could not be observed, the recording of the dying declaration cannot be said to be invalid. It becomes the utmost duty of the Magistrate or before whom the dying declaration is made to record it with due caution by the earliest possible. At the face of the dying declaration (Exht. 8) it appears that it is voluntary as the maker of the same was in a position to make the same and it verbatim virtually tallies from the Fardbeyan already recorded by the deceased. About the dying declaration there is another evidence of P.W. 4. P.W. 4 in categorical terms has stated in his evidence that in his presence statement of the injured deceased was taken by PW 8. This fact also finds corroboration from the evidence of P.W. 6 Dr. Satyendra Mishra. He has also stated in his evidence that in his presence dying declaration was recorded by P.W. 8. It has also come in the evidence of P.Ws. 4 and 6 that at the time of recording of the dying declaration the injured deceased was in a position to make the same and only after operation by which the stuck bullet was taken out, he succumbed to the injuries. In such circumstances, voluntariness of the dying declaration cannot be doubted.

20. In this case, it appears that besides the dying declaration there is another corroborative evidence to suggest that it was the appellant who opened fire upon the deceased. Even assuming that besides the dying declaration, there is no corroborative evidence, the same can be acted upon without corroboration. In the case of [State of Uttar Pradesh Vs. Ram Sagar Yadav and Others](#), it has been held that it is well settled that, as a matter of law a dying declaration can be acted upon without corroboration. There is no rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear and convincing then the court may, for its assurance, look for corroboration to the dying declaration.

21. In this case, other circumstances are there lending support to the dying declaration (Exht 8) and as discussed above the dying declaration being voluntary one, it is one of the substantive pieces of evidence u/s 32 of the Evidence Act.

22. For the reasons and discussions aforementioned, it must be held that prosecution has proved the charge against the appellant beyond reasonable doubts. In the result, this appeal is dismissed and the impugned judgment of conviction and sentence passed

against the appellant is confirmed conviction of the appellant is maintained

M.L. Visa, J.

I agree.