

AIR 1987 SUPREME COURT 98 "State of Assam v. Muhim Barkataki"

(From : Gauhati)

Coram : 2 A. P. SEN AND B. C. RAY, JJ.

Criminal Appeal No. 271 of 1986, D/- 20 -10 -1986.

State of Assam, Appellant v. Muhim Barkataki and another, Respondents.

(A) Penal Code (45 of 1860), S.300, S.302, S.436, S.34 - DYING DECLARATION - MISCHIEF - COMMON INTENTION - Offences under - Accused sprinkled and poured kerosene oil in deceased's shop as well as on person of deceased and set fire on deceased as well as to shop - Dying declaration by deceased implicating two accused persons as his assailants - Evidence of eye witnesses found to be truthful and reliable - Statement of eye-witness recorded under S. 164, Cr. P.C., was also reliable - Charges against accused under S. 302/34 and S. 436/34, held, proved by prosecution beyond reasonable doubt - Order of acquittal passed by High Court liable to be set aside.

Cri Appeal No. 66 of 1983 (Gau.), Reversed. (Paras 7, 8)

@page-SC99

(B) Criminal P.C. (2 of 1974), S.311 - TRIAL - EVIDENCE - WITNESS - Murder case - Evidence of police officer - Trial Court examining him as Court witness - Reasons therefor elaborately recorded in order sheet by trial Court - Held, there was no infirmity in finding of trial Court in treating such witness as Court witness under S. 311.

Penal Code (45 of 1860), S.300. (Para 7)

(C) Penal Code (45 of 1860), S.300 - MURDER - EVIDENCE - Murder - Evidence of police officer - Cannot be underestimated merely because he is a police officer.

Evidence Act (1 of 1872), S.3. (Para 7)

Cases Referred : Chronological Paras

AIR 1983 SC 274 : (1983) 2 SCC 14 : 1983 Cri LJ 426 7

AIR 1980 SC 559 : 1980 Cri LJ 408 7

AIR 1976 SC 1519 : 1976 Cri LJ 1186 7

AIR 1958 SC 22 : 1958 SCR 552 : 1958 Cri LJ 106 7

AIR 1953 SC 420 7

Judgement

B. C. RAY, J. :- This appeal by special leave is against the judgment and order passed in Criminal Appeal No. 66 of 1983 by the High Court of Gauhati acquitting both the accused respondents from the charges under Sec. 302 read with Sec. 34 I.P.C. as well as under Sec. 436 read with Sec. 34 of Indian Penal Code, 1860.

2. The prosecution case in short is that on 2nd November, 1978 at about 7 p.m. two accused respondents Muhim Chandra Barkataki and Dulu Dutta came together to the shop of Nagen Dey since deceased and sprinkled and poured kerosene oil in the shop as well as on the person of Nagen Dey and then set fire. Immediately fire caught and spread over the shop as well on the body of Nagen Dey. The shop was a Guliamal (grocery) shop where rice, Dahl, soap, mustered oil, kerosene oil, etc., goods were sold and situate at Na-Ali Road of Jorhat Town in front of M/s. Baruah Printers. Nagen Dey came out of the shop house with ablazing condition all over his body. The witnesses Arun Barua, Prabin Barua and Kiron Saikia on seeing the fire rushed to the place of occurrence and put off the fire from the body of the Nagen Dey but Nagen Dey suffered extensive burnt injuries all over his body. Pradip Jyoti Sarma, Assistant Sub-Inspector of Police also came to the place of occurrence a few minutes later and he also witnessed the fire on the

person of Nagen Dey as well as in the shop of Nagen Dey. Prosecution case is, further, that Nagen Dey made a dying declaration before the witnesses stating that the two accused persons namely Muhim Barkataki and Dulu Dutta set fire on his body after pouring kerosene oil. It was also the prosecution case that both the accused were found at the place of occurrence and public caught hold of the accused Muhim Barkataki red handed at the shop of occurrence whereas other accused Dulu Dutta fled away. Injured Nagen Dey was immediately removed to Jorhat Civil Hospital for treatment, but he died at the hospital. Accused Muhim Barkataki was handed over to the Police by the witness Pradip Jyoti Sarma, Assistant Sub-Inspector of Police. The information of the incident was received over telephone message at 7.15 p.m. by the Officer-in charge of Jorhat Police Station who recorded an entry in the General Diary being G.D. Entry No. 47 dated 2-11-1978 at 7.15 p.m. The Town Sub-Inspector Sri P. Khatoniar was immediately deputed to make local investigation on the spot. Sri P. Khatoniar made enquiry and investigation locally at the spot, arrested accused Muhim Barkataki at the spot and returned to police station. He then informed the facts of occurrence to the Officer-in-charge of the Police Station who recorded the same under G.D. Entry No. 50 at 8.10 p.m. On 3rd November, 1978 at about 7 a.m one Sri Montu Ch. Dey, nephew of deceased Nagen Dey lodged Ejahar (Ext. 5) with Jorhat Police Station. Thereafter murder and arson cases have been registered against Muhim Barkataki and Dulu Dutta. Investigation was carried on by Shri Prafulla Kumar Khatoniar. The Investigation Officer forwarded witnesses Arun Barua, and Kiran Saikia to the court for recording their statements under Sec. 164 of the Criminal Procedure Code. The Judicial Magistrate Shri Dharyya Saikia recorded the statements of these two witnesses on 7-11-1978.

3. The Sessions Judge found that the message received over telephone was an information relating to commission of cognizable offence and same was entered

@page-SC100

into General Diary of the Police Station as Entry No. 47. On the basis of this information the investigation of the case was entrusted to the Town Sub-Inspector Shri Prafulla Kumar Khatoniar with the recording of General Diary Entry No. 47 and the Investigating Officer fairly progressed with the investigation in that very night. Subsequent information of Montu Chandra Dey on 3rd November, 1978 are nothing but statements during the course of investigation and as such those are hit by Sec. 162 of the Criminal Procedure Code. It has, therefore, been held that Exhibit 5 cannot be recognize as the First Information Report of the occurrence. The General Diary Entry No. 47 which is proved as Ext. 7(1), is the First Information Report of the occurrence.

4. The Sessions Judge duly considered the evidences of P.W. 4 Arun Barua and C.W. 1 Pradip Jyoti Sarma as well as the statements under Sec. 164 recorded by the Judicial Magistrate, P.W. 8 on 7-11-1978 and accepted the dying declaration made by the deceased Nagen Dey implicating the accused Muhim Barkataki and Dulu Dutta as pouring kerosene oil on his body and setting fire to his person. P.W. 6 Kiran Saikia also stated in his statement under Sec. 164 of Criminal Procedure Code, before the Judicial Magistrate, that Nagen Dey, deceased made a dying declaration that these two accused persons sprinkled kerosene over the body of the deceased Nagen Dey and then set fire on him. These witnesses also proved that the accused Muhim Barkataki was caught hold of red handed at the place of occurrence whereas Dulu Dutta fled away from the place. The Sessions Judge, therefore, convicted both the accused under Sec. 302 read with Sec. 34 of

the Indian Penal Code and sentenced them to rigorous imprisonment for life. The accused persons were further convicted and sentenced under Sec. 436 read with Sec. 34 of the Indian Penal Code and they were sentenced to suffer rigorous imprisonment for 5 years each. Both the sentences shall run concurrently.

5. Against this judgment and order of conviction and sentence the accused person preferred an appeal being Criminal Appeal No. 66 of 1983 in the High Court of Gauhati. The High Court proceeded on the footing that entire evidence in the case was circumstantial as there was no eye witness to the occurrence and the clinching circumstances in which the case according to the prosecution is proved are the circumstances relating to the dying declaration. The learned Judges held that the evidence of P.W. 4 Arun Barua who deposed to the dying declaration was wholly unreliable as there was serious infirmity in his evidence as he disputed his statement made to the Police that the three persons used to drink liquor and play cards which fact as we have observed, is very material to cast a serious doubt on prosecution version itself. The learned Judges, therefore, held that the prosecution failed to prove beyond doubt the offences for which the appellants were charged. The conviction and sentence passed against the accused persons was set aside and the appeal was allowed.

6. There is no dispute that the shop of deceased Nagen Dey situated by the side of Na-Ali Road was set on fire and fire was also set on the person of Nagen Dey by pouring kerosene. Eye witnesses P.W. 4 Arun Barua, P.W. 6 Kiran Saikia and P.W. 5 Prabin Barua came to the place of occurrence immediately on seeing the fire. It is also evident from the evidence of P.W. 4 that he and Kiran Saikia who was in the shop of P.W. 4 both came together at the place of occurrence and they tried to put out the fire by throwing dust on the body of Nagen Dey who was on fire by tearing off his dress and Kiran Saikia put the clothing on the person of deceased Nagen Dey. It is also in the evidences of P.W. 4 and C.W. 1 Pradip Jyoti Sarma, Assistant Sub-Inspector, Police, that the deceased Nagen Dey made a dying declaration to the effect that the accused persons Muhim Barkataki and Dulu Dutta poured kerosene oil in his shop and sprinkled kerosene oil on his person and then set on fire. It is also evident from the depositions of P.W. 4 and C.W. 1 that the accused Muhim Barkataki was caught hold red handed on the spot and he was detained there by the public while Dulu Dutta fled away from the place of occurrence. It is also evident from the G.D. Entry No. 47 i.e. telephonic message received at the Jorhat Police Station at about 7.15 p.m. on the date of occurrence that the said two men set fire to the person of Nagen Dey, deceased as well as to his Guliamal shop which is in front of

@page-SC101

Baruah Printers after pouring kerosene oil. One of the accused persons was caught hold of by local rija (public) while it was informed that Shri P. K. Khatoniar was investigating for local investigation after giving all entries in the diary. This is proved by Investigating Officer P.W. 7 and marked as Ect. 7(1). It also appeared that immediately after the enquiry and investigation into the incident the Town Sub-Inspector Shri Khatoniar returned to the Police Station and informed that Muhim Barkataki and Dulu Dutta entered in the Guliamal shop of Nagen Dey which was in front of Baruah Printers of Na-Ali and poured kerosene oil kept in the shop for sale and set fire on it and as a result the Guliamal shop was burnt. Nagen Dey was the owner of the shop who also was set on fire. It was also recorded in the G.D. Entry that Muhim Barkataki who was caught hold of at the place by the local people has been sent to the police station. This G.D. Entry No. 50 was

proved by P.W. 7 and it was marked as Ext. 7(2). It also appears that the witnesses P.W. 4 Arun Barua, P.W. 5 Prabin Barua, P.W. 6 Kiran Saikia and C.W. 1 Pradip Jyoti Sarma who was on duty on that Na-Ali locality at that time arrived at the place of occurrence almost simultaneously and all of them found Nagen Dey out of his shop in a complete ablazing state all over his body. It also appears from evidences of these three witnesses Arun Barua, Kiran Saikia and Pradip Jyoti Sarma that the injured Nagen Dey was conscious and was crying out due to burning pain. It was also their evidence that the deceased Nagen Dey made a dying declaration at the place of occurrence implicating accused Muhim Barkataki and Dulu Dutta as his assailants. It is also evident from Exts. 3 and 4 that the Judicial Magistrate Shri Dharyya Saikia (P.W. 8) recorded the statements of Arun Barua (P.W. 4) and Kiran Saikia (P.W. 6) on 7-11-1978 under Sec. 164 of the Criminal Procedure Code stating about the dying declaration made by the deceased Nagen Dey implicating that Muhim Barkataki and Dulu Dutta had set fire on him. P.W. 4 Arun Barua also in his evidence clearly testifies to this dying declaration made by the deceased Nagen Dey. Of course P.W. 6 Kiran Saikia tried to contradict his statement made before the Police as well as before the Judicial Magistrate as to the dying declaration made by the deceased Nagen Dey. He admitted in his examination-in-chief that he made a statement about this incident before the Magistrate of Jorhat Court. Exhibit 4 is his statement and Ext. 4(2) is his signature. He further stated that the Magistrate has recorded his statement. But in cross-examination he contradicted himself by saying that he was tutored by the police to say so before the Magistrate. Even if his statement is not taken into consideration there is a clear statement of P.W. 4 Arun Barua before the Magistrate (Ext. 3) as well as his deposition which clearly corroborates his statement before the Magistrate about the dying declaration made by the deceased implicating the two accused persons as his assailants. The court of appeal below has acted illegally in discarding the evidence of P.W. 4 as well as his statement recorded under Sec. 164 of the Criminal Procedure Code by the Judicial Magistrate on the flimsy ground that it was not reliable because he contradicted his statement made before the Police that these three persons (the two accused and the deceased Nagen Dey) used to take liquor and play cards. Moreover C.W. 1 Pradip Jyoti Sarma who came to the place of occurrence a few minutes after the arrival of P.W. 4 and P.W. 6 at the place of occurrence has stated in his evidence that he saw the body of the deceased under fire and the deceased is crying out of burnt pain. He implicated in his dying declaration that Muhim Barkataki and Dulu Dutta had set fire on his person after pouring kerosene oil on him. He also stated that at the place of occurrence he found that the accused Muhim Barkataki was caught by the public and he was being assaulted. He further stated that to save Muhim Barkataki from assault he handed him over to the Police Constable who was with him. He also deposed that Nagen Dey has sense and he was speaking. There was no cross-examination of this witness as to the dying declaration made by the deceased. This witness further stated that he came to the Thana in the night and told the inspector about the incident. He also stated that he did not know whether O.C. recorded this in the General Diary or not. P.W. 2 Dr. Jibakanta Borah who held post-mortem on the body of the deceased has stated in his evidence that a

@page-SC102

person sustaining burnt injuries of such nature may have consciousness for some time before death. It cannot, therefore, be ruled out that the deceased Nagen Dey was

conscious in spite of the severe burnt injuries on his person and he could speak and could make dying declaration as testified to by the witnesses P.W. 4, and C.W. 1. It has been tried to be urged before us by the learned counsel on behalf of the respondents that there is no evidence to show that the deceased Nagen Dey made a dying declaration as has been alleged as the General Diary Entry was not produced to show such statement of C.W. 1 about the dying declaration recorded therein. Moreover even if such a dying declaration has been made the same being not corroborated cannot be taken into consideration by the Court in convicting the accused respondents. It has been further submitted that the court of appeal below rightly discarded the alleged dying declaration as being not corroborated by any other evidence and duly acquitted the accused persons.

7. We have considered and appraised thoroughly the evidence on record and on an overall assessment of the same, we hold that the prosecution has proved beyond reasonable doubt the charges framed against them. The order of acquittal passed by the High Court is liable to be set aside for the reasons stated hereafter. Firstly, eye-witnesses P.Ws. 4, 5, 6 and C.W. 1 undoubtedly arrived at the place of occurrence immediately on seeing the fire in the grocery shop of the deceased Nagen Dey at about 7 p.m. on 2-11-1978. All these witnesses have seen that the shop is ablaze and there is fire on the person of Nagen Dey. It is also the specific evidence of P.W. 4 Arun Barua and C.W. 1 Pradip Jyoti Sarma, A.S.I. at Jorhat Police Reserve deputed by the Jorhat Thana at Jorhat Town in law and order duty on that day. All these eye-witnesses P.W. 4 and C.W. 1 also stated that Nagen Dey was crying a lot in pain out of burnt injuries and he stated clearly that the accused persons Muhim Barkataki and Dulu Dutta poured kerosene oil on him and set fire on his body. So far as depositions of P.W. 4 and C.W. 1 are considered there is no cross-examination on this point. Furthermore P.W. 4 and P.W. 6 made statements Exts. 3 and 4 under Sec. 164 of Criminal Procedure Code before the Chief Judicial Magistrate of Jorhat (P.W. 8) to the effect that the deceased Nagen Dey made a dying declaration implicating the accused persons as his assailants. This recording of the statements of P.W. 4 and P.W. 6 was proved by the deposition of the Addl. Chief Judicial Magistrate at Jorhat, Shri Dharyya Saikia (P.W. 8). Of course, P.W. 6 Kiran Saikia tried to contradict his statement made before the Chief Judicial Magistrate. As regards the evidence of C.W. 1 it has been tried to be contended that his statement before the O.C. of the Police Station that the deceased made a dying declaration cannot be accepted as there is nothing to show that this was recorded in the G.D. Entry. This statement cannot be accepted inasmuch as the learned Sessions Judge has assigned cogent reasons as to why Pradip Jyoti Sarma was examined as a court witness under the provisions of Sec. 311 of the Code of Criminal Procedure. It has been clearly found that Shri Sarma was an independent and disinterested witness and he was found to be reliable and trustworthy. It has been also found that Shri Pradip Jyoti Sarma is an important witness of the case and his examination was for the just decision of the case and his evidence has full corroboration with another independent and disinterested witness namely Arun Barua who is also found to be trustworthy and reliable witness. The evidence of Shri Pradip Jyoti Sarma cannot be under-estimated merely because he is a police officer. The Sessions Judge also stated in his order that the reasons for examining him as a court witness had been elaborately recorded in the order sheet dated 17-2-1982 and 22-3-1983. Therefore, considering this finding of the Sessions Judge we hold that there is no infirmity in the findings of the Sessions Judge in treating Pradip Jyoti Sarma as a court witness under the provisions of

Sec. 311 of the Code of Criminal Procedure. There is no criticism regarding the evidence of P.W. 4 on behalf of the respondents as to why his testimony regarding the dying declaration shall not be taken into consideration apart from the evidence of C.W. 1 Pradip Jyoti Sarma. Moreover it is

@page-SC103

of evident from Exts. 3 and 4, the statements of P.Ws. 4 and 6 recorded under Sec. 164 of the Code of Criminal Procedure by the Addl. Judicial Magistrate, Jorhat on 7-11-1978 that these two witnesses P.Ws. 4 and 6 clearly stated about the dying declaration made by Nagen Dey implicating both the accused as his assailants. Along with this testimony of P.W. 4 and C.W. 1 that Muhim Barkataki was caught hold red handed on the spot and was detained by the public while Dulu Dutta fled away from the place of occurrence. All these clearly go to prove the prosecution case beyond any reasonable doubt and it leads to the only conclusion that these two accused persons poured kerosene oil in the shop as well as sprinkled kerosene oil on him and set fire on the deceased as well as to the shop. It has been tried to be contended that the dying declaration as referred to by P.W. 4 in his deposition has not been corroborated by any independent witness and as such the same cannot be relied upon in convicting the accused. In support of this submission reference has been made to the decision reported in Ramnath Madho Prasad v. State of Madhya Pradesh, AIR 1953 SC 420 wherein it has been observed :-

"It is settled law that it is not safe to convict and accused merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might be well drawing upon his imagination while he was making the declaration. It is in this light that the different dying declaration made by the deceased and sought to be proved in the case have to be considered."

This observation has been overruled being in the nature of obiter dicta by this Court in a subsequent decision in Khushal Rao v. State of Bombay, 1958 SCR 552 : (AIR 1958 SC 22). The same view was taken by this Court in the case of Kusa v. State of Orissa, AIR 1980 SC 559 at P. 562, Para 9. It is pertinent to refer to the observation of this court on this point made in State of Assam v. Mafizuddin Ahmed (1983) 2 SCC 14 at p. 19, Para 10 : (AIR 1983 SC 274 at p. 276, Para 10) which are in the following terms-

"Thus, the law is now well settled that there can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any other manner."

It has been observed by this Court in Jayaraj v. State of Tamil Nadu, AIR 1976 SC 1519 at p. 1522, Para 16 which reads:-

"When the deponent (while making his dying declaration) was in severe bodily pain (because of stab injuries in the abdomen) and words were scarce, his natural impulse would be to tell the Magistrate, without wasting his breath on details as to who had stabbed him. The very brevity of the dying declaration, in the circumstances of the case, far from being a suspicious circumstance, was an index of its being true and free from the taint of tutoring, more so when the substratum of the dying declaration was fully consistent with the ocular account given by the eye-witnesses."

8. In the instant case we have carefully considered the evidences of P.W. 4 as well as of C.W. 1 and we are clearly of the opinion that the deceased Nagen Dey made the dying declaration in question clearly implicating the two accused persons as his assailants. The dying declaration made by the deceased while he was suffering severe pain from grievous injuries is truthful and reliable. Therefore, on an overall assessment of evidences recorded particularly the evidence of P.W. 4 and C.W. 1 and also the statements recorded under Sec, 164 of Criminal Procedure Code Exts. 3 and 4, we find that the charges under Sec. 302/34 and Sec. 436/34 of the Indian Penal Code, 1860 has been proved by the prosecution beyond reasonable doubt against the two accused persons. They were rightly convicted by the Sessions Judge and sentenced to rigorous imprisonment for life under Sec. 302/34 I.P.C. and also to rigorous imprisonment for 5 years under Sec. 436/34 of the Indian Penal Code. Both the sentences will run concurrently. The judgment and order of acquittal passed by the High Court is hereby set aside and the judgment and order of conviction and sentence awarded by the Sessions Judge is hereby affirmed. Let

@page-SC104

Warrant of arrest issue forthwith against the accused for serving out the sentence.

Order accordingly.