

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 127 of 2011**

- Javed Khan son of Abdul Jabbar, aged about 21 years, R/o Marimai Mandir, Talapara, P.S. Civil Lines, Bilaspur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Civil Line Bilaspur, District Bilaspur (C.G.)

---- Respondent**And****CRA No. 456 of 2011**

- Saleem Beg @ Raja Khan S/o Rahim Beg, aged about 20 years, R/o Majhwapara, Civil Lines, District Bilaspur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Civil Line Bilaspur, District Bilaspur (C.G.)

---- Respondent**And****CRA No. 318 of 2011**

- Videshi Dhruv S/o Golu Dhruv, aged about 19 years, resident of Taiyab Chouk, Thana - Civil Line, District Bilaspur

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Civil Line Bilaspur, District Bilaspur (C.G.)

---- Respondent**And****CRA No. 177 of 2011**

- Ajay Sen Koshle S/o Jeet Ram, aged about 19 years, resident of Taiba Chouk, Thana Civil Line, District Bilaspur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Civil Line Bilaspur, District Bilaspur (C.G.)

---- Respondent

For Appellant in CRA No. 127/2011 & 456/2011	:	Shri Shailendra Dubey, Advocate
For Appellant in CRA No. 318/2011	:	Shri A.K. Yadav, Advocate
For Appellant in CRA No. 177/2011	:	Shri N. Naha Roy, Advocate
For Respondent/State	:	Shri Ravindra Agrawal, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment on Board

Pritinker Diwaker, J

09/01/2018

As these four criminal appeals arise out of the same judgment of conviction and order of sentence dated 18.01.2011 passed by 1st Additional Sessions Judge, Bilaspur (C.G.), in S.T. No.09/10 convicting accused/appellant Ajay Sen in Cr.A. No.177/2011, appellant Saleem Beg in Cr.A. No.456/2011, appellant Videshi Dhruv in Cr.A. No.318/2011 under Sections 147, 148, 120-B, 302 IPC and sentencing each of them to undergo R.I. for six months, R.I. for one year, imprisonment for life & imprisonment for life with fine of Rs.1000/-, plus default stipulations respectively, and appellant Javed Khan in Cr.A. No.127/2011 under Sections 147 and 120-B of IPC & sentencing him to undergo R.I. for six months and imprisonment for life respectively, they are being disposed of by this common judgment.

02. In the present case, name of the deceased is Sunny Pandey, young boy aged 23 years. It is alleged that on account of previous enmity between the deceased and

accused persons, on 31.07.2009 at about 11.00 pm, when the deceased was going on his motorcycle, near Tayyaba square he was stopped by the accused persons, who were waiting for him with hockey stick, baseball bat and club. It is said that the accused persons severely beaten the deceased. The incident was witnessed by Anil Pandey (PW/10). The Police was called, the injured was first taken to police station from where he was shifted to Chhattisgarh Institute of Medical Science (CIMS), Bilaspur, and during treatment in between 2-2.30 am of 01.08.2009, the deceased made oral dying declaration before Gaya Prasad Pandey (PW/1), Sunil Prajapati (PW/6) and Bablu Pandey (PW/7) informing them that he was beaten by accused/appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011. However, dying declaration of the deceased could not be recorded by the Executive Magistrate as immediately after making oral dying declaration, deceased died at about 3.15 am on 01.08.2009. In the meanwhile, information about maarpeet to deceased was given to Gaya Prasad Pandey (PW/1), father of the deceased, who immediately reached the spot along with his wife. After the death of the deceased, at the instance of Gaya Prasad Pandey (PW/1), on 01.08.2009 FIR (Ex.P/1) was lodged against appellant Ajay Sen in Cr.A.No.177/2011, Videshi Dhruv in Cr.A.No.318/2011, one Sonu Dubey @ Santosh (absconded accused) and Golu @ Mawadih, (who has been acquitted by the trial Court in a separate trial) under Section 302/34 of IPC.

On the same day at 6.30 am, mereg intimation (Ex.P/2) was recorded at the instance of PW/1. Inquest on the body of deceased was conducted vide Ex.P/4 on 01.08.2009 and body was sent for postmortem to CIMS, Bilaspur vide ExP/4 where Dr. D.S. Ukey (PW/2) conducted postmortem examination on the body of deceased and gave his report (Ex.P/6) noticing following injuries:-

- (i) Contusion of 8 x 5 cm between left elbow and shoulder on palpation.
- (ii) Multiple contusion, multiple lacerated wound varying from 16 x 17 cm on back of shoulder, right side and on left side in the size of 9 x 2 cm.
- (iii) Abrasion in the size of 2 x 10 cm on right thigh, left knee in the size of 2 x 8 cm and on face on right maxillary area in the size of 7 x 4 cm.
- (iv) Abrasion in the size of 13 x 3 cm & 8 x 3 cm on back side of spine.
- (v) Multiple abrasions on left leg, anterior and posterior aspect varying from 3 cm to 10 cm.
- (v) Lacerated wound of 16 x 7 cm x 0.2 cm on occipital posterior area.
- (vi) Fourteen stitches were present on scalp.
- (vii) Stab wound 1 cm deep behind right ear.
- (viii) Long hematoma present between injured area of scalp.
- (ix) Massive intracranial hemorrhage present.
- (x) All the injuries were antemortem in nature.

The Autopsy Surgeon opined the cause of death of deceased to be cardio respiratory failure, massive external

and internal bleeding due to trauma to vital organ.

03. Memorandum of accused/appellant Saleem Beg in Cr.A.No.456/2011 was recorded on 09.08.2009 vide Ex.P/19, based on which, one club was seized vide Ex.P/20. Memorandum of accused/appellant Ajay Sen in Cr.A.No.177/2011 was recorded on 18.08.2009 vide Ex.P/15, based on which, one hockey stick was seized vide Ex.P/14. Memorandum of accused/appellant Videshi Dhruv in Cr.A.No.318/2011 was recorded on 18.08.2009 vide Ex.P/16, based on which, one baseball bat was seized vide Ex.P/13. Seized articles were sent for its chemical examination and as per FSL report (Ex.P/30), blood was found on hockey stick and baseball bat, however, there is no serological report confirming its origin. After investigation, charge sheet was filed against the accused/appellants and two other persons namely Santosh Dubey @ Sonu Dubey and Sheikh Naseem Sharif @ Golu @ Mawadih showing them to be absconder. During pendency of the present appeal, Sheikh Naseem Sharif @ Golu @ Mawadih was arrested, tried separately and vide judgment and order dated 23.09.2017, he has been acquitted by the trial Judge. So far as present appellants are concerned, they were charged under Sections 147, 148, 149, 302 and 120-B of IPC.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 12 witnesses. Statements of the accused/appellants were also recorded under Section

313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. In defence, Aashif Khan (DW/1) and Sheikh Riyajuddijn @ Baba (DW/2) were also examined to substantiate its case.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the accused/appellants as mentioned in para 1 of this judgment. Hence, this appeal.

06. Learned counsel for appellant Saleem Beg @ Raja Khan in Cr.A.No.456/2011 and Javed Khan in Cr.A.No.127/2011 submits :

(i) That these two appellants have not been named in the FIR (Ex.P/1).

(ii) That even in the oral dying declaration made before Gaya Prasad Pandey (PW/1), Sunil Prajapati (PW/6) and Bablu Pandey (PW/7), these appellants have not been named.

(iii) That so called eye-witness Anil Pandey (PW/10) is not reliable and trustworthy as according to him, he is maternal uncle of the deceased and saw the entire incident but he kept quiet till 06.08.2009, when for the first time his diary statement has been recorded by the police. He further argued that statement of PW/10 has not been corroborated by the other witnesses.

07. In respect of appellant Ajay Sen in Cr.A. No.177/2011 and Videshi Dhruv in Cr.A. No.318/2011, it has been argued :-

(I) That the statement of Anil Pandey (PW/10) is not reliable and trustworthy being maternal uncle of the deceased and he saw the entire incident yet he kept quiet till 06.08.2009 when for the first time his diary statement has been recorded by the police. He further argued that statement of PW/10 has not been corroborated by the other witness.

(II) That the alleged oral dying declaration made before Gaya Prasad Pandey (PW/1), Sunil Prajapati (PW/6) and Bablu Pandey (PW/7) is not reliable because after the incident deceased became unconscious and remained in same condition till his death and, therefore, question of making dying declaration by him does not arise. It has been further argued that if the deceased was in a fit state of mind to make dying declaration, the same would have been either recorded by the Executive Magistrate or by the Doctor who was available while treating the deceased.

(III) That the investigating officer has also admitted the fact that deceased was in unconscious condition and not in a position to make any statement.

(iv) That though certain seizure have been effected from accused/appellant Saleem Beg in Cr.A.No.456/2011, Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 & as per FSL report (Ex.P/30), presence of blood thereon was confirmed but there is no serological report on record to confirm its origin.

(v) That the said recovery has not been proved by the

prosecution as per requirement of law.

(vi) That in absence of serological report and further in absence of proving origin of blood group, FSL report also loses its significance.

(vii) That appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 had no intention to commit murder of the deceased and from the evidence it is apparent that they only wanted to teach a lesson to the deceased for which he was beaten and even if he was severely beaten, in view of judgment of Apex Court rendered in the matter of **Narayan Manikrao Salgar & Ors Vs. State of Maharashtra**¹ at best, these accused persons are liable to be convicted under Section 304 Part-I or II of IPC. It has been argued that these appellants are in jail since August, 2009 and, therefore, after converting their conviction, they be set free forthwith.

08. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State :-

(I) That even if in the dying declaration and FIR name of Saleem Beg in Cr.A.No.456/2011 and Javed Kahan in Cr.A.No.127/2011 are not there but considering the statement of eye witness Anil Pandey (PW/10), their conviction along with other accused persons is in accordance with law.

(II) That there is no reason for this Court to disbelieve the statements of Gaya Prasad Pandey (PW/1), Sunil Prajapati (PW/6) and Bablu Pandey (PW/7) who are the witnesses to oral

¹ (2012) 8 SCC 622

dying declaration made by the deceased.

(III) That it has come in the evidence that while making oral dying declaration, the deceased was in a fit state of mind and was conscious.

(IV) That even if there is delay in recording diary statement of Anil Pandey (PW/10), his entire statement cannot be discarded *per se* merely on the ground of delay.

(V) Though there is no serological report on record but considering the evidence available on record, FSL report (Ex.P/30) can be treated as an additional evidence against the appellants.

(VI) That considering the grievousness of injuries, it cannot be said that the accused/appellants had only intention to beat the deceased. It has been argued that the accused/appellants had every intention to commit the murder of the deceased.

09. Gaya Prasad Pandey (PW/1) is father of the deceased, who lodged FIR (Ex.P/1) and merg (Ex.P/2). He is also a witness before whom oral dying declaration was made by the deceased. He has stated that on the fateful night at about 9.30 pm, he came to his other house with dinner for his mother and there one Ganesh Prajapati (PW/5), Manish Kamle (PW/4) and Anil Pandey (PW/10) were also sitting and there he asked deceased Sunny, his son, to go and have his dinner in other house. He has further stated that all the persons sitting there left his house and after giving food to his mother, when he had gone to sleep, he received an information that his son was being

beaten. He has also stated that when he reached the place of occurrence, he found his son in a pool of blood and then he immediately informed the incident to his wife who also rushed to the spot and there his wife had asked the deceased as to what had happened. Some information was given by the deceased but he is not aware about the same as he was highly perturbed. He has further stated that somebody informed the police, who reached the place of occurrence and immediately thereafter the deceased was taken to police station from where he was taken to hospital. During treatment the deceased regained consciousness and at that time he disclosed to him and other witnesses that it is accused Sonu Dubey, Videshi Dhruv, Ajay Sen, Saleem Beg @ Raja Khan and Mawadih who had beaten him. He has also stated that at about 3.00 am his son expired. In cross-examination, this witness remained firm but for minor variation and nothing could be elicited by the defence to discredit his testimony.

10. Sunil Prajapati (PW/6), another witness who was also present when the deceased made oral dying declaration after regaining consciousness in the hospital, has stated that the deceased was screaming that appellant Ajay Sen, Videshi Dhruv and accused Sonu Dubey @ Santosh (absconded accused) had brutally beaten him by hockey stick and baseball bat. In cross-examination, he remained firm and nothing could be elicited from him to discredit his testimony. Almost similar statement has been made by Bablu Pandey (PW/7) that the deceased

made oral dying declaration before him and the other witnesses and had named Sonu Dubey @ Santosh (absconded accused), Ajay Sen and Videshi Dhruv as the assailants.

11. Anil Pandey (PW/10), eye-witness to the incident, while supporting the prosecution case, has stated that he left the house of his brother-in-law Gaya Prasad along with the deceased and Manish Kamle and near Tayyaba chowk accused persons who were carrying hockey stick and baseball bat caused several injuries to the deceased. On account of fear, he could not save him. Diary statement of this witness was recorded after about six days of the incident.

12. Dinesh Kumar Sahu (PW/12) - Investigating Officer has duly supported the prosecution case.

13. Close scrutiny of the evidence makes it clear that apart from the statement of eye-witness PW/10, who has stated that he saw the accused persons assaulting the deceased, there is oral dying declaration made by the deceased before PW/1, PW/6 and PW/7. Even in the FIR (Ex.P/1) lodged by PW/1, father of the deceased and witness to the oral dying declaration, name of accused Sonu Dubey @ Santosh (absconded accused), Videsh Dhruv in Cr.A.No. 318/2011, Ajay Sen in Cr.A.No.177/2011 and Golu @ Mawadih (subsequently acquitted by the trial Court) is there. Likewise, PW/1, PW/6 and PW/7 have also deposed the name of Ajay Sen and Videshi Dhruv. Considering the cumulative effect of the evidence of PW/1, PW/6, PW/7 and PW/10, we are of the view that the trial Court

was justified in convicting appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 under Sections 147, 148, 120-B and 302 of IPC.

14. So far as conviction of appellant Saleem Beg in Cr.A.No.456/2011 and Javed Khan in Cr.A.No.127/2011 is concerned, these accused persons have not been named in the FIR (Ex.P/1), merg (Ex.P/2) and also in the statement of PW/1, PW/6 and PW/7. Thus, considering overall evidence in respect of these accused/appellants, they are very much entitled to receive benefit of doubt.

15. We find no substance in the argument of counsel for the accused persons that the deceased was thought unconscious and therefore could not have made any dying declaration. It has come in the evidence that at the time of making oral dying declaration, the deceased had regained consciousness and made oral dying declaration. Though in one of the document (unexhibited) it has come that the deceased was semi conscious (non-oriented) but the statement of other witnesses (PW/1, PW/6 and PW/7) clearly spell that the deceased had regained consciousness.

16. We further find no substance in the argument on behalf of accused/appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 that they are liable to be convicted for lessor offence. The case law relied upon by the learned counsel for the appellant (A-2 and A-3) in the matter of **Narayan (Supra)**, is distinguishable on the ground of fact.

Considering the overall evidence adduced by the prosecution, nature of injuries sustained by the deceased to vital organ (skull) and oral dying declaration of the deceased before PW/1, PW/6 and PW/7, accused/appellant Ajay Sen and Videshi Dhruv were watching for the deceased to come, they were having hockey stick and baseball bat and assaulted him in brutal manner resulting into his death. The evidence further shows that they have committed the offence in a preplanned manner. Thus, the complicity of appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 has been proved beyond shadow of doubt.

17. As discussed above in respect of appellant Saleem Beg in Cr.A.No.456/2011 and Javed Khan in Cr.A.No.127/2011, nothing incriminating has been brought by the prosecution to hold them guilty beyond reasonable doubt. Thus, considering the quality of evidence collected by the prosecution, this Court is of the opinion that conviction of appellant Saleem Beg in Cr.A.No.456/2011 under Sections 147, 148, 120-B and 302 of IPC & Javed Khan in Cr.A.No.127/2011 under Sections 147 and 120-B of IPC is not based on due appreciation of the evidence available on record and that being so they are entitled for benefit of doubt. Consequently, the judgment impugned convicting the appellant Saleem Beg and Javed Khan under relevant Sections is set aside and they are hereby acquitted of the charges levelled against them. Both the appellants are on bail, their bail bonds stand discharged.

18. In the result, Cr.A.No.177/2011 and 318/2011 filed on behalf of appellant Ajay Sen and Videshi Dhruv respectively, have no substance and it is liable to be dismissed. Dismissal recorded accordingly. Appellant Ajay Sen in Cr.A.No.177/2011 and Videshi Dhruv in Cr.A.No.318/2011 are in jail, therefore, no further order regarding their surrender etc is needed.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Sanjay Agrawal)
JUDGE