

Criminal Appeal (D.B.) No. 158 of 2011

With

Criminal Appeal (D.B.) No. 387 of 2011

With

Criminal Appeal (D.B.) No. 950 of 2012

[Arising out of judgment of conviction and order of sentence dated 14.12.2010 passed by learned Additional Sessions Judge, F.T.C. V, West Singhbum in Sessions Trial No. 41 of 2006 and Sessions Trial No. 32 of 2007]

Criminal Appeal (D.B.) No. 158 of 2011

Anuj Kumar Gupta @ Ravi @ Guddu son of Shyam Kumar Gupta, resident of Gandhi Tola, near Jain Mandir, P.O. Chaibasa, P.S. Sadar, District Singhbum West at Chaibasa **Appellant**

--Versus--

The State of Jharkhand **Respondent**

With

Criminal Appeal (D.B.) No. 387 of 2011

Danial Pal @ Danial Paul son of Late Sushil Pal resident of Ward No.7, near Bhagat Singh Chowk, Chakradharpur, P.O. & P.S. Chakradharpur, District Singhbum West, Jharkhand **Appellant**

--Versus--

The State of Jharkhand **Respondent**

With

Criminal Appeal (D.B.) No. 950 of 2012

Anup Srivastava @ Anuu Sriwastav son of Late Manindra Nath Srivastava, resident at Tungri, P.O. Chaibasa, P.S. Sadar, (Chaibasa), District West Singhbum **Appellant**

--Versus--

The State of Jharkhand **Respondent**

For the Appellant

: Mr. Gautam Kumar, Advocate

Mr. Birat Kumar, Advocate

(In Cr. Appeal (D.B.) No.158 of 2011 and
Cr. Appeal (D.B.) No.387 of 2011)

Mr. N.K. Sahani, Advocate

Ms. Shridhi Priya, Advocate

Mr. Randhir Kumar Vishwakarma, Advocate
(In Cr. Appeal (D.B.) No.950 of 2012)

For the State

: Mr. Vishwanath Roy, Special P.P.

(In Cr. Appeal (D.B.) No.158 of 2011
and Cr. Appeal (D.B.) No.950 of 2012)

Ms. Vandana Bharti, A.P.P.

(In Cr. Appeal (D.B.) No.387 of 2011)

PRESENT: SRI ANANDA SEN, J.

SRI GAUTAM KUMAR CHOUDHARY, J.

JUDGMENT

Reserved on: 07.08.2024

Pronounced On:19.08.2024

Per Gautam Kumar Choudhary, J. All these appeals arise out of common judgment and sentence passed in Sessions Trial No.41 of 2006 and Sessions Trial No.32 of 2007, by which the appellants have been convicted and sentenced under Section 302/34 of the IPC and Section 27 of the Arms Act, they have been heard together and disposed of by the common judgment.

2. West Singhbhum, Sadar, Gua P.S. Case No.31/2004 was registered on 21.08.2004 under Section 307/34 of the IPC and 25(1-B), 26, 27 of the Arms Act on the basis of the statement of Arun Prakash Srivastava (deceased) recorded at General Hospital, Kiriburu.

3. As per the FIR, informant was living in the house of Subhash Gupta with his step sister Guriya @ Binita Srivastava. He had an old land dispute with his cousin brother Anup Srivastava (appellant). On 21.08.2004, when he was at his home, his step brother Anup Srivastava came along with Danial Pal and Ravi (appellants) and started abusing him with respect to the land dispute and also entered into physical altercation with him. When he opposed this, his step brother took out his revolver and fired at him, as a result he sustained bullet injury over his stomach. Thereafter, the accused persons fled away from the place of occurrence.

4. On the basis of the fardbeyan, FIR was registered against all these appellants. During course of treatment, informant died on 11.09.2004 thereafter, Section 302 of the IPC was added in the FIR. Police on investigation, found the case true and submitted charge sheet. After cognizance and commitment, the appellants were put on trial for offences under Section 302/34 of the IPC and Section 27 of the Arms Act and were convicted under these Sections.

5. Judgment of conviction and sentence has been assailed by the learned counsel on behalf of appellants on the ground that none of the prosecution witness have claimed themselves to be an eye witness to the incidence and the judgment of conviction has been passed only on the basis of the FIR which has been treated as a dying declaration. Most of the witnesses have been declared hostile and have not supported the allegations against the appellants.

Furthermore, it is argued that the deceased died 20 days after the said incidence and it was not proved that the death was caused by fire arm. Autopsy Surgeon (P.W. 7) has deposed that death was due to septicemia. Thus, it was not proved that death was caused by gunshot injury.

6. It is further argued that FIR cannot be treated as dying declaration in view of the ratio laid down by the Apex Court in *Mannulal Sahu & Another Versus State of Madhya Pradesh, (2005)10 SCC259*. There was no certificate from the Doctor about the capacity of the patient to make the said statement before the police.

7. It is argued by the learned counsel on behalf of appellant - Danial Paul and Anuj Kmar Gupta @ Ravi @ Guddu that they had no enmity with the deceased and no overt act has been attributed to them. Allegation of firing is solely directed against appellant Anup Srivastava. Without any element of participation, mere presence by itself, is not sufficient to fix criminal liability with the aid of Section 34 of the IPC.

8. Learned A.P.P. has defended the judgment of conviction and sentence. It is argued that the deceased died of gunshot injury, will be evident from the post-mortem report in which the features of the injury are very much compatible with fire arm injury.

ANALYSIS

9. Prosecution case is about fratricidal death of the informant in the hand of appellant – Anup Srivastava. As per the FIR, he was living with his step sister as tenant in the house of Subhash Gupta. Appellant – Anup Srivastava came along with the other two appellants, entered into a hot exchange with the deceased and thereafter, he took out his revolver and fired at the deceased.

10. On the factum of incidence, PW-1 has deposed that the incidence took place two years ago on 21st August 2004. He received information that Arun Prakash Srivastva had been shot. On this information, he went to his house and by the time he had been moved to the hospital. On next day, he had a word with him in the hospital, but he did not say as to how he had been injured. This witness was declared hostile. In his cross-examination, he has admitted that the deceased was his brother-in-law(*sala*). Person who had informed him about the incidence had not disclosed the name of assailant. Deceased was in business and had enmity with several persons.

PW-2, Vineeta Sinha is the step sister of the deceased and full sister of Anup Srivastava, who was living with the deceased at the time of the incidence. She has supported the prosecution case on the date time and place of incidence, in which the informant sustained fire-arm injury and was lying in a pool of blood when on hulla, she arrived at the place of occurrence. He was bleeding from the left side of the abdomen. She has proved her signature on the seizure list of the empty cartridge and blood soaked soil which was marked as Exhibit 1/1. Beyond this, she has not supported the prosecution case and consequently was declared hostile on the prayer made by the prosecution. In the cross-examination, she has deposed that deceased had not disclosed the name of assailant to her.

PW-3 is the younger step brother of the deceased. On that day, he had gone to offer prayer in a temple where he received information that his brother had sustained bullet injury. He went to the hospital and found him in an injured condition. He had conversation with his brother, and thereafter, he was referred for treatment to Tata Memorial Hospital. He died after ten days during the course of his treatment. He has proved his signature on the statement of the deceased (*fardbeyan*) which has been marked as Exhibit-2. He also proved the signatures of his mother and brother – Radha Ballabh, and brother – Rabindra Srivastva on the *fardbeyan*, which have been marked as Exhibits-2 series. He has also proved his signature and that of his brother – Barun Srivastava on the inquest report which have been marked as Exhibit 3. Beyond this, he has not disclosed the name of the assailant and was consequently declared hostile. In his cross-examination, he has admitted that his brother was treated at TMH hospital.

PW-4, is the brother of the deceased. He like other witnesses has deposed the factum of incidence and the injury sustained by the incidence, but has withheld the name of the assailant and was consequently declared hostile. He has deposed that deceased died during course of his treatment on 10.09.2004. He has identified his signature and that of Gita Verma on the *fardbeyan*, which had already been proved and marked exhibits. He has identified his signature on the inquest report, already marked as Exhibit-1/1.

PW-5, is the house owner in which the deceased resided as a tenant. He has deposed that Arun Prakash Srivastava had sustained fire arm injury. He has

testified that he heard the cries that someone had fired, but at the time he was suffering from malaria and was under saline water infusion and therefore could not move out. He has also been declared hostile.

PW-6 is the step mother of the deceased. She has identified her signature on the *fardbeyan*, but beyond this has not stated anything and consequently was declared hostile.

11. Criminal Trial is a process where the crime scene is sought to be constructed on the basis of admissible evidence, in order to fix criminal liability or innocence of the accused charged with the offence. Law of evidence is not a pedantic but a pragmatic document which will be evident from the definition of ‘proof’ as contained in Section 3 of the Evidence Act. It reads as under:-

Proved- *A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstance of the particular case, to act upon the supposition that it exists.*

Shorn of semantics and technicalities proof of a fact is based on a prudent men test. Proof of a fact is to be grounded on the totality of evidence both oral and/or circumstantial. Evidence are not to be eviscerated from the context to rush to any finding. It does not require a fact to be proved to mathematical exactitude as held in **Hawkins v. Powells Tillery Steam Coal Co. Ltd.** [(1911) 1 KB 988 : 1911 WN 53]:

“Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion.”

12. Law is settled that testimony of a witness declared hostile, cannot be discarded in its totality. A combined reading of the testimony of the witnesses completely supports the prosecution case that the informant – Arun Kumar Srivastava sustained bullet injury on 21.08.2004, when he was at his home. Later during course of treatment at TMH Hospital Jamshedpur, he succumbed to his injuries. This is corroborated by the medical evidence. Post-mortem of the deceased was conducted on 11.09.2004 at MGM College, Jamshedpur and following ante-mortem injury was found by the Doctor (P.W. 7):

I. Circular lacerated wound of size 17 cm X 14 cm X Cavity Deep over left side lower chest and upper abdomen.

- II.** Longitudinal para median stitched wound of size 30 cm with 19 stiches.
- III.** Lacerated wound of 3 cm X 2.5 cm over left side of abdomen.
- IV.** Lacerated wound of size 3 cm X 1.5 cm over right side of the abdomen.
- V.** Stitched wound of size 6 cm X 2 cm with four stiches over left side back of lower abdomen in healing condition.
- VI.** Bedsores present over sacral area wound is infected.

On Dissection

Left side lower chest and abdominal wall lacerated and infected. Massive paritorial adhesion and contusion of intestine present. Doctor opined that death was due to septicemia and shock. Opinion regarding injuries may be had from the surgeon who handled the case. It has been deposed by the Doctor in his cross examination that the deceased was previously treated in TMH, Jamshedpur.

13. The circular lacerated wound detailed above, fully corroborates the testimony of the witnesses that the deceased had sustained bullet injury on his abdomen which ultimately proved fatal. These evidences leave no room to raise doubt over the homicidal death of the deceased caused by fire arm. Merely because the proximate medical cause of death was septicemia, therefore weight of evidence of the deceased having received fire arm injury cannot be brushed aside.

14. As discussed above, the signatures of the family member of the deceased have been proved and marked as Exhibits -2 of P.W.-3, 2/1 of P.W.-6, Exhibit-2/2 of Radha Ballabh, Exhibit-2/3 of P.W.-4, Exhibit-2/4 of Rabindra Srivastva on another fardbeyan recorded on 11.09.2004 of Smt. Geeta Verma step mother of the deceased after the death of the deceased. This cannot be regarded as FIR and can be treated as restatement of the witnesses, and is of no legal significance being hit by Section 162 of the Cr.P.C in view of the ratio laid down in **T.T. Antoney Versus State of Kerala, (2001)6 SCC 181.**

15. Coming to the author of crime, from plain reading of the testimonies of witnesses, it is evident that all have withheld the name of the assailant. They have also stated that deceased did not disclose to them the name of the person who fired the fatal shot. Except for P.W.-5 who was the land lord, all other eye witnesses are the close relatives of the appellant – Anup Srivastava as well as

the deceased, who happened to be the step brother of the deceased. The predicament and emotional dilemma in such circumstance is understandable. Bonds of relationship appears to have triumphed over truth and justice for the deceased. Real life at times presents difficult choices, and in this case the mother opted for her living son to the step son who had fallen to his bullet, so was the case with the sister and brothers who stopped short of naming the assailant, while supporting the incidence.

16. In the present case as discussed in the foregoing paragraphs, shooting incidence in which the informant sustained fatal injuries is proved beyond the shadow of any doubt, on the evidence of witnesses and corroborated by the seizure of empty cartridges and blood stains from the place of occurrence.

17. Law is settled that dying declaration is a substantive piece of evidence and a judgment of conviction can rest on it if it is reliable and trustworthy. It is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. Death is so unpredictable that it can come anytime unannounced and knock any one's door. Therefore, no specific format is prescribed for it. It can be written and it can be oral. Matter for consideration is whether reliance can be placed on *fardbeyan* of the deceased which was recorded immediately after the incidence?

18. There is no impediment in treating FIR as a dying declaration in view of the ratio laid down in ***Dharam Pal & Others Versus State of U.P., (2008) 17 SCC 337.*** It has been held in ***Babulal & Others Versus State of M.P., (2003) 12 SCC 490***

"7. The pivotal point which was pressed into service with some amount of vehemence was acceptability of the dying declaration. There is no legal bar for the information given by the deceased to be treated as a dying declaration. This position was stated succinctly by this Court in Munnu Raja v. State of M.P. [(1976) 3 SCC 104 : 1976 SCC (Cri) 376 : AIR 1976 SC 2199] Section 32 of the Indian Evidence Act, 1872 (in short "the Evidence Act") deals with dying declaration. A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (nemo moriturus praesumitur mentiri). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth;

situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. (See R. v. Woodcock [(1789) 1 Leach 500 : 168 ER 352] .)

Further, it has been held in ***State of M.P. Versus Dal Singh & Others, (2013) 14 SCC 159 Para 20.***

"The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case."

19. In the present case, the *fardbeyan* of the informant was recorded in an injured condition in the hospital on 21.08.04 at 10.30 am and has been proved and marked as Exhibit-6 by the Investigating Officer (P.W.-8).

20. In view of the facts and circumstance of the case, I do not see any reason to discard the statement of the deceased which is the basis of the present case. It has come in evidence that after the incidence, his statement was recorded and the case was registered. Thereafter, the deceased was referred for treatment to Tata Memorial Hospital, Jamshedpur where he unsuccessfully battled for life and died after about 20 days during course of treatment. In these circumstance, his *fardbeyan* can be treated as dying declaration. Although overwhelming evidence is that deceased died due to gunshot injury, but we are left with only the *fardbeyan* as evidence of the circumstance in which he was shot at. It emphatically states that appellant Anup Srivastava fired at him from his revolver due to land dispute. Other two appellants were present along with him at the time of the incidence, but the fatal shot was fired by Anup Srivastava. Therefore, *fardbeyan* can be treated as dying declaration and on its basis Anup Srivastava is held guilty for committing the offence under Section 302 of the IPC.

21. Deceased does not impute any overt act on the part of the other two appellants. There is nothing on record to suggest that appellants – Anuj Kumar Gupta and Danial Pal had any past enmity with the deceased, or they were armed with any weapon, or they shared the common intention with appellant Anup Srivastava in commission of the offence. Under the circumstance, they are entitled to benefit of doubt and cannot be convicted with the aid of Section 34 of the IPC. It has been held in ***Suresh & Another Versus State of U.P., (2001)***

3 SCC 673

“31. It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused.”

Under the aforesaid facts and circumstance, judgement of conviction and sentence passed under Section 302 of the IPC against appellant – Anup Srivastava is affirmed, whereas the judgment of conviction and sentence passed against Anuj Kumar Gupta and Danial Pal is set aside.

Criminal Appeal preferred by Anup Srivastava is dismissed, and that of Anuj Kumar Gupta and Danial Pal is allowed.

Appellant – Anup Srivastava is on bail. His bail stands cancelled. He is directed to surrender before the court below to serve the remaining part of sentence.

Appellants – Anuj Kumar Gupta and Danial Pal are on bail. Their sureties are discharged from the liability of bail bonds.

Let the Trial Court Records be transmitted to the Court concerned along with a copy of this judgment.

(Gautam Kumar Choudhary, J.)

Per Ananda Sen, J. I agree

(Ananda Sen, J.)

High Court of Jharkhand, Ranchi

Dated, 19th August, 2024

AFR/Anit