

**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No.3441 of 1999**

1. Dau Ram @ Harinam, S/o Dheerpal Singh, aged about 41 years.
2. Meluram, Son of Shri Bhaddu Pradhan, Aged about 34 years.
3. Jhool Singh Son of Shri Labara, Aged about 41 years.

All residents of village Nawagaon Dayali, P.S. Lormi, District Bilaspur, Madhya Pradesh (Now Chhattisgarh).

**---- Appellants**

**Versus**

State of Madhya Pradesh (Now State of Chhattisgarh)

**---- Respondent**

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| For Appellants:       | Smt Ranjana Jaiswal, Advocate.  |
| For Respondent/State: | Shri Neeraj Mehta, Panel Lawyer |

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**Hon'ble The Chief Justice**

**Hon'ble Shri Justice P. Sam Koshy**

**C A V Judgment**

**Per Navin Sinha, Chief Justice**

**05/05/2015**

1. The Appellants stand convicted under Section 302/34 IPC to life imprisonment with fine of Rs.500, in the event of failure to pay which, they were required to undergo further three months simple imprisonment as ordered on 5.11.1999 by the Additional Sessions Judge, Mungeli in Sessions Trial No.13/1997.
2. The deceased Ashok Kumar was assaulted on 14.8.1996 about 4:00pm and died the same day hours later. 'Merg', Exhibit P-19 was lodged the same day about 8:45pm by Kishore Kumar, PW-20, the brother of the deceased. Formal FIR was also lodged the same day marked Exhibit P-20. The witness stated that Vishnu Prasad, PW-6 informed him that his brother had been assaulted. He left along with Onkar Prasad, PW-2 and PW-6. On the way they met Phul Singh, PW-1 who informed that about 4:00 pm he

had seen the deceased lying in the field of Lallu Gond and the injured had asked him for water. The deceased named the Appellants as the assailants. The deceased died on the way while the witness was taking him to the hospital on his motorcycle accompanied by PW-6. The feet of the deceased was dragging on the ground while being taken on the motorcycle to the hospital because of which he had suffered injuries on his feet.

3. Postmortem of the deceased Exhibit P-12 was conducted by Dr. M.T. Minz, PW-12 who found the following injuries on the person of the deceased:-

- I) Incised wound 3 x 1 cms muscle deep on the left arm.
- II) Incised wound 4 x 1 cms muscle deep on the right arm with swelling.
- III) Incised wound 4.5 x 1 cms of frontal bone which was fractured in the center with excessive bleeding and meninges had burst.
- IV) Incised wound 2 x 0.5 cms bone deep in front of the head
- IV) Incised wound 5 x 2 cms on the left parietal bone which was fractured with internal bleeding.
- V) Incised wound 2 . 0.5 cms near the occipital area bone deep.
- VII) Lacerated wound 2.5 x 0.5 cms near the left eye bone deep.
- VIII) Lacerated wound 5 x 3 cms near the metatarsal right toe which was fractured.
- IX) Lacerated wound 4 x 2 cms near the metatarsal left toe which was fractured.
- IX) Lacerated wound 2 x 1 cm bone deep of the left ankle.

Cause of death was opined to be intracranial hemorrhage caused due to the head injury and fracture of the skull bone.

4. Learned Counsel for the Appellants submitted that there is no eyewitness to the occurrence. The only material to connect the Appellants with the crime is the alleged dying declaration of the deceased stated to have been made before PW-1, PW-2, PW-6 and PW-20. Vishnu Prasad, PW-6 has deposed that the deceased was so badly injured that he was not in a position to speak. There is also evidence that the deceased and one

Rajaram were drunk and were abusing each other and also indulged in a brawl. The possibility that Rajaram, who was a man of criminal antecedents in the habit of harassing the villagers, may have assaulted the deceased in a drunken condition cannot be ruled out. There was a serious property dispute between the deceased and his brother PW-20. The latter had driven the deceased out of the house who survived by begging. The possibility that PW-20 had his brother exterminated to enjoy the property alone also cannot be ruled out. It was next submitted that according to PW-1, only he and PW-20 were present when the deceased allegedly disclosed the name of the Appellants. PW-1 has not spoken of the presence of PW-2 and PW-6. On the contrary PW-2 stated that the deceased disclosed the name of the Appellants in his presence along with PW-1, PW-6 and PW-20. Rambharos, PW-5 has stated that the deceased was not present when Rajaram assaulted Appellant No.2. In cross-examination, PW-5 stated that the deceased had chased Rajaram to assault him when the latter ran away. PW-6 has deposed specifically that the deceased was lying on the ground seriously injured unconscious and unable to speak or to even get up. The number of injuries on a vital area like the head with fracture of bone and the brain area also affected, the possibility that he was not in a position to speak at all cannot be ruled out. There was no possibility of his making a dying declaration in that condition which therefore is suspect and not acceptable. The benefit of doubt must be given to the Appellants. The prosecution has not asked any questions to Dr. M.T. Minz, PW-12 that if a person in such an injured condition could make a dying declaration. Reliance was placed on 2011 CRI.L.J. 2673 (Waikhom Yaima Singh v. State of Manipur) to submit that a dying declaration was a weak piece of evidence and could not alone be made the basis for the conviction.

5. Learned Counsel for the State opposing the appeal submitted that the dying declaration is stated to have been made by the deceased not in

the solitary presence of his brother PW-20, but in the presence of PW-1, PW-2 and PW-6. If four persons were vouching for the credibility of the dying declaration sanctity will attach to it and the onus is on the accused to demonstrate to the contrary. The Appellants are named in the First Information Report itself. The statement of PW-1 under Section 161 Cr.P.C was recorded the same day. He is the own brother of Appellant No.3 Jhool Singh. In cross-examination, not a single question has been asked on behalf of Appellant No.3 why his own brother would falsely implicate him. Similarly, the statement of PW-2 under Section 161 Cr.P.C was also recorded on 15.8.1996 itself. Blood has been found on the clothes of Appellants No.2 & 3 confirmed in the Forensic report marked Exhibit P-29 for which the Appellants have offered no explanation.

6. We have considered the submissions on behalf of the parties and examined the evidence on record.

7. There is no eye-witness to the assault. The entire case of the prosecution is based on dying declaration of the deceased coupled with other circumstantial evidence. The conclusions will therefore have to be arrived at on the reliability and conclusiveness of the dying declaration and the analysis of the evidence with regard to the circumstances suggesting that the Appellants are the assailants. It will also call for greater scrutiny and caution while examining the dying declaration in the given facts of the case.

8. A dying declaration normally is a weak piece of evidence requiring corroboration. But if the dying declaration is voluntary, truthful, reliable and inspires confidence in the facts and circumstances of a particular case, conviction can be founded on it. There is no rule of criminal jurisprudence that conviction cannot be ordered on basis of a dying declaration. Unless there are other contravening circumstances to doubt the veracity of the same, a dying declaration does carry an element of sanctity in the belief that a dying person will not meet his maker with falsehood. If the only

material against the accused is a dying declaration, naturally it will have to be subject to much closer scrutiny and judicial examination to rule out any other possibility in which event the benefit of doubt has to be given to the accused.

9. The evidentiary value of a dying declaration and its acceptability coupled with the inherent weakness were all considered in (1970) 2 SCC 113 ( Tapinder Singh v. State of Punjab) observing as follows :-

“5. The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under Section 32(1) of the Indian Evidence Act in a case in which the cause of that person’s death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. This Court in *Kushal Rao v. State of Bombay* laid down the test of reliability of a dying declaration as follows:

“On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the oppor-

tunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

This view was approved by a Bench of five Judges in *Harbans Singh v. State of Punjab*."

10. In a case of circumstantial evidence, a dying declaration may be one of the links corroborating the circumstances against the accused. The evidentiary value and acceptability of the surrounding circumstances must show compatibility with the possibility of the deceased having made such declaration. If the other evidence of surrounding circumstances is itself contradictory and raises doubts about its veracity the dying declaration shall also become suspect and lose its credibility. If the surrounding evidence reveals vital contradictions it will also create doubt with regard to the dying declaration. The possibility then that the death took place in a different manner and different circumstances could not be ruled out in which case the benefit of the doubt will have to be given to the accused.

11. According to the crime spot map, Exhibit P-21, prepared by the police officer PW-19, Jayendra Singh, the body of the deceased was lying in the field of Lallu Gond. PW-6 who is stated to have gone and informed the brother of the deceased PW-20, has deposed that the body was lying in the field of Lallu Gond. PW-20 is stated to have gone to the place of occurrence with PW-1, PW-2 and PW-6. The injured is stated to have made a dying declaration in their presence naming the Appellants as his assailants. The deceased is stated to have succumbed on way to the hospital.

12. PW-1, Phulsingh deposed that the deceased was lying injured on the road and told him to go and inform his brother PW-20. We find the conduct of witness unusual that he found the deceased lying seriously injured, gave him water and then simply went away without making any effort to help the injured. The witness met PW-20 on the way and came back to the place of occurrence. He did not state that PW-2 and 6 were accompanying the two of them when the deceased made the dying declaration. This was contrary to the evidence of PW-2, 6 and 20 and sequence of events as narrated by them. In cross-examination, the witness was asked about a property dispute with his brother, Appellant No. 3. There is a vital omission in his statement under Section 161 CrPC when he states that he did not disclose to the police that the deceased had told him to go and inform his brother PW-20. Likewise, the witness states that the Appellants were arrested on the night of the occurrence itself while the fact from Exhibit P-23, P-24 and P-25, the arrest memo, is that the Appellants were arrested after 6:00 pm the next day on 15.8.1996. According to the witness, the police had recovered Tangi, Lathi and Tabbal on 14.8.1996 itself. The witness also acknowledged in cross examination that PW-20 had threatened him with regard to deposition in Court asking him to name several suspects. This obviously was with the intention to deflect any suspicion from himself. No explanation has been given by the prosecution why the statement of the

witness was recorded under section 164 CrPC if he was residing in the village and would be available for examination at the relevant time, unless PW-20 was not very confident that they would come to his aid at the relevant time.

13. PW-2, Onkar Prasad deposed that PW-6 informed that the deceased had been assaulted near the pond by the villagers. On the way they met PW-1 who informed that the deceased was lying injured in the fields of Lallu Gond. This was contrary to the evidence of PW-1 who stated that the deceased was lying by the roadside and went to inform PW-20 on the asking of the deceased. PW-2 stated that the deceased was unconscious but yet deposed that he made dying declaration. Likewise no explanation has been given for the need to record his statement under Section 164 CrPC if he was a co-villager and would be available for examination at the relevant time. In cross-examination, the witness acknowledged that the deceased was drunk. He also acknowledged a property dispute between the deceased and PW-20 and that the latter had not having given any property to his brother. The witness sought to deny that that PW-20 did not give food to his brother. PW-3, Samarulal has deposed in cross-examination that the deceased had been thrown out of the house by PW-20 due to property dispute between them and PW-20 had usurped all the property ousted the deceased who would wander in the village begging for food. PW-2 deposed that the body of the deceased was smeared with mud. Though the witness stated that the deceased made the dying declaration naming the Appellants as the assailants, but in cross-examination the witness acknowledged that on asking, the deceased did not mention any reason why the Appellants assaulted him and neither mentioned the weapons of assault used. If such a murderous assault was made on the deceased by three persons surely there would have been a reason for it howsoever trivial. We find it difficult to accept the reliability of the dying declaration also on the ground that even on being asked the deceased did

not disclose any motive for the assault. The statement of the witness under Section 161 CrPC contains a vital omission as he did not disclose about any dying declaration by the deceased. Again, the prosecution did not give any reason for the need to record his statement under section 164 CrPC if he was a co-villager available for deposition.

14. PW-3, Samarulal deposed that one Rajaram who was a notorious criminal and would generally harass the villagers. He and the deceased were both seen together in drunken condition, abusing each other. The witness also deposed about the ongoing property dispute between the deceased and PW-20. He also stated that the police had randomly arrested six persons and kept them in the lock-up whole night on the day of the occurrence.

15. PW-5, Rambharos deposed that the cycle of Rajaram lying in the mud. PW-2 had deposed that the body of the deceased was also mud-spattered. According to the witness, the deceased was sitting near the well. The witness states that the assault took place near the well contrary to the two other versions of assault near the pond by the villagers and the body lying in the fields. The witness also stated of a fight between the deceased and Rajaram.

16. PW-6, Vishnu Prasad was a witness to inquest report, Exhibit P-1. The witness deposed that he heard that the deceased was lying drunk and there had been a fight. He went and informed PW-20. The mother of the deceased and wife were also present. Surprisingly only PW-2 and PW-20 proceeded to the place of occurrence. A natural behaviour would be that if not the mother, at least the wife of the deceased would have accompanied them naturally concerned about her husband. The witness did not state that the feet of the deceased were dragging on the road while being carried to the hospital and he suffered injuries because of the same on his feet despite the fact that he was carrying the deceased to the hospital along with PW-20 on the motorcycle. The witness stated that the deceased died

at the Lormi hospital while PW-20 on whose motorcycle the deceased is stated to have been taken together by the witness stated that the deceased died on way to the hospital. While PW-20 stated that after the deceased died on the way they went first to the police station, the witness made no such statement. The prosecution again gave no explanation of the need for recording his statement under Section 164 CrPC if he was a co-villager. In cross-examination, the witness stated that when they reached the deceased was unconscious unable to speak. The deceased who was seriously injured would undoubtedly have been sitting in the middle between PW-20 and the witness on the motorcycle. Yet neither the witness nor PW-20 spoke of their clothes having been soiled by blood in the process.

17. PW-20, Kishore Kumar brother of the deceased stated that PW-6 came and informed him regarding assault on the deceased and he along with PW-2 Onkar Prasad proceeded. They met PW-1 who was sitting by the roadside where they saw the bicycle of Rajaram and asked PW-1 the whereabouts of the deceased. This was completely contrary to the evidence of PW-1 that he saw the deceased lying by the roadside and went to inform PW-20 on the asking of the deceased. The witness deposed that the deceased died on the way to hospital and he went first to the police station. PW-6 who was accompanying him on the motorcycle had stated that the deceased died at the hospital and said nothing about having gone to the police station. The conduct of the witness in heading for the hospital with the injured, the deceased succumbing on the way, the witness then suddenly heading for the police station when the natural human behaviour would have been to reach the hospital more expeditiously to save precious human life raises serious doubts about the manner of occurrence and the identity of the assailants. The fact that the deceased may have had a scuffle with Appellant No. 1 a year back as deposed is considered to be too remote an issue. The statement of the witness was never recorded under

Section 161 CrPC. The deposition of the witness contains a vital contradiction when he states that in the FIR he had never told the police of the deceased having injured his feet due to dragging on the road while being taken to the hospital on the motorcycle. The witness acknowledged that the deceased was virtually unconscious and unable to speak. The deceased was seen with Rajaram same day in the afternoon. The witness further acknowledged a property dispute with his brother the deceased.

18. It is therefore apparent that there are vital omissions and contradictions in the evidence of the witnesses with regard to the place of occurrence, the manner in which information was given, the unconscious condition of the deceased raising serious doubts about his ability to make a dying declaration. There is complete absence of any evidence by the prosecution how and when the deceased was shifted from near the pond to the fields of Lallu Gond and by whom. The property dispute between PW-20 and the deceased with the former having thrown him out of the house and the deceased begging for survival in the village are all considered crucial. The deceased was been seen drunk in the company of Rajaram. His body was spattered with mud and the cycle of Rajaram was also lying in the mud. One of the witnesses has stated about assault near the well as the third place of occurrence. Both of them were drunk and there had been a fight. Rajaram was of a bad character with antecedents who would harass the villagers. The possibility that the deceased may have been killed by any other or at any other place, there is no reason why the benefit of doubt must not be given to the Appellants.

19. It has already come in the evidence that the police had arrested six persons on suspicion on the night of occurrence and kept them in the lockup. The Appellants have not been named as one of them. PW-1 stated that the police had with it Lathi, Tabbal and Tangiya on the night of the occurrence itself. In those circumstances, the deposition of PW-8, Mohitram of a confession by the Appellants and the recovery of blood stained clothes

of Appellant No. 1 and 3 in the entirety of the facts and circumstances of the case cannot be considered sufficient to presume that they were the assailants of the deceased. Blood can be found on the clothes of a person for various reasons. There cannot be a conclusive presumption of such person being assailant for that reason. The extent of blood stains, its age has not been mentioned in the forensic report. The presence of blood on the clothes of two of the Appellants may be an incriminating factor but certainly is not a piece of conclusive evidence to hold of their guilt in the facts of the present case when the entire evidence is otherwise and it cannot be said beyond all reasonable doubt that they were the assailants. Significantly, no mud has been found on the clothes of the Appellants when according to the prosecution, the deceased is alleged to have been assaulted and was lying in the mud.

20. A close scrutiny and analysis of the evidence led by the prosecution leaves us satisfied that it cannot be said with certainty that the Appellants were the assailants of the deceased and that the deceased made any dying declaration naming the Appellants. The possibility that Rajaram, a notorious criminal, who was seen with the deceased may have been hired or engaged by PW-20 to do away with the deceased so that he could have undisputed possession of the entire property of his brother also, cannot be ruled out completely. The benefit of doubt has therefore to be given to the Appellants, who are therefore acquitted.

21. The appeal is allowed. The Appellants are on bail and shall abide by the conditions in Section 437-A of the CrPC.

Sd/-  
(Navin Sinha)  
**CHIEF JUSTICE**

Sd/-  
(P. Sam Koshy)  
**JUDGE**