

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.2856 of 1999**

Kuber Singh Sahu, S/o Bishali Ram, aged 26 years, Resident of Village Gangrel, P.S. Dhamtari, Tahsil Dhamtari, District Dhamtari

---- Appellant

versus

The State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellant	:	Smt. Savita Tiwari, Advocate
For State/Respondent	:	Smt. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

18/4/2016

1. The Appellant stands convicted under Section 302 IPC and sentenced to life imprisonment by the Additional Sessions Judge, Dhamtari in Sessions Trial No.429 of 1998 dated 23.8.1999.
2. The deceased, brother-in-law of the Appellant was assaulted on 3.9.1998 at about 7:30 P.M. near the gokulpur culvert over a nullah. Dehati Nalishi, Exhibit P-1, was lodged the same day at 11:00 P.M after the deceased expired on way to the hospital. Formal FIR, Exhibit P-19 was registered at 11:30 P.M. The Appellant was named as the assailant. The post mortem, Exhibit P-21 found 8 injuries on the person of the deceased. Death was opined due to excessive bleeding caused by knife injury to the liver, a vital organ of the body.
3. Learned Counsel for the Appellant submitted that there is no eyewitness to the assault. The only material for implicating the Appellant is the alleged dying declaration of the deceased made to his father, PW-1, Inderman Singh. According to the other witnesses, the deceased was

seriously injured. He was therefore not in a position to speak and was unconscious as also deposed by PW-2, Melaram, PW-5, Dr. Satyendra Netam of the hospital at Dhamtari. Except for PW-1, Inderman Singh, who is the father of the deceased, no other independent witness has stated that the deceased had made any oral dying declaration naming the Appellant as the assailant. PW-2, Melaram or PW-3, Omprakash Sahu did not depose that the injured had named the Appellant as assailant when they picked him up on the tractor from the alleged place of occurrence. PW-4, Mahesh Sahu deposed that the deceased was unconscious and unable to speak when he was picked up on the tractor from the alleged place of occurrence. PW-6, Shantiram also deposed that the deceased never disclosed the name of anyone as the assailant. PW-7, Tukeshwar Lal Sahu has wrongly been relied upon by the Trial Court to hold that the deceased had named the Appellant as the assailant. Referring to the evidence of this witness, it was submitted that PW-1, Inderman Singh is stated to have simply told him that someone had assaulted his son without naming anyone.

4. The deceased had received several injuries and was bleeding profusely. PW-4, Mahesh Sahu deposed that the deceased was lying injured on the ground at the place of occurrence. The possibility that he was rendered unconscious immediately after assault cannot be ruled out making the deceased incapable of making any disclosure to PW-1, Inderman Singh. The alleged oral dying declaration is therefore unreliable evidence for conviction not being free from doubt. Motive for false implication of the Appellant existed because he was insisting that his wife, sister of the deceased accompany him to the matrimonial home against the wishes of the deceased and his family. PW-1, Inderman Singh in cross-examination has deposed that he lodged Dehati Nalishi the next morning which makes Exhibit P-1 lodged on 3.9.1998 at 11:00 P.M. and the consequent FIR the same night at 11:30 P.M. suspicious. The

recovery of knife alleged to have been used for assault is inconsequential as it was recovered from an open place accessible to all. In the circumstances benefit of doubt must be given to the Appellant and he be acquitted.

5. Reliance was placed on 2011 Cri.L.J. 2673 (SC) (Waikhom Yaima Singh v. State of Manipur) in support of the submission that if the deceased cannot be said with certainty to be fully conscious it would not be safe to rely upon his dying declaration for upholding the conviction. Reliance was also placed on AIR 1957 SC 589 (Bhagwan Das v. State of Rajasthan) that in absence of reliable evidence regarding the capacity of the deceased to make the statement notwithstanding the injuries and his unconscious condition, it cannot be safely relied upon to convict.

6. Learned Counsel for the State submitted that the evidence of PW-1, Inderman Singh that the deceased disclosed the name of the Appellant as the assailant is reliable. The deceased was the son of the witness. The Appellant was the son-in-law. Naming the Appellant as the assailant ruins the life of the daughter of PW-1, Inderman Singh, unless there was compelling justification for him to state the truth. Motive clearly existed as the day earlier the Appellant had threatened to teach a lesson if his wife was not sent back to the matrimonial home. Pursuant to the confession of the Appellant Exhibit P-14 proved by PW-10, Mohan Sahu and PW-11, Kriparam Sahu the knife used for assault has been recovered not from an open space but concealed in the bushes, Exhibit P-15 confirming presence of blood on it as also the trouser of the Appellant in the FSL Report, Exhibit P-28 which has remained unexplained. The conviction therefore calls for no interference. PW-2, Melaram and PW-3, Omprakash Sahu have both stated that the injured disclosed on the spot that the son-in-law had assaulted. It is not the case of the Appellant that there was any other son-in-law in the family of the deceased.

7. We have considered the respective submissions on behalf of the parties and perused the evidence on record.

8. The deceased was assaulted on 3.9.1998 at about 7:30 P.M. near the gokulpur culvert over a nullah. Exhibits P-2 and P-3 the spot map with regard to the place of occurrence has been signed by PW-2, Melaram. It was a rainy night. PW-2, Melaram was driving the tractor with a trolley. Obviously the witness was the first person to see the injured standing on the road with his hands on his chest asking for help. Similarly, PW-3, Omprakash Sahu has likewise deposed that the deceased was standing by the road side with his hands on his chest seeking help. The injured was put on the tractor-trolley and taken home. PW-1, Inderman Singh, father of the deceased deposed that he was brought home in the tractor-trolley around 7:00-8:00 P.M. and told his father PW-1, Inderman Singh that the Appellant had assaulted him near the gokulpur culvert. PW-2, also stated that he picked up the injured from near the nullah. PW-3, Omprakash Sahu stated that the injured was picked up by them from the gokulpur road. The injured was then taken to the hospital at Dhamtari from where he was referred to Raipur and died on the way. Dehati Nalishi, Exhibit P-1 was then lodged at 11:00 P.M. Dr. Satyendra Netam, PW-5 of the hospital at Dhamtari deposed that the deceased was brought at 8:45 P.M. in a semi-conscious condition.

9. If the only injury dangerous to life was caused to the liver and more than one witness stated that the deceased was standing by the road side seeking help, it can safely be presumed that the deceased was in a conscious condition immediately after the incident when he was brought home and disclosed the name of the Appellant as the assailant to his father PW-1, Inderman Singh. This fact is corroborated by PW-2, Melaram and PW-3, Omprakash Sahu that the injured had told them that the son-in-law had assaulted him. It is not the case of the Appellant that there was

any other son-in-law in the family. It cannot be said with any element of certainty nor can it be speculated that the deceased was unconscious unable to speak so as to give the Appellant the benefit of doubt. A finding is recorded by us of the satisfaction that the dying declaration is convincing and reliable.

10. The disclosure made by the injured naming the Appellant as the assailant was an oral dying declaration in the facts of the case admissible as hearsay evidence under Section 32(1) of the Evidence Act. The law presumes that a person just before dying would not lie at the end moment before meeting his maker. If the dying declaration is considered reliable and convincing, conviction can be based on it alone also. It is not necessary always that unless made before a Magistrate it must find corroboration. It is only a rule of prudence to be applied in the given facts of a case. In (2001) 6 SCC 118 (*Laxmi v. Om Prakash*) it was observed :-

“29. A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances (see *Tapinder Singh v. State of Punjab*). One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it.....”

11. PW-1, Inderman Singh was the father of the deceased. He would be the most interested person to ensure that the real assailant of his son

is brought to book and not that he falsely implicates his own son-in-law ruining the life of his daughter in the process without having sufficient reason to do so. A day earlier to the assault, the Appellant had threatened that if his wife was not sent back to the matrimonial home, the deceased would have to face the consequences. Motive for the Appellant to make the assault therefore existed. It was not an assault made on the spur of the moment but with a cold calculated mind the next day.

12. The contradiction in the cross-examination of PW-1, Inderman Singh that the Dehati Nalishi was lodged by him only the next morning is considered irrelevant in view of the Dehati Nalishi, Exhibit P-1 having been proved by the Investigating Officer J.P. Dubey, PW-16 to have been lodged the same night. Furthermore, the knife used for assault has been recovered on the confession of the Appellant made before two witnesses. The recovery was not from an open place but from the bushes. When a knife is hidden in the bushes it would not be known to all and sundry except for the person who had hidden it as observed in (1999) 4 SCC 370 (State of H.P. v. Jeet Singh) :-

“26....It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

Blood has been found both on the knife which was also rusted and on the trouser of the Appellant for which he has offered no explanation. In his

defence under Section 313 Cr.P.C., the Appellant has stated that he wanted to lead evidence in defence but never did so. No reliance can be placed on the uncorroborated evidence of DW-1, Lakhanlal that the deceased was brought in an unconscious condition for reasons already discussed.

13. Intention is a fact to be gathered from all surrounding circumstances such as if the assault was made with a cool calculated mind, the weapon used, the nature and number of injuries caused etc. In the facts of the present case, the injuries reveal 8 assaults with a knife even though the immediate cause of death was injury to the liver, a vital organ of the body. It is therefore not possible for us to hold that the Appellant had no intention to cause death. The Appellant has offered no explanation with regard to the presence of blood on the knife and his trouser.

14. Waikhom Yaima Singh (supra) sought to be relied upon is clearly distinguishable on the singular fact that the person named as culprit was not named in the original FIR. Moreover, the deceased was unconscious and not in a position to speak. It was in those circumstances that the oral dying declaration was held to be insufficient. It is clearly distinguishable from the facts of the present case as discussed.

15. Bhagwan Das (supra) is completely distinguishable on its own facts in view of clear evidence of the doctor that the deceased was brought to the hospital in an unconscious condition which again is not the case presently.

16. It is not the quantity but the quality of evidence that matters. The evidence of PW-1, Inderman Singh, PW-2, Melaram and PW-3, Omprakash Sahu read cumulatively lead to the conclusion that the deceased was not unconscious when he was brought home on the tractor after assault thus lending credibility to his oral dying declaration as

deposed by the three witnesses.

17. We therefore find no reason to interfere with the conviction of the Appellant. The bail bonds of the Appellant are cancelled and he is directed to surrender forthwith and/or be taken into custody for serving out the remaining period of sentence.

18. The appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE