

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.421 of 2017**

Arising Out of PS. Case No.-129 Year-2009 Thana- GARKHA District- Saran

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1. Prabhu Rai, Son of Late Ram Adhikar Rai
 2. Ashok Rai
 3. Arjun Rai
- Both are sons of Prabhu Rai
All are residents of Village-Bhuigaon, P.S. Gadkha, District-Saran, Chapra.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellants	:	Mr. Ranjay Kumar Singh, Advocate Mr. Shankar Kumar, Advocate
For the State	:	Mr. Dilip Kumar Sinha, APP
For the Informant	:	Mr. Manoj Kumar, Advocate

**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 03-10-2023

The facts of this case, notwithstanding the consistent eyewitness account of several witnesses and oral dying declaration of the deceased before such witnesses, surprisingly but disquietingly, do not commend to us that the conviction and sentence of the appellants is justified.

2. We have heard Mr. Ranjay Kumar Singh and



Mr. Shankar Kumar, learned Advocates for the appellants, Mr. Manoj Kumar, learned Advocate for the informant and Mr. Dilip Kumar Sinha, learned APP for the State.

3. The appellants have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code *vide* judgment dated 28.02.2017 passed by the learned Xth Additional District and Sessions Judge, Saran at Chapra and by order dated 8th of March, 2017, they have been sentenced to undergo imprisonment for life, to pay a fine of Rs.10,000/- (ten thousand) each and in default of payment of fine, to further suffer simple imprisonment for six months.

4. The amount of fine has been directed to be given to the son of the deceased.

5. The FIR of this case has been lodged by the nephew of the deceased, *viz.*, Shivnath Sah (P.W. 5) who stays in a house contiguous to the house of the



deceased where the murder took place in the night intervening between 25th and 26th of July, 2009.

6. In his *fardebayan* statement which was lodged by Sub-Inspector Mahesh Kumar (P.W. 10) at the house of the deceased at about 04:45 A.M. on 26.07.2009, it was alleged that at about 12:30 in the night intervening between 25th and 26th of July, 2009, he and others who were sleeping along with him heard the caterwauls of his uncle who had been sleeping in the courtyard of his own house situated next to the house of the informant.

7. When he along with others had arrived there, he saw the appellants and others assaulting the deceased by means of *gupti* and *knife*. The appellants, on seeing the informant and others approaching them, ran away by scaling over the wall. The deceased was still surviving and he told P.W. 5 and others that the appellants had attacked him by *knife* and *gupti*. The deceased had bled profusely. The informant with the



help of others made attempts to take the deceased to the hospital but shortly after the occurrence, he died. P.W. 5 saw injuries on the chest, stomach and shoulders of the deceased.

8. The cause of occurrence as narrated in the *fardbeyan* is that the deceased had deposed against appellant/Prabhu Rai in a Civil dispute, as a result of which the deceased was done to death by him and his associates.

9. With this *fardbeyan* of P.W. 5 having been recorded at 04:45 A.M. in the morning of 26.07.2009, the FIR was registered *vide* Garkha P.S. Case No. 129 of 2009 on 26.07.2009 at 07:45 A.M. for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

10. The police after investigation submitted charge-sheet against the appellants and the appellants faced trial.

11. The Trial Court after having examined 14



witnesses on behalf of the prosecution and three on behalf of the defence, convicted the appellants under Section 302 read with Section 34 of the Indian Penal Code and sentenced them as aforesaid.

12. The Trial Court completely relied upon the eyewitness account of P.Ws. 1 to 5 and the oral dying declaration made by the deceased before the aforementioned witnesses. The Trial Court also appears to have taken note of the fact that there was a motive of appellant Prabhu Rai to have killed the deceased along with his associates, viz., the two appellants, both of them are the sons of appellant Prabhu Rai.

13. At the trial, one of the three sons of the deceased, viz., Jay Prakash Sah was examined as P.W. 1. Be it noted that the other two sons of the deceased have not been examined even though according to the prosecution case, they had also arrived on learning about the killing of their father.

14. P.W. 1 has claimed to have seen the actual



act of assault from a distance. On that account, he has supported the version of P.W. 5 and has testified to the fact that when all of them reached near the deceased, the appellants ran away. He has also asserted that efforts were made by him and others to stop the bleeding by tying the wounds with cloth. The police had arrived at the scene of occurrence after about 2 to 3 hours and the mosquito net, inside which the deceased was sleeping on a cot, the mattress and blood stained earth were seized by the police.

15. Inquest was prepared but he never signed on the inquest.

16. What is noticeable is that he has made a categorical statement in paragraph-14 of his deposition that for the first time, he gave his statement to the police after about three to four days of the occurrence. However, he has denied that at the time of occurrence, he was at Hyderabad and had come to his village home on being telephonically asked by P.W. 5 on 26.07.2009



to come back to his home as his father had been murdered.

17. The Investigating Officer (P.W. 10) of this case (there are three Investigating Officers but P.W. 10 had recorded the FIR and had proceeded with investigation), however, denies that P.W. 1/Jay Prakash Sah ever made any statement before him claiming himself to be an eyewitness to the occurrence.

18. On the contrary, he has stated that before him, P.W. 1/Jay Prakash Sah had conceded that his cousin P.W. 5/Shivnath Sah had informed him on his mobile telephone on 25.07.2009 that his father had been murdered and that he should come back to his home as early as possible. He had also told the Investigating Officer (P.W. 10) that he along with his two brothers worked for livelihood at Hyderabad in a cable manufacturing company.

19. The presence of P.W. 1/Jay Prakash Sah, therefore, at the place of occurrence at the time when



the assault was made is rendered extremely doubtful. The fact that he did not make the *fardbeyan* being the son of the deceased; did not sign the *fardbeyan* lodged by his cousin P.W. 5/Shivnath Sah and did not also put his signature on the inquest report further confirms that he had come back home only after three to four days, when for the first time he made statement before the police.

20. On P.W. 1/Jay Prakash Sah being discredited on this account, the major part of the deposition of P.W. 5/Shivnath Sah is also rendered doubtful.

21. Before we analyze his deposition, it would be appropriate to follow the pecking order in discussing about the witnesses.

22. Sunil Sah, another nephew of the deceased, has been examined as P.W. 2, who has also narrated the same story as P.W. 5/Shivnath Sah but in his cross-examination, he has said that when he along



with others reached the place of occurrence, the deceased was about five yards away from the cot on which he was sleeping and within five minutes he died. He has also stated that there was no time for putting the deceased to any First Aid or for bandaging his wounds for stopping the bleeding for preventing any neurogenic shock.

23. This statement assumes importance, which shall be discussed later, in the context of the deceased having made an oral dying declaration before P.Ws. 1 to 5.

24. Satyanarayan Sah (P.W. 3), who is the own brother of the deceased, but separate in mess and business, has claimed to have reached the place of occurrence after about five to six minutes of the *halla* raised by the deceased. When questioned regarding his having identified the assailants/appellants, he told the Trial Court that none of the appellants had concealed their faces.



25. However, the mother of the informant, viz., Tetari Devi (P.W. 4) had a somewhat different story to narrate. We, however, noticed the candor with which she has spoken about the Civil dispute between her, Satyanarayan Sah, Dharamsheela Devi (wife of Satyanarayan Sah) and Sunil Sah with appellant Prabhu Rai.

26. From her statement, it becomes very clear that in fact, appellant no. 1 had Civil dispute with P.Ws. 2 to 5 and not with the deceased for appellant/Prabhu Rai and his associates to have executed the murder of the deceased, even if it be assumed that he had deposed against the cause of the appellants in that Civil dispute. In complete contretemps with the statement of P.W. 3/Satyanarayan Sah, she has stated that she had seen the assailants having covered their faces. Though she has denied the suggestion that she did not tell the Investigating Officer (P.W. 10) about the actual role played by each of the appellants in killing the deceased,



but P.W. 10/I.O. has stated in paragraph-18 of his cross-examination that P.W. 4/Tetari Devi never talked about the manner of occurrence and the specific role played by each of the appellants to him.

27. She, thus, also stands completely discredited so far as her presence at the time of the occurrence is concerned.

28. This takes us to the deposition of the informant (P.W. 5), who also has conceded in his cross-examination that the parcel of land which was conveyed by one Yogendra Singh in favour of his mother and his uncles, viz., the prosecution witnesses in this case was later in point of time than the same land having been conveyed by one Birendra Singh in favour of wife of appellant/Prabhu Rai.

29. He could not remember the names of the villagers, hundreds of whom, according to him, had assembled immediately after the occurrence at the house of the deceased. In paragraph 37 of his cross-



examination, he has said that after the assault, the deceased came out of the courtyard on his own, which statement appears to be a complete exaggeration.

30. He has denied at the trial that he had not taken the names of the appellants before Ibne Ali/Dafadar (P.W. 14), who was the first person who was informed about the occurrence by him, who in turn had informed the police station, whereafter the police party had arrived at the house of the deceased. Ibne Ali (P.W. 14), however, has confirmed during the trial that P.W. 5/Shivnath Sah never took the names of the appellants as the assailants of the deceased. He had only told him in the night intervening between 25th and 26th of July, 2009 that the criminals had killed his uncle.

31. Though the Investigating Officer (P.W. 10) has claimed that Ibne Ali/Dafadar telephonically informed him about the occurrence and the names of the appellants as well, but such statement cannot be believed in face of the clear deposition of P.W. 14, who



was never informed about the names of the assailants by P.W. 5/Shivnath Sah.

32. The deposition of two other witnesses, viz., Sambhu Sah and Kangres Sah (P.W. 6 and 11 respectively) also throws light on the case. Sambhu Sah (P.W. 6) is also one of the nephews of the deceased, who hails from the family-line of P.W. 5/Shivnath Sah. He too has confirmed at the trial that a same plot of land was sold by Yogendra Singh, brother of Birendra Singh in favour of Tetari Devi, Satyanarayan Sah and Sunil Sah, which was earlier sold to the wife of appellant/Prabhu Rai by the brother of Yogendra Singh, viz., Birendra Singh. Birendra Singh and Yogendra Singh are own brothers.

33. Kangres Sah (P.W. 11) claims to have learnt about the occurrence from P.W. 5/Shivnath Sah immediately after the deceased was killed. He has given the details of the family-tree and has stated that the three sons of the deceased, viz., Jay Prakash Sah (P.W.



1), Surrendra and Arun (not examined) work at Hyderabad in a cable company and out of the three sons only P.W. 1/Jay Prakash Sah was present at the place of occurrence. He had also signed on the inquest report which was prepared. With respect to the Civil dispute, he too agreed that a Title suit was pending between P.Ws. 2 to 5 and appellant/Prabhu Rai.

34. The main Investigating Officer (P.W. 10) did not investigate about the Civil dispute between the parties and relied upon the statement of the witnesses that because the deceased had deposed in a Civil case against the interest of appellant/Prabhu Rai, therefore, he had been killed. He had also not investigated about the papers of alibi of appellant/Prabhu Rai, which was given to him during the course of investigation and he had also received instructions from superior police officers for investigating the aforesaid defence of appellant/Prabhu Rai.

35. The dead body was subjected to post-



mortem examination by Dr. Sambhu Nath Singh (P.W. 8) on 26.07.2009 at 10:30 A.M. He had found several injuries on the person of the deceased. There were four incised wounds and one lacerated wound. The incised penetrating wounds were on the right side of the chest; below the left axilla; on the left forearm and in the right side of chest. All such injuries were cavity deep and dangerous to life. The lacerated wound was found on the right leg. The lungs and the liver, on dissection of the body, was found to be ruptured. The death according to P.W. 8/ Dr. Sambhu Nath Singh was the composite result of the injuries suffered by him. The death was accelerated because of the resultant haemorrhage and shock. The time fixed for death was 8 to 24 hours before the post-mortem examination.

36. Could the deceased have made a detailed statement before P.Ws. 2 to 5 that he was assaulted by the appellants by means *knife* and *gupti* is the question which beckons an answer.



37. An oral dying declaration could be, even without corroboration, the basis for conviction but not when the same is found to be doubtful or untrustworthy of reliance.

38. There is a different sanctity to such statement as it is the last of the statements of the deceased under the expectation of death and no chances of survival. It is based on the doctrine *nemo moriturus praesumitur mentire*. However, before relying on such oral dying declaration, the evidence needs to be critically analyzed and sifted to churn out the truth of the matter.

39. In ***Paniben vs. State of Gujarat reported in (1992) 2 SCC 474***, the Hon'ble Supreme Court, after taking into account several judgments on the issue has formulated certain broad features which are in a way a test for affirming the veracity of such dying declarations, be it oral or written.

40. There is no rule of law or prudence, the Hon'ble Supreme Court asserts, that the dying



declaration cannot be acted upon without corroboration, but the Courts must be satisfied that such declaration is true and voluntary; that the deceased had the opportunity of seeing his assailants; that he was in a fit mental and physical health to narrate about the incident and that such statements do not have such infirmity which would make it difficult to be accepted as a reliable piece of evidence.

41. The caution to be exercised by the Courts do not fall in the category of bog standard for evaluating evidence but something more. Special care has to be taken when interested; related and partitioned witnesses claim to have heard the dying declaration. The Courts have also to find out whether there was any animus against the accused which goaded the witnesses to claim that they had heard the dying declaration. Unless the declaration passes the muster and crosses this litmus test, it cannot be relied upon solely for convicting an accused.



42. With this legal proposition in mind, we have tested the deposition of the witnesses.

43. We have found that P.W. 1 cannot be relied upon as he was not present at the place of occurrence. The informant (P.W. 5) has made contradictory statements at the trial. He had gone to Ibne Ali, the Dafadar (P.W. 14) in the dead of the night with the information that criminals had killed the deceased and that he should inform the police. On such information, P.W. 14, accompanied by two other Dafadars, who have not been examined, came to the place of occurrence and informed the police. P.W. 14 is emphatic enough that immediately after the occurrence, the names of the appellants were not disclosed to him even when he had called the police.

44. There is yet another peculiarity in this case, namely, the prosecution not exhibiting the Station Diary Entry No. 661 of 2009 which was registered on the information of P.W. 14 to S.I. Mahesh Kumar (P.W. 10).



This indicates that the names of the assailants were not available to the police when it has visited the house at 04:45 in the morning of 26.07.2009 before the *fardebayan* was recorded. The witnesses, therefore, got plenty of time to ponder over and turn their gaze towards the appellants with whom P.Ws. 2 to 5 had definite axe to grind. A plot of land which was earlier acquired by appellant/Prabhu Rai in the name of his wife from one of the co-sharers of the property was later attempted to be obtained by P.Ws. 2 to 5 by a separate sale-deed by the brother of the original vendee. At the trial, P.W. 5 had assured the Court that he shall bring on record the Title documents of the land in question, which he conveniently failed to do so and which fact has been recorded by the Trial Court in his judgment.

45. These discrepancies, firstly, points towards the falsity of the claim of the appellants to have seen the occurrence; and secondly, to a complete absence of motive on the part of the appellants to eliminate the



deceased with whom there was no litigation whatsoever and that the story was very conveniently spun by the P.Ws. 2 to 5 about the deceased having made a statement before him.

46. The deceased had received four incised wounds which were cavity deep and there was copious blood-loss.

47. We have great doubts whether he would have been in a position to speak about the names of assailants when P.Ws. 2 to 5 came near him. According to one of the witnesses, there was no time for even putting bandage to the wound for preventing blood-loss. The deceased had died instantaneously.

48. On the other hand, there is also a lurking doubt that the appellants may have been targeted by P.Ws. 2 to 5 as the case of the appellant/Prabhu Rai was stronger than that of P.Ws. 2 to 5.

49. A Civil dispute also existed between the witnesses and the deceased. We have but no idea



whether such dispute was so cantankerous as to propel the murder of the deceased at the hands of the witnesses themselves. This suggestion to the witnesses, therefore, appears us to be a far fetched.

50. What we intend to say is that the oral dying declaration claimed to have been heard by P.Ws. 2 to 5 appears to us to be doubtful.

51. A word about related and partition witnesses also would be important for analyzing their evidence with greater circumspection. Without any circumlocution, the Hon'ble Supreme Court in **C. Mangesh and Ors. vs. State of Karnataka (2015) 5 SCC** has settled the law that the evidence of related/partitioned witness should be viewed with care and the Court should proceed to find whether there are any discrepancies in their deposition which would adversely strike the Court in accepting their version as genuine. The Courts are also required to see whether the story disclosed by them is probable and while doing so, a



Court has to take into account all the circumstances available in the case. Mere consistency of accusation in the deposition of witnesses is not the only test.

52. In this circumstance, the deposition of P.Ws. 2 to 5 appear to us to be agenda-driven and with a purpose; against a particular enclave, with the central content being to frame the appellants.

53. To tie the strings together, we have found that (a) P.W. 1 had given statement, despite his claim of remaining in the house at the time of the occurrence, after four days to the police. He had not signed either the *fardebayan* or the inquest report;

(b) P.Ws. 2 to 5 have made contradictory statements about the physical health of the deceased and their having seen the appellants committing the act and retreating;

(c) the oral dying declaration claimed to have been heard by P.Ws. 2 to 5 is rendered doubtful;

(d) the prosecution not bringing on record the



Station Diary Entry No. 661 of 2009 which was the first version; and the deposition of Dafadar (P.W. 14) who was personally informed by the informant (P.W. 5) about the occurrence with no names of the assailants of the deceased. It may be noted here that the house of P.W. 5 according to P.W. 14 was only one kilometer away, and therefore, he was the first person to have been told about the occurrence by P.W. 5.

54. For these grounds, we find the conviction of the appellants to be absolutely unjustified and the sentence to be not condign.

55. We must state that appellant no. 1/Prabhu Rai has been kept bound over for the last 13 years, whereas appellants no. 2 and 3 (Ashok Rai and Arjun Rai respectively) also have remained in jail for quite a long time up till now. Even though after the passage of 13 years of appellant no. 1 remaining in jail, his sentence was suspended, but for some technical reason i.e. inadvertently incorrect mentioning of Sessions Trial



Number in the memo of appeal, appellant no. 1/Prabhu Rai has not yet been released.

56. The Sessions Trial No. 626 of 2010 appearing in memo of appeal should be read as 'Sessions Trial No. 696 of 2010'.

57. We set aside the conviction of all the appellants in Sessions Trial No. 696 of 2010 new 369/2014, arising out of Garkha P.S. Case No. 129 of 2009 and G.R. No. 2536 of 2009 and acquit them of all the charges.

58. Since all the appellants are in jail, they are directed to be released forthwith from jail, if not detained or wanted in any other case.

59. The appeal stands allowed.

60. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

61. The records of this case be returned to the Trial Court forthwith.



62. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Alok Kumar Pandey, J)

Saurabhkrishna/
krishna-

AFR/NAFR	AFR
CAV DATE	NA
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