

PARAS YADAV AND ORS.

v.

STATE OF BIHAR

JANUARY 12, 1999

[G.B. PATTANAİK AND M.B. SHAH, JJ.]

*Criminal Law :*

*Evidence Act, 1872 : Section 32.*

*Dying declaration—Statement of deceased—Recorded in a routine manner by Sub-Inspector of Police and not as a dying declaration—After death of deceased statement treated as dying declaration—Deceased was in a fit state of health to make statement—Held, Evidence of witnesses does not suffer from any infirmity which would render dying declaration as doubtful or unworthy of credence—In the circumstances of the case, lapse on the part of the Investigating Officer should not be taken in favour of the accused—Prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not.*

*Penal Code, 1860 : Section 302/34.*

*Death by chhura blow—No eyewitness to the incident—Prosecution case based upon complaint of deceased which was later treated as dying declaration after death of deceased—Such oral dying declaration found reliable—Prosecution version corroborated by medical evidence—Held, Conviction of A-1 who inflicted churra blow, upheld—However, because of inconsistencies in the evidence of witnesses with regard to the role played by A-2 and A-3, their conviction set aside—Criminal Trial.*

**The appellant-accused No. 1 and the appellants-accused Nos. 2 and 3 were convicted by the Sessions Court under Section 302 of the Indian Penal Code, 1860 and Section 302 read with Section 34 IPC respectively and sentenced to undergo rigorous imprisonment for life. The High Court confirmed the conviction. Hence this appeal.**

**According to the prosecution, the deceased was found lying on a road with bleeding injuries when witnesses rushed to the scene of offence. The deceased made a statement to the witnesses that accused Nos. 2 and 3**

A caught hold of him while accused No. 1 gave a *churra* blow in his abdomen. The Sub-Inspector of Police who was on patrolling duty recorded the statement of the deceased as a complaint. The deceased expired after 24 hours. Later, the said complaint was treated as dying declaration. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident.

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On behalf of the appellants it was contended that the Sub-Inspector of Police recorded the statement in a routine manner as a complaint and not as a dying declaration; and that there were inconsistencies in the evidence of the witnesses with regard to the role played by accused Nos. 2 and 3 and, therefore, their conviction should be set aside.

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Allowing the appeal partly, this Court

HELD : 1. It is true that there is negligence on the part of the Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt, which would obviously go in favour of the accused. But, in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of a number of witnesses who rushed to the scene of offence. Their evidence does not suffer from any infirmity, which would render the dying declaration doubtful or unworthy of credence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. [60-G-H, 61-H-C]

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*Ram Bihari Yadav v. State of Bihar*, JT (1998) 3 SC 290, relied on.

H

2.1. There is no reason to disbelieve the dying declaration as deposed by number of witnesses and as recorded by the Sub-Inspector of Police. The medical evidence also corroborates the prosecution version. Hence, the courts below have rightly convicted accused No. 1 for the offence punishable under Section 302 of the Indian Penal Code, 1860. [61-E-F]

2.2. However, the prosecution version with regard to the part played by accused Nos. 2 and 3 is inconsistent. Considering the inconsistencies in the dying declaration as deposed by the witnesses with regard to the part played by accused Nos. 2 and 3, and as there is no direct evidence, it cannot be said that prosecution has proved beyond reasonable doubt that accused Nos. 2 and 3 are guilty of the offence punishable under Section 302 read with Section 34, IPC. [62-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 276-277 of 1997.

From the Judgment and Order dated 3.9.96 of the Patna High Court in Crl. A. No. 14 and 62 of 1985.

S.B. Sanyal, K.K. Rai and P.K. Roy for the Appellants.

B.B. Singh for the Respondent.

The Judgment of the Court was delivered by

SHAH, J. These two appeals are filed against the Judgment and Order dated 3rd September, 1996 in Criminal Appeal No. 14 of 1985 and Criminal Appeal No. 62 of 1985 by which Conviction of original accused nos. 2 and 3 under Section 302 read with Section 34 I.P.C. and that of original accused no. 1 under Section 302 I.P.C. is upheld by the High Court and they all have been sentenced to undergo rigorous imprisonment for life.

It is a prosecution version that on 7th February, 1983 Sambhu Yadav who was working as an employee in the cloth shop at Chanpatia Bazar was returning at about 7.00 p.m. on a bicycle. At about 8.00 p.m., when he reached about 100 yards north of Ghogha Chowk on the pitch road, he met three persons who abused him and asked him to stop his bicycle. Thereafter, Paras Yadav (accused no. 1) caught hold of the bicycle and accused nos. 2 and 3, Satan and Tulsi caught both the arms of Sambhu Yadav and started assaulting him with fists and slaps. In the meantime, Paras Yadav gave chhura blow in abdomen. Accused thereafter fled away. On hulla being raised, Jhakhari Yadav (p.w. 9), Bagur Raut (p.w. 8) Basgeet Yadav (p.w. 1), Gogari Yadav and other persons came there. It is the prosecution version that Sambhu Yadav (deceased) stated before the witnesses and the Police Sub-Inspector that he was surrounded by Tulsi, Satan, Munshi and

A Paras and thereafter Paras stabbed him on abdomen. It is also a prosecution version that there was enmity between the accused person and the deceased on account of land dispute. Sub-Inspector of Police, Shri Dina Nath Singh (p.w. 16) arrived on the spot while he was on patrolling duty along with others and recorded farbdeyan under Section 307 I.P.C. against the three appellants, besides two unknown persons. The victim was shifted to hospital where he succumbed to the injuries at night on 8th February, 1983. Thereafter, offence under Section 302 I.P.C. was added.

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 C The Sessions Court convicted the accused by relying on farbdeyan (Ext. 1), which was treated as dying declaration. The learned Additional Sessions Judge held that as there was no eye witness to the occurrence the entire case rested on the dying declaration made by the deceased. The Court arrived at the conclusion that there was nothing to suggest that the Police Sub-Inspector Dina Nath Singh who recorded the dying declaration-cum-statement of Sambhu Yadav had any ill feeling against any of the accused persons. The said statement is consistent with what other prosecution witnesses have deposed before the Court. It is also found that dying declaration is corroborated by the medical evidence as the doctor (p.w. 11) who held post-mortem examination found injury in the abdominal region of the deceased by a penetrating weapon like dagger. After appreciating the entire evidence on record, the High Court has upheld the conviction of the appellants. Hence, this appeal by special leave is preferred.

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 F Learned Counsel appearing on behalf of the accused vehemently submitted that there is no evidence on record to hold that the accused were having any common intention and there is no evidence on record from which common intention could be inferred. The evidence of the prosecution witnesses is totally inconsistent with regard to the role played by accused no. 2 and 3 as stated by the deceased. It is further submitted that farbdeyan should not be treated as dying declaration as it is recorded in a routine manner by the Police Sub-Inspector.

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 H The learned Counsel referred to the evidence of P.W. 1, Basgeet Yadav who has stated that at 8.00 p.m., he rushed to the newly built bridge and saw Sambhu Yadav lying there and he was bleeding. Sambhu, on being asked, informed that Paras Yadav, Tulsi and Munshi surrounded him and Paras gave a chhura blow. Similarly, P.W. 2, Bachu Das stated that he alongwith Jagannath was going home on bicycle and when they reached at

the distance of 200 yards from Ghogha Chowk, they saw five persons going away. They were Paras, Munshi, Tulsi and Satan and fifth person could not be identified. At Ghogha Chowk, they saw Sambhu falling down in an injured condition. On inquiry, Sambhu told that Munshi, Tulsi and Satan caught hold of him and Paras gave a Chhura blow. The statement to the aforesaid effect was made by Sambhu to Sub-Inspector. Similarly, P.W. 4, Ramchander Raut also stated that he rushed to the place of occurrence after hearing the noise and found that Sambhu had fallen down on the pitch road. On inquiry, Sambhu told that he was stabbed by Paras while Tulsi, Munshi and Satan had caught hold of him. P.W. 5 Kanchan Yadav, deposed similarly and has stated that Sambhu told him that he was surrounded by Munshi, Tulsi, Satan and Paras and Paras stabbed him on abdomen. He also deposed it with regard to the enmity between Sambhu and others accused on account of the land dispute.

P.W. 6 Jokhu Yadav, P.W. 7 Nug Raut, p.w. 8, Ragur Raut, P.W. 9, Jhakhari Yadav and P.W. 12 Wakil Rai also deposed to the same effect that Tulsi, Munshi, Satan caught him and Paras gave a knife blow. P.W. 13, Lakshman Chowkidar has stated that he was patrolling with the Sub-Inspector on the relevant date. Hearing hulla, they rushed at the spot and saw Sambhu in injured condition. Sambhu told that Paras gave chhura blow while Satan, Tulsi and Munshi instigated him. The next witness is P.W. 16 Dina Nath Singh, Police Sub-Inspector, who has stated that he recorded the statement of Sambhu Yadav at the place of occurrence at 8.30 p.m. on 7th February, 1983. His thumb impression was taken on the FIR.

From the aforesaid evidence, one thing is clear that there is no eye witness to the incident. Prosecution has relied upon the statements made by the deceased Sambhu at the place where he was lying injured. As stated above, these dying declarations consistently establish beyond reasonable doubt that deceased Sambhu was conscious and was in a position to speak after receiving the injuries. Considering the evidence of the prosecution witnesses, following facts emerges :-

- (a) No. of persons reached at the scene of offence after the incident and at the time injured Sambhu Yadav was lying in the bleeding condition. P.W. 1, 2, 4, 5, 6, 7, 8, 9, 13 and 14 are the witnesses who have deposed that the deceased disclosed the names of the accused persons. They have also

A stated that Police Sub- Inspector, Dina Nath Singh came there and recorded the farbdeyan.

B (b) Dina Nath Singh, Police Sub-Inspector was on patrolling duty and reached at the place of occurrence at 8.30 p.m. He recorded the FIR on the spot. That FIR is taken as dying declaration after the death of Sambhu. It is true that FIR is recorded in a routine manner by the Police Sub-Inspector as complaint and not as dying declaration. However, it has to be noted that at the relevant time, Police Sub-Inspector was recording FIR and at that stage, there was no question of recording it as a dying declaration.

C (c) No. of witnesses deposed about dying declaration made by Sambhu on inquiry, that Paras gave chhura blow while Satan, Tulsi and Munshi caught hold of him.

D (d) Witness Bachu Das P.W. 2 and P.W. 7, Jag Raut state that while going home by bicycle they saw five persons going away, namely, Paras, Munshi, Tulsi and Satan and the fifth could not be identified.

E (e) Sambhu was removed to the hospital by bus and that he was conscious through out.

(f) Giving of chhura blow is corroborated by the medical evidence.

F It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor the dying declaration is recorded by the Doctor. The Doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such  
G negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus.  
H All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more

than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of *Ram Bihari Yadav v. State of Bihar and others*, J.T. (1998) 3 SC 290.

"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."

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 number of witnesses and as recorded in farbdeyan of deceased Sambhu Yadav. The farbdeyan was recorded by the Police Sub-Inspector on the scene of occurrence itself, within few minutes of the 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 next question would be with regard to the conviction of accused nos. 2 and 3. that is Satan Yadav and Tulsi Sonar under Section 302 read with Section 34 I.P.C. In our view the learned Counsel for the appellants rightly pointed out that the prosecution version with regard to the part played by accused nos. 2 and 3 is inconsistent. Some witnesses deposed that the deceased informed that accused nos. 2 and 3 surrounded him while other witnesses deposed that the deceased told that they gave fist blows or slaps while some witnesses state that the deceased told that Tulsi Sonar

- A and Satan Yadav caught hold of the deceased. Considering, the aforesaid inconsistencies in the dying declaration as deposed by the witnesses with regard to the part played by accused nos. 2 and 3, and as there is no direct evidence in our view, it cannot be said that prosecution has proved beyond reasonable doubt that accused nos. 2 and 3 are guilty for the offence punishable under Section 302 read with Section 34, I.P.C.

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In the result, the appeals are partly allowed, the conviction of original accused No. 1, Paras Yadav is confirmed and the conviction of original accused nos. 2 and 3, that is, Satan Yadav and Tulsi Sonar is set aside. Appellant Satan Yadav and Tulsi Sonar be set at liberty forthwith, unless required in any other case. Ordered accordingly.

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V.S.S.

Appeals partly allowed.