

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 20/07/2017

Judgment delivered on:04/08/2017

CRA No. 4 of 2012

- Nepal Singh @ Karan S/o. Adhan Singh aged about 40 years, Caste Gond, R/o. Ravanpara, Baheramuda Chowki, Belgahna, P.S. Kota Distt. Bilaspur (C.G.)

---- Appellant

Versus

- State Of Chhattisgarh through the Station House Officer, Police Station – Kota, District Bilaspur (CG)

---- Respondent

For Appellant	:	Shri PP Sahu & Shri RK Pali, Adv.
For Respondent/State	:	Shri Vivek Sharma, Govt. Adv.

Hon'ble Shri Pritinker Diwaker,

Hon'ble Shri Ram Prasanna Sharma, JJ

Per P. Diwaker, J

This appeal arises out of the judgment of conviction and order of sentence dated 14.12.2011 passed by the First Additional Sessions Judge, Bilaspur in ST No.31/2011 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life and to pay a fine of Rs.200/- with default stipulation.

02. Brief facts of the case are that on 26.11.2010 at about 6.30 pm deceased Lalva Gond left his house but did not return thereafter. His wife Shivvati (PW-1) was all alone in the house, on number of occasions she came out of her house to see her husband Lalva Gond

but as she was all alone, she could not leave the house to search for her husband. On the early morning of 27.11.2010 PW-3 Budhram saw Lalva Gond lying in injured condition near his house, he gave intimation about the same to PW-1, who immediately came out from her house and called her son PW-2 Dharam Singh. Both of them saw injured Lalva Gond lying near the house and axe was stuck in his head. When they asked Lalva Gond as to who assaulted him, he disclosed the name of the appellant twice as the assailant. From his head the axe was removed. As Lalva Gond was alive at that time, they thought it fit to take him to hospital and was thus first taken to Community Health Center, Kota where he was treated vide Ex.P/8 and the doctor noticed head injury on left parietal region and a big fracture of skull bone and the brain matter was visible. Considering the gravity of the injury, Lalva Gond was referred to CIMS, Bilaspur vide Ex.P/9. On 27.11.2010 itself injured Lalva Gond was admitted in CIMS, Bilaspur where he was given medical treatment, however, he expired on 28.11.2010 in the hospital. In the meanwhile, on 27.11.2010 Dehati Nalishi (Ex.P/1) was recorded at 1.30 pm at the instance of PW-1 Shivvati and FIR (Ex.P/16) was registered on 28.11.2010 at 12.50 hours under Section 307 of IPC against the appellant at the instance of PW-1. After death of Lalva Gond, information was given from the hospital, based on which unnumbered merg (Ex.P/19) was recorded at Police Station – City Kotwali, Out Post – CIMS and numbered merg (Ex.P/20) was registered on the same day at 4.30 pm at Police Station – Kota, Distt. Bilaspur. Inquest over the dead body was prepared vide Ex.P/3 on 28.11.2010. The dead body was sent for postmortem, which was conducted on the same day by PW-13 Dr. KK Jaiswal vide

Ex.P/17 who noticed lacerated wound of size 6 cm x 2 cm x 2 cm on parietal temporal region, fracture of skull and that brain matter had come out. In his opinion, the mode of death was secondary shock and cause of death was subdural heamorrhage. After filing of charge sheet, the trial Court framed charge under Section 302 of IPC against the appellant.

03. So as to hold the accused/appellant guilty, the prosecution examined 17 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned above.

05. Counsel for the appellant submits as under:

(i) that the appellant has been convicted solely on the basis of so-called oral dying declaration of the deceased before PW-1 Shivvati, PW-2 Dharam Singh, PW-5 Mani Ram and PW-6 Ram Lal but as all these witnesses are closely related to the deceased, merely on the basis of their evidence the appellant cannot be convicted.

(ii) that authenticity of the dying declaration itself is doubtful because at the time when these witnesses saw the deceased, he was not in a position to make any such statement.

(iii) that as per evidence available on record, about 30-35 persons had gathered near the deceased, but none of the independent

witnesses has been examined by the prosecution to prove the oral dying declaration.

(iv) that physical condition of the deceased was not as such where he could have made any such statement.

(v) that no motive has been attributed to the appellant for commission of murder of the deceased and rather the evidence goes to show that relations between the appellant and the deceased were cordial.

(vi) that the appellant is in jail since 28.11.2010 and as such he has been in jail for the last more than 6 ½ years and therefore, he be set free forthwith by giving him benefit of doubt.

06. On the other hand, State counsel supporting the impugned judgment has submitted as under:

(i) that there is no legal bar in convicting the accused solely on the basis of oral dying declaration, provided the same inspires confidence of the Court.

(ii) that present is a case where a specific question was put by PW-2 Dharam Singh, son of the deceased, to the deceased as to who assaulted him and in reply thereto, the deceased named the appellant twice as assailant.

(iii) that there is absolutely no ambiguity in the answer given by the deceased, a very short question was put to him which was specifically replied by the deceased not only before one witness but before at least four witnesses and therefore, there is no reason for this Court to disbelieve the evidence of oral dying declaration.

(iv) that the witnesses have not been cross-examined by the defence

on the point of false implication of the appellant when his relations were cordial with the deceased.

(v) that Dehati Nalishi was recorded at the instance of PW-1 very promptly and as such, there was no occasion for PW-1 or PW-2 to cook up a case and falsely implicate the appellant.

(vi) even the witnesses have not been confronted with their diary statements wherein they have also stated about the oral dying declaration made by the deceased before them naming the appellant as the perpetrator of the crime.

(vii) that the evidence is there on record to show that when the deceased was attended by the witnesses (PWs-1, 2, 5 & 6), he was alive and could answer the question.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Shivvati, wife of the deceased, has stated that in the evening of 26.11.2010 her husband/deceased left the house, however, he did not return the whole night. Since she was all alone in the house, she could not go out in search of her husband. On the next morning she was informed by PW-3 Budhram that her husband Lalva Gond is lying in injured condition near her house. Thereafter, she called her son Dharam Singh (PW-2) and then went to call her brother Ramlal. At that time, Dharam was standing by the side of his father Lalva Gond. When Ramlal came to the spot, axe was stuck in the head of her husband. When she asked her husband as to who assaulted him, he took the name of the appellant twice. Having noticed that Lalva Gond was alive and removal of axe could save his life, her son Dharam removed the

axe from his head, however, soon thereafter Lalva Gond stopped talking. In cross-examination she has admitted the suggestion that there was no quarrel between her family and that of the appellant and that their relations were cordial. She has further stated that her diary statement was recorded wherein also she informed the police that on being asked the deceased named the appellant as assailant.

09. PW-2 Dharam Singh, son of the deceased, has stated that his father left the house at 6-7 pm and he (this witness) returned to his house at about 8 pm and after taking meals he slept. On 28.11.2010 in the morning his mother Shivvati informed him that somebody has killed his father Lalva Gond and thrown him in the lane. When he reached the spot, number of persons had gathered there, his father was lying on the ground, axe was stuck in his head, at that time he was alive and when he asked his father as to who assaulted him, he took the name of the appellant twice. Thereafter, he removed the axe from the head of his father. In cross-examination he states that his father talked to him only and her mother (PW-1) had not talked with Lalva Gond and she was only weeping. He too has admitted that relations between the two families were cordial.

10. PW-3 Budhram has stated that on the date of incident when he and Lachchhan were going to the house of the deceased, they found him lying near his house and immediately thereafter he gave information about the same to PW-1 Shivvati, who in turn immediately called her son Dharam (PW-2) and then he along with Dharam went to the place where the deceased was lying, axe was stuck in his head and then he (this witness) returned to his house. He states that in his

presence Lalva Gond did not disclose the name of the assailant. However, later on he came to know that it is the appellant who killed Lalva Gond by axe and was charge sheeted therefor. In cross-examination he admits that relations between the two families were cordial. He states that when he saw the deceased lying on the ground he was unconscious and was not in a position to talk. He has further stated that for the first time when he saw the deceased lying on the ground, at that time Mahesh and Lachchhan were with him, however, after informing Shivvati when he returned to the spot, by that time number of villagers had gathered there. After 2-3 days Shivvati informed him that her husband has been killed by the appellant.

11. PW-5 Maniram, brother of the deceased, is also a witness of oral dying declaration allegedly made by the deceased. His house is about 1 km away from the house of the deceased. On the date of incident at about 6 am one village boy informed him that his brother Lalva has been killed and when he reached the house of the deceased he noticed that axe was stuck in his head. He states that thereafter his brother Lalva himself took the name of the appellant twice, nobody had asked Lalva about the assailant in his presence and thereafter, the axe stuck in his head was removed by Dharam. He states that thereafter he went to call the village Patel Mohan and by the time he returned to the spot, police had come. At that time since Lalva was alive, he was taken to hospital at Kota from where he was referred to CMIS where during treatment he expired. In cross-examination he admits that it might have taken him half an hour to reach the house of the deceased from his house and by the time he reached the spot, 40-45 people had gathered

there. He has further stated that for the first time when he reached the spot, Dharam asked him for removing the axe and then Lalva took the name of the appellant twice.

12. PW-6 Ramlal, brother-in-law of the deceased, has stated that his house is about $\frac{1}{2}$ km away from the house of the deceased. On the date of incident PW-1 Shivvati came to his house to call him and when he reached the house of the deceased he saw the deceased lying with axe stuck in his head. When son of the deceased Dharam asked the deceased as to who assaulted him, the deceased disclosed the name of the appellant twice and thereafter, the axe was removed from his head by Dharam. In cross-examination he states that when he reached the house of the deceased, apart from Lachchhan, Budhram and Dharam, 20-25 people were also there. He states that when he reached the spot Lalva was unconscious, he did not talk to him but talked to Dharam only. He states that his sister Shivvati did not ask anything from the deceased and it is only Dharam (PW-2) who asked the deceased about the assailant. According to this witness also, relations between the two families were cordial.

13. PW-7 Dr. Omprakash Raj first medically examined injured Lalva at Community Health Center, Kota vide Ex.P/8 and noticed head injury on left parietal region and a big fracture of skull bone and the brain matter was visible. Considering the gravity of the injury, he referred Lalva Gond to CIMS, Bilaspur vide Ex.P/9. He has stated that when injured Lalva was brought to him he was unconscious and was not in a position to talk. PW-8 Dr. Anil Haripriy treated the deceased at CIMS, Bilaspur. He has stated that during treatment injured Lalva expired. He

has further stated that when the injured was brought to hospital, he was unconscious and was not in a position to talk. PW-13 Dr. KK Jaiswal conducted postmortem on the body of the deceased on 28.11.2010 vide Ex.P/17 and noticed lacerated wound of size 6 cm x 2 cm x 2 cm on parietal temporal region, fracture of skull and that brain matter had come out. In his opinion, the mode of death was secondary shock and cause of death was subdural haemorrhage. PW-16 Rajkumar Sori is the investigating officer.

14. Close scrutiny of the evidence makes it clear that but for the oral dying declaration of the deceased before PW-1 Shivvati, PW-2 Dharam Singh, PW-5 Mani Ram and PW-6 Ram Lal there is no other legally admissible evidence connecting the appellant with the crime in question.

15. Law in respect of oral dying declaration is well settled. In ***Puran Chand Vs. State of Haryana, (2010) 6 SCC 566*** it has been stated that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous and it is the duty of the court to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court further opined that the law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused.

16. Regard being had to the aforesaid principles, we shall now advert to the facts of the present case to see whether the oral dying declaration was truthful and made in a conscious state of mind. In the present case, PW-1 Shivvati after being informed by PW-3 Budhram that her husband Lalva is lying injured near his house, called her son PW-2 Dharam and then went to call her brother Ramlal (PW-6) and when Ramlal reached the spot axe was stuck in his head and on being asked by PW-1, deceased Lalva took the name of the appellant twice as assailant. However, as per PW-2 Dharam his father Lalva talked to him only and her mother (PW-1) have had no talk with Lalva and that she was only weeping. PW-5 Maniram, another witness of oral dying declaration, resides about 1 km away from the house of the deceased. He has stated that Lalva himself took the name of appellant saying "Nepal, Nepal", nobody had asked Lalva about the assailant in his presence and thereafter only, Dharam removed the axe from his head. As such, there is contradiction in the statement of PW-5 and PW-2 and it is difficult to ascertain as to who is telling the truth because PW-2 says that on being asked by him when his father Lalva disclosed the name of the appellant, it is only thereafter that he removed the axe from his head but PW-5 says that the deceased himself took the name of the appellant and after that PW-2 removed the axe from his head. Furthermore, according to PW-5, for the first time when he reached the spot, Dharam (PW-2) asked him for removing the axe and then Lalva took the name of the appellant twice. Again, PW-6 Ramlal states that when after being informed by PW-1 he reached the spot he found Lalva lying on the ground with axe stuck in his head and on being asked by Dharam (PW-2), Lalva disclosed the name of the appellant

twice and thereafter the axe was removed from his head. Thus, there is material contradictions in the statements of PW-1, 2, 5 & 6. According to these witnesses, number of other villagers had also gathered on the spot, but none of the independent witnesses has been examined by the prosecution for the reasons best known to it.

17. This apart, PW-3 Budhram is the person who first saw the deceased in injured condition along with Lachchhan but Budhram has nowhere stated that the deceased made any statement before him accusing the appellant for assaulting him. He has categorically stated that before him the deceased did not disclose the name of anyone and later on he came to know that it is the appellant who killed the deceased for which he was charge sheeted. He has further stated that when he saw the deceased in injured condition, he was unconscious and was not in a position to talk. PW-3 has further stated that when he first saw the deceased, Mahesh and Lachchhan were with him, however, both these persons have not been examined by the prosecution, though they were cited as witnesses. As stated above, it is PW-3 who first saw the deceased lying in injured condition and according to him at that time he was unconscious and was not in a position to talk.

18. Furthermore, no motive has been attributed to the appellant for commission of murder of the deceased, rather in the evidence of prosecution witnesses (PWs-1, 2, 5 & 6) it has come that relations between the family of the deceased and that of the appellant were cordial.

19. Thus considering the inconsistency in the evidence of the witnesses to the alleged oral dying declaration and that except oral dying declaration, there is no other evidence much less legally admissible evidence, we are unable to hold the appellant guilty of the heinous crime of murder which requires a higher degree of proof beyond all shadow of reasonable doubt. The prosecution has utterly failed to prove involvement of the appellant in the crime beyond all reasonable doubt. Being so, the benefit of doubt must be credited to the appellant and he deserves to be acquitted of the charge leveled against him.

20. In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellant is acquitted of the charge under Section 302 of IPC by extending him benefit of doubt. The appellant is reported to be in jail, therefore, he is directed to be set free forthwith if not required in any other case.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(R.P. Sharma)

Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 4 of 2012

• Nepal Singh @ Karan

---- Appellant

Versus

• State Of Chhattisgarh

---- Respondent

Judgment for consideration

(Pritinker Diwaker)
Judge
/08/2017

Hon'ble Shri R.P. Sharma, J

(R.P. Sharma)
Judge
/08/2017

Post for pronouncement of the judgment on August, 2017

(Pritinker Diwaker)
Judge
/08/2017