

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.21 of 1993

Against the judgment of conviction, dated 02.12.1992, and the order of sentence, dated 03.12.1992, passed by Shri Sushil Kumar Dwivedi, Sessions Judge, Gopalganj, in Sessions Trial No. 25 of 1992, arising out of Bishambharpur P.S. Case No. 23/91, corresponding to G.R. Case No. 785 of 1991.

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Ram Naresh Rai, S/o. Nageshwar Rai, resident of Village- Naya Tola Salehpur, P.S. Bishambharpur, District- Gopalganj.

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance:

For the Appellant : Mr. Birendra Kumar Sinha, Senior Advocate

For the Respondent: Mr. Ajay Mishra, APP

=====
CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 10-02-2015

Under the impugned judgment, dated 02.12.1992, passed, in Sessions Trial No. 25 of 1992, by learned Sessions Judge, Gopalganj, the appellant, Ram Naresh Rai, stands convicted under Section 302 of the Indian Penal Code. Following his conviction, under Section 302 of the Indian Penal Code, the accused-appellant, Ram Naresh Rai, has been sentenced to undergo imprisonment for life.

2. The case of the prosecution may, in brief, be described thus:

(i) On 04.06.1991, at about 12.30 PM, when



Biresh Nonia (since deceased) was talking with Asarfi Devi (PW 4), wife of one Hakim Mahto, at her door, in village Sallehpur, Naya Tola Mallahi, accused Ram Naresh Rai, a co-villager, appeared there with a country-made pistol in his hand and fired at Biresh Nonia's abdomen. The bullet, so fired by accused Ram Naresh Rai, struck on the left side of the abdomen of Biresh Nonia, who, on receiving the pellet injury, fell down and while he was crying in pain, Asarfi Devi (PW 4), with the help of a piece of cloth, bandaged the injury caused on the abdomen of injured Biresh Nonia.

(ii) While Biresh Nonia, as mentioned hereinbefore, was restless and writhing in pain, the son of PW 4 (Asarfi Devi), Lachhuman Mahto (PW 1), a young boy, aged about 12 years, arrived at the place of occurrence from his school and, on witnessing injured Biresh Nonia writhing in pain, inquired from his mother, PW 4 (Asarfi Devi), as to what had happened. PW 4 (Asarfi Devi) replied by saying that Ram Naresh Rai had injured Biresh Nonia by firing from a pistol.

(iii) On being called by Lachhuman Mahto (PW 1), Ghughuli Mahto (PW 2) and Mahatam Mahto (PW 3), amongst others, arrived at the place of occurrence and while they were carrying, along with others, the injured towards Bishambharpur Police Station, Assistant Sub-Inspector, Ram Nath Singh (PW 7), who stood posted at Bishambharpur Police



Station, and was, at the relevant point of time, proceeding to investigate another case, happened to find Biresh Nonia being carried on a cot. Ram Nath Singh (PW 7) made inquiry from the injured as to what had happened and the statement, which the injured made to PW 7 describing as to how he had happened to have sustained injury on his abdomen, was recorded by PW 7, the statement being Exhibit-3.

(iv) On returning to Bishambharpur Police Station, Assistant Sub-Inspector (PW 7) referred the injured to Kuchaikota Primary Health Centre for examination and treatment. Having examined the injured, Medical Officer, Kuchaikota Primary Health Centre (PW 5) noted the said injuries and having found that the condition of the injured was serious, he referred the injured, for examination and treatment, to Sadar Hospital, Gopalganj.

(v) While under the treatment at Sadar Hospital, Gopalganj, the injured succumbed to his injuries on 04.06.1991 itself at 10.30 PM.

(vi) In the meanwhile, however, injured Biresh Nonia's statement, recorded by Assistant Sub-Inspector (PW 7) on the way to Bishambharpur Police Station, was made the basis for registration of Bishambharpur Police Station Case No. 23/91, under Section 302 of the Indian Penal Code read with Section 27 of the Arms Act, 1959, against accused Ram Naresh

Rai treating injured Biresh Nonia's said statement as the First Information Report.

(vii) While, however, the injured was being treated at Sadar Hospital, Gopalganj, his statement was, again, recorded by Punit Singh, Assistant Sub-Inspector of Gopalganj Police Station, which has been proved as Exhibit-3/1.

(viii) On the death of injured Biresh Nonia, Biresh Nonia's statement (Exhibit-3), recorded by PW 7, as well as the statement (Exhibit-3/1), recorded by Punit Singh, Assistant Sub-Inspector of Gopalganj Police Station (not examined as a witness), were treated as the *dying declarations* of the said deceased.

(ix) During investigation, *inquest* was held over the said dead body by the said Punit Singh, Assistant Sub-Inspector, and inquest report Exhibit-6 was prepared. The said body of Biresh Nonia was subjected to *post mortem* examination and, on completion of investigation, *charge sheet* was laid, under section 302 of the Indian Penal Code read with Section 27 of the Arms Act, 1959, against accused Ram Naresh Rai.

3. At the trial, when charges, under section 302 of the Indian Penal Code read with Section 27 of the Arms Act, 1959, were framed against the accused-appellant, he pleaded not guilty thereto.



4. In support of their case, prosecution examined altogether seven witnesses including the doctor, who had examined the said injured at Primary Health Centre and also the doctor, who had conducted *post mortem* examination. So far as Ghughuli Mahto (PW 2) was concerned, he was tendered as a witness. The accused-appellant was, then, examined under Section 313 of the Code of Criminal Procedure and, in his examination aforementioned, he denied that he had fired at Biresh Nonia by means of pistol, though he admitted that there existed enmity between him and Biresh Nonia. No evidence was, however, adduced by the prosecution.

5. Having found the accused guilty of the offence, under Section 302 of the Indian Penal Code, the learned trial Court convicted him accordingly; but so far as the charge, under Section 27 of the Arms Act, 1959, was concerned, the learned trial Court acquitted the accused on the ground that sanction for prosecution of the accused, in terms of the provisions of the Arms Act, 1959, had not been obtained. Following his conviction under Section 302 of the Indian Penal Code, the accused has been sentenced to suffer life imprisonment.

6. Aggrieved by his conviction and the sentence, which has been passed against him, the accused, as convicted person, has preferred this appeal.

7. We have heard Mr. Birendra Kumar Sinha, learned Senior Counsel, appearing for the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing for the State.

8. While considering the present appeal, it may be noted that no one has been examined by the prosecution as an eye witness to the alleged occurrence. The case of the prosecution, admittedly, rests on the two statements, one recorded by Rama Kant Singh, Assistant Sub-Inspector (PW 7), and the other recorded by Punit Singh, Assistant Sub-Inspector of Gopalganj Police Station, who was not examined as a witness at the trial, both the said statements having been treated as *dying declarations*. The statement, which was recorded by PW 7, has been proved as Ext-3; whereas the other statement, recorded by Punit Singh, Assistant Sub-Inspector of Gopalganj Police Station, who has not been examined as witness at the trial, has been proved as Ext-3/1.

9. The very fact as to whether the two *dying declarations* aforementioned had actually been made by the injured or not fell in dispute at the trial and has been raised before us, in this appeal, too, inasmuch as the learned trial Court has concluded that the said two statements, proved as Ext-3 and Ext-3/1, can be safely relied upon as *dying declarations*, wherein the injured had stated that he had been

shot at, and injured by, the accused by means of a pistol.

10. The fact that the Ext-3 and Ext-3/1 implicate the accused-appellant as the person, who had allegedly shot Biresh Nonia, is, however, not in dispute; what is in dispute is the very veracity of the assertion of the prosecution that Ext-3 and Ext-3/1 were statements of the injured recorded in the manner as has been claimed by the prosecution.

11. With regard to the above, the defence has pointed out before us that according to the evidence on record, the injured was unconscious and was, therefore, not in a position to make any statement far less a statement, which is shown to have been made so elaborately by the injured.

12. Bearing, therefore, in mind the focal point of this appeal, we, first, come to the evidence of Lachhuman Mahto (PW 1), who had, admittedly, arrived at the scene of occurrence after Biresh Nonia had already sustained injury and was lying on the ground restlessly and writhing in pain. The evidence of this witness, namely, Lachhuman Mahto (PW 1) is to the effect that on 04.06.1991, at about 1.00 PM, when he returned from his school, he found Biresh Nonia lying restless and writhing in pain with injury on his abdomen, his mother was weeping and, on inquiry made by him, she told him (PW 1) that Ram Naresh Rai had fired at Biresh Nonia.



13. Since Asarfi Devi (PW 4), the mother of PW 1 (Lachhuman Mahto), has not claimed, in her evidence, that she had seen the accused firing at Biresh Nonia by means of pistol, it follows that the evidence, given by PW 1 as to what his mother had told him, is nothing, but *hearsay* and ought to have been kept excluded by the learned trial Court from the purview of its consideration. This apart, PW 4 (Asarfi Devi), mother of PW 1, did not assert, in her evidence, that she had reported the occurrence to her son, Lachhuman Mahto (PW 1), when he arrived at the scene of the occurrence from his school. Looked at from this angle also, the evidence of PW 1 that his mother (PW 4) had reported to him that Ram Naresh Rai had shot at Biresh Nonia, by means of a pistol, is nothing, but *hearsay* and ought to have been kept excluded, and needs to be kept excluded, from the purview of the Court's consideration.

14. What is also noticeable, in the evidence of Lachhuman Mahto (PW 1), is that according to him, he called PW 2 (Ghughuli Mahto) and PW 3 (Mahatam Mahto) and, then, with their help and, along with other co-villagers, they carried, on a cot, injured Biresh Nonia and, on the way, Ram Nath Singh, (PW 7) happened to meet them and recorded injured Biresh Nonia's statement, which, as we have already noted above, has been proved as Ext-3 and has been treated, as the

first *dying declaration*, which the said injured had allegedly made.

15. What is, however, impossible to ignore is that in his cross-examination, PW 1 (Lachhuman Mahto) has admitted that on the way to the police station, the injured did not talk to them. This apart, according to the evidence, adduced by the prosecution, Ext-3 was recorded by PW 7 in the presence of two witnesses, namely, Manoj Pandey and Baidhnath Mallah and as far as the injured was concerned, he is claimed to have put his thumb impression on Ext-3.

16. In order to prove the veracity of the evidence of PW 7, which had been seriously questioned at the trial, it was, undoubtedly, the duty of the prosecution to examine Manoj Pandey and Baidhnath Mallah inasmuch as these two were, in the facts and circumstances of the present case, material witnesses. None of these two witnesses was examined at the trial. Neither any explanation has been offered by the prosecution for their omission to examine Manoj Pandey and Baidhnath Mallah nor is there any explanation, plausible and convincing, discernible, in this regard, from the evidence on record.

17. Situated thus, the logical inference would be that had Manoj Pandey and Baidhnath Mallah been examined, they would not have supported the case of the prosecution and that

was the reason why they were withheld by the prosecution.

18. When a shadow of doubt is cast on the veracity of the evidence of PW 7, there has to be unimpeachable evidence proving beyond any shadow of doubt not only that the injured was capable of speaking, but had, in fact, made the statement, which has been proved as Ext-3.

19. With regard to the above, we may pause and turn to the evidence of doctor PW 5, who had examined the said injured at Kuchaikote Primary Health Centre and referred him to Sadar Hospital, Gopalganj.

20. The evidence of Dr. Janak Lal Sharma (PW 5), shows that on examining injured Biresh Nonia, he found as follows:

(i) "Lacerated oval wound profusely with charring of skin ¾" x ¾" x stomach deep on the left side of the upper abdomen;

(ii) A huge portion of omentum was appearing on surface of wounds.

(iii) The injury was caused by fire-arm and was grievous in nature. The age of the injury at the time of examination was within six hours. This injury report is in my pen and signature- mark exhibit.

(iv) The condition of the injured was

very serious. Therefore, after first aid he was immediately referred to Sadar Hospital, Gopalganj.

(v) Charring of the skin was caused by fire-arm. The skin was singeing, immediately underneath the stomach There is muscle. Thereafter, there is peritoneum. Thereafter, omentum comes. On the right side there is liver and on the left side is spleen. Omentum is spread around the stomach. Omentum will come out of the stomach through many organs. Volunteers- those organs are tightened with the stomach. Only omentum is loose, which comes out of the stomach easily."

21. In the opinion of doctor (PW 5), injury was grievous, in nature, inflicted by fire-arm and that patient was, immediately after the first aid, referred to Sadar Hospital, Gopalganj.

22. In his cross-examination, PW 5 has admitted that he had not talked to the patient, but he adds that he had not talked to the patient '*probably*' because he was unconscious.

23. Taking cue from the expression, '*probably*', used by the doctor (PW 5), it has been contended, on behalf of the

appellant, that evidence of PW 5 does not prove that the injured was conscious at the time, when he was examined PW 5.

24. We agree with the contention of the learned counsel for the appellant that in the light of the expression '*probably*' used by the doctor (PW 5), the possibility that the injured was not conscious cannot be boldly ruled out. At the same time, however, we must hasten to add, that it cannot be said that the injured was definitely and positively conscious.

25. It is trite that when a piece of evidence is capable of two equally possible or reasonable views, it is the view, favouring the defence's case, which needs to be adopted by the Court. Placed, therefore, as we are, we are constrained to hold that the evidence of PW 5 does give any positive or definite indication that the injured was conscious and/or capable of making any statement, when he was being examined and referred to the Sadar Hospital, Gopalganj, by PW 5. The possibility, therefore, that the said injured was not conscious and not capable of making any statement, contrary to what prosecution contends, cannot be ruled out.

26. We, now, turn to the evidence of PW 6 (Dr. D. N. Thakur), who had, admittedly, performed *post mortem* examination on the dead body of Biresh Nonia. This witness has deposed that on 05.06.1991, at 9.50 A.M., he held *post*

mortem examination on the dead body of Biresh Nonia and found the following *ante mortem* injuries:

"On external examination:

(i) *One circular lacerated wound of 2¹/₂" in diameter with blackening of the margin and tattooing and singeing of the hair on the left upper part of the abdomen with stomach omentum bulging out.*

On dissection:

(ii) *The abdominal cavity was found full of blood and blood clots. The stomach was ruptured. The chest cavity was full of blood. The left lobe of lung was ruptured. Ten pellets and wads were recovered from the chest cavity."*

27. In the opinion of the doctor (PW 6), the cause of death was shock and haemorrhage due to above injury, which was sufficient to cause the death of a person in ordinary course of nature, the injury having been caused by fire-arm and PW 6 has also clarified that Biresh Nonia died at Gopalganj Sadar, Hospital, on 04.06.1991, at 10.30 P.M.

28. In his cross-examination, PW 6 has deposed that the condition of the injured was serious at the time of his admission and he cannot say if at the time of admission, the injured was conscious or not.

29. Thus, even PW 6 could not prove that at the time of his admission to Sadar Hospital, Gopalganj, injured Biresh Nonia was conscious or not and/or he was capable of

speaking or not.

30. In the backdrop of the above uncertain and indefinite evidence on record, with regard to the question as to whether injured Biresh Nonia was or was not conscious at the time of allegedly making the statement, which has been treated as the first *dying declaration*(Ext-3) of the said deceased and/or the statement (Ext-3/1), which has been treated as the second *dying declaration*(Ext-3/1) of the said deceased, we cannot ignore the fact that Assistant Sub-Inspector, Punit Singh, who is claimed to have recorded injured Biresh Nonia's statement (Ext-3/1), was not examined as a witness at the trial; rather, the said statement was proved by PW 7 (Ram Nath Singh).

31. Obviously, there is no iota of evidence on record nor is it claimed that PW 7 (Ram Nath Singh) was present at the time, when Ext-3/1 was, according to the prosecution, had been recorded by Assistant Sub-Inspector, Punit Singh.

32. No reliance could have, therefore, been placed on Ext-3/1 as a *dying declaration* consciously made by injured Biresh Nonia. Consequently, contents of Ext-3/1, which is said to constitute *dying declaration* of injured Biresh Nonia, could not have been treated as a proved piece of *dying declaration* made by the said injured.

33. Though the learned trial Court, we may point



out, has observed that the evidence of PW 2 (Ghughul Mahto), who was tendered as a witness, cannot be relied upon inasmuch as he has been gained over by the prosecution, there is nothing at all on record that PW 2 (Ghughul Mahto) had been gained over by the defence. Merely because a witness, such as PW 2, did not support the case of the prosecution, he could not have been described, in the absence of anything else, as a witness, who had been gained over by the defence, particularly, when PW 2 was not declared hostile and was not cross-examined by the prosecution with regard to any previous statement made by him.

34. Coupled with the above, the evidence of PW 1 (Lachhuman Mahto), which we have already discussed above, clearly shows that PW 3 (Mahatam Mahto) and PW 2 (Ghughul Mahto) were called after the occurrence had already taken place. PW 2 (Ghughul Mahto) could not have, therefore, been regarded as a witness, who had been gained over by the defence, especially, when there was no material, on record, in this regard.

35. Turning to the evidence of PW 3 (Mahatam Mahto), who, too, according to the evidence of PW 1 (Lachhuman Mahto), had been called to the place of occurrence after the occurrence had taken place, we notice that according to him, Biresb Nonia (i.e., the injured) had told him (PW 3) the

name of his assailant, but he could not recall the name. He has, however, identified the accused-appellant, at the trial, as the one, whose name had been revealed by the injured as his assailant.

36. We find it impossible to place reliance on the evidence of PW 3 (Mahatam Mahto), when he does not even recall the name, which had been allegedly mentioned by the injured, but identifies nevertheless the accused-appellant as the person, whose name had been revealed by the injured. The evidence, so given, is wholly unsafe and, if we may repeat, unreliable.

37. What is also of immense importance to note, in the evidence of PW 3 (Mahatam Mahto), is that in his cross-examination, he has conceded that when he had arrived at the place of occurrence, the injured was unconscious and there is nothing, in the evidence of PW 3, to show that the injured had regained his senses at any time thereafter.

38. In such a situation as pointed out above, it is too unsafe and wholly hazardous to place implicit reliance on the evidence of PW 7, more particularly, when the two material witnesses, namely, Manoj Pandey and Baidhnath Mallah, have not been examined to prove that Ext-3 was the statement, which had been made by the injured to PW 7 on the way to the said police station.



39. We notice that the learned trial Court, in the judgment, under appeal, has referred to paragraph 33 the case of **Mannu Raja and Another v. The State of Madhya Pradesh (AIR 1976 2199)** and held that the Supreme Court has observed therein that a Court must not look for corroboration of a *dying declaration* unless the *dying declaration* suffers from any infirmity.

40. We are afraid that the law, laid down in **Mannu Raja** (Supra), has not been correctly appreciated by the learned trial Court. In the case of **Mannu Raja** (Supra), there were as many as two dying declarations and not only the learned trial Court, but also the High Court had accepted the *dying declarations* as the *dying declarations* made by the deceased.

41. In the circumstances mentioned above, the Supreme Court, **Mannu Raja** (Supra), has observed that it is in full agreement with the High Court that both the *dying declarations* were true and the Supreme Court has further observed that considering the facts and circumstances of the case, the two statements can be accepted without corroboration. The relevant observations, made in **Mannu Raja** (Supra), read under:

"10. We are in full agreement with the High Court that both of these dying declarations are true, We are further of the opinion that

considering the facts and circumstances of the case, these two statements can be accepted without corroboration. Bahadur Singh was assaulted in broad day light and he knew the appellants. He did not bear any grudge towards them and had therefore no reason to implicate them falsely. Those who were in the constant company of Bahadur Singh after the assault, had also no reason to implicate the appellants falsely. They bore no ill-will or malice towards the appellants. We see no infirmity attaching to the two dying declarations which would make it necessary to look out for corroboration.”

(Emphasis is added)

42. There is, therefore, in the light of **Mannu Raja** (Supra), no bar in looking for corroboration of a *dying declaration*, especially, in a case, wherein the very veracity of the *dying declaration* gets engulfed in the cloud of doubt.

43. Moreover, in the case of **Mannu Raja** (Supra), what had fallen for determination was the issue as to whether the First Information Report, registered on the basis of the statement made by an injured person, can be regarded as his *dying declaration* if the injured happens to subsequently succumb to the injuries sustained by him. Making the law explicitly clear in this regard, the Supreme Court has laid down, in **Mannu Raja** (Supra), that a First Information Report, registered on the basis of the statement made by an injured

person, can be regarded as his *dying declaration* if the injured happens to subsequently succumb to the injuries sustained by him and died. In the case of **Mannu Raja** (Supra), at para-5, read as under:

"5. In regard to these dying declarations, the judgment of the Sessions Court suffers from a patent infirmity in that it wholly overlooks the earliest of these dying declarations, which was made by the deceased soon after the incident in the house of one Barjor Singh. The second statement which has been treated by the High Court as dying declaration is Ex. P-14, being the first information report which was lodged by the deceased at the police station. The learned Sessions Judge probably assumed that since the statement was recorded as a first information report, it could not be treated as dying declaration. In this assumption, he was clearly in error. After making the statement before the police, Bahadur Singh succumbed to his injuries and therefore the statement can be treated as a dying declaration and is admissible under Section 32 (1) of the Evidence Act. The maker of the statement is dead and the statement relates to the cause of his death."

(Emphasis is supplied)

44. From what has been laid down in **Mannu Raja** (Supra), it becomes clear that when an injured makes a statement, which is recorded as First Information Report, and after making the statement, which was treated as First Information Report, if the injured, during the course of



investigation or at any subsequent stage, dies and the statement, recorded as the First Information Report, relates to the cause of death of its maker or *as to* any of the circumstances of the transaction, which resulted in his death, in cases in which the cause of that person's death comes into question, such a statement becomes his *dying declaration* under Section 32(1) of the Evidence Act, 1872.

45. With regard to the position of law relating to *dying declaration*, reference made by Mr. Birendra Kumar Sinha, learned Senior Counsel, appearing on behalf of the appellant, to the case of **Jai Karan v. State of (N.C.T. Delhi) (AIR 1999 Supreme Court 3512)**, is not entirely misplaced inasmuch as it has been held, in **Jai Karan** (supra), that in order that a dying declaration may form the sole basis for conviction without the need for independent corroboration, it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish and if, in the facts and circumstances of a case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the Court, on strict scrutiny, finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. The

Supreme Court has also clarified, in **Jay Karan** (supra), that a dying declaration is an independent piece of evidence like any other piece of evidence neither extra strong nor weak and can be acted upon without corroboration if it is found to be otherwise true and reliable.

46. The relevant observations, appearing in **Jai Karan** (supra), read as under:

"In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration, it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of a case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the Court, on strict scrutiny, finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an

independent piece of evidence like any other piece of evidence neither extra strong nor weak and can be acted upon without corroboration if it is found to be otherwise true and reliable.”

(Emphasis is added)

47. In support of his contention that the two *dying declarations*, in the present case, ought to be treated as reliable, though the learned Additional Public Prosecutor has referred to the case of **Prabin Ali v. State of Assam**, reported in **(2013) 2 SCC 81**, we may point out that so far as the case of **Prabin Ali** (supra) is concerned, the doctor was not at all cross-examined and it had not been elicited from the doctor, who had performed the *post mortem* examination, if the injured was or was not capable of making any oral declaration with regard to cause of death.

48. The case at hand, therefore, is not the same as the case of **Prabin Ali** (supra), wherein the doctor was not at all cross-examined by the defence; whereas the defence, in the present case, did cross-examine both the doctors, namely, PW 5 and PW 6, and none of them could assert either that the injured was conscious or that the injured was capable of making statements. Benefit of such an uncertain situation, arising out of nature of evidence adduced by the prosecution,

has to necessarily go in favour of the accused-appellant.

49. We are, therefore, clearly of the view, on the basis of the nature of evidence available on record, that the prosecution had failed to prove the very basic fact, namely, that Exts-3 and 3/1 are the statements made by the injured in conscious state of mind or while the injured was capable of speaking , he had made the said statements and that the statements, therefore, contained in Ext-3 and Ext-3/1, could have been treated, and have rightly been treated, as the *dying declarations* of the said deceased.

50. What emerges from the above discussion is that the prosecution failed to prove that Ext-3 and/or Ext-3/1 was the statement of the injured given to the police. The so-called *dying declarations* fail to fasten the accused-appellant with the charge, under Section 302 of the Indian Penal Code. The prosecution has to, therefore, fall back on the remaining evidence on record and here, again, we find that apart from the fact that there is no eye witness to the occurrence, even the evidence of PW 3, which we have already discussed above, cannot be made the basis to confidently hold that it was the accused-appellant, who had been named by the injured as his assailant, when PW 3, on being called by PW 1, arrived at the place of occurrence.

51. Because of what have been discussed and

pointed out above, we are clearly of the view that in the facts and attending circumstances of the present case, the accused-appellant deserves to be given, and ought to have been given, at least, benefit of doubt.

52. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offence, which he stands convicted of, and he is hereby acquitted of the same under benefit of doubt.

53. Since the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall stand discharged.

54. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Samarendra Pratap Singh, J.)

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