

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**Crl. Appeal No.D-869-DB of 2005
Date of Decision: January 22, 2020**

Pal

...Appellant

VERSUS

State of Haryana

...Respondent

**CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN
HON'BLE MRS. JUSTICE ARCHANA PURI**

Present: Mr.K.P.S.Virk, Advocate for
Mr.K.S.Dhaliwal, Advocate
for the appellant.

Mr.Vikrant Pamboo, Deputy Advocate General, Haryana
for the respondent-State.

ARCHANA PURI, J.

Challenge in the present appeal, is to the judgment of conviction dated 19.08.2005 and order of sentence dated 22.08.2005 passed by learned Addl. Sessions Judge(I), Kaithal, vide which appellant was held guilty and convicted under Section 302 IPC and sentenced to undergo imprisonment for life and to pay fine of ₹25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for two years.

The background facts in nutshell are, as follows:-

That, on 19.05.2004, SI Hem Chander of Police Station City, Kaithal, recorded the statement of Balkar Singh to the effect that, on that day, Balkar Singh and Pal son of Manga, caste Prajapat, were going near

Chandana Gate and when they were near Gyara Rudri Mandir, a tractor

trolley came there and Pal suddenly gave a push to Balkar Singh, as a stunt of which, he came under the rear wheel of the trolley. The tractor trolley driver had taken him to hospital. The aforesaid statement of Balkar Singh was recorded by SI Hem Chander, when he reached the hospital in pursuance of ruqa received by him about the injured. He had recorded the statement of injured, in pursuance of the opinion regarding fitness of the injured to make the statement, having obtained from the concerned doctor.

On 19.05.2004, medical ruqa was again received in the Police Station, City Kaithal regarding death of Balkar Singh. During the course of investigation, inquest proceedings were conducted. Even post-mortem examination on the dead body of Balkar Singh was got conducted. Rough site plan of the spot of occurrence was prepared. Photography of the spot of occurrence was got conducted. The tractor trolley was taken in possession vide separate recovery memo. Even, statements of the witnesses were recorded.

On 21.05.2004,, Head Constable Kehar Singh had handed over one application Ex.P19 to SI Hem Chander, which was taken into possession by the Investigating Officer, vide separate memo, which was also attested by the witnesses. Their statements were recorded. In the said application, which later on came to be proved as to be Ex.P19, there was mention that Manga, father of accused was having enmity with Balkar Singh on the date of commission of crime. As such, the offence under Section 302 IPC was added.

On completion of the investigation, accused Pal was sent up to face trial.

On presentation of challan, compliance of Section 207 Cr.P.C.

was made and thereupon, case was committed to the Court of Session.

In pursuance of the commitment proceedings, on the basis of material coming forth, charge was framed against accused Pal under Section 302 IPC, to which he pleaded not guilty and claimed trial.

In endeavour to establish its case, the prosecution examined as many as 13 witnesses, besides adducing documentary evidence.

PW-1 Manoj Kumar and **PW-2 Pala**, brothers of deceased Balkar Singh were examined. However, they did not support the prosecution version. Even **PW-3 Naresh Kumar** and **PW-4 Madan Lal**, who, as per version of the prosecution, had attested the statement of Balkar Singh deceased, while deposing in the witness box, did not support the prosecution version. **PW-5 Rajbir**, is driver of the tractor trolley. **PW-6 Rajinder** is the photographer. **PW-7 Dr.Piyush Sharma**, had medico-legally examined Balkar Singh deceased and he proved MLR **Ex.P9** and bed head ticket **Ex.P13**. He also proved ruqa **Ex.P10**, opinion **Ex.P12** on the application **Ex.P11**. He further proved the medical ruqa qua death of Balkar Singh as **Ex.P14**. **PW-8 Dr.Lajja Ram**, who had conducted post-mortem examination on the dead body of Balkar Singh, proved the post-mortem report **Ex.P15**. **PW-9 Laxman Singh** proved the scale site plan of the spot **Ex.P18**. **PW-10 Head Constable Kehar Singh** has deposed about application **Ex.P19**, produced by Manga to him. **PW-11 SI Sumer Chand**, has deposed about having recorded formal FIR on receipt of ruqa. **PW-12 Constable Bijender Kumar** has deposed about delivery of Special Report to CJM, Kaithal. **PW-13 SI Hem Chander**, in the Investigating Officer of this case.

Thereafter, evidence of the prosecution was closed.

On closure of the prosecution evidence, all the incriminating circumstances, appearing in the prosecution evidence were put to accused Pal in his statement under Section 313 Cr.P.C. However, the accused denied those allegations and pleaded innocence. In fact, he had taken the plea that Balkar Singh had met with an accident and later on, occurrence of accident was converted into case of murder, in connivance with brother of Balkar Singh. However, no evidence was led in defence.

After hearing learned Public Prosecutor, learned defence counsel and on appraisal of the evidence brought on record, vide judgment dated 19.08.2005 and order of sentence dated 22.08.2005, accused-appellant was held guilty, convicted and sentenced, as already detailed aforesaid.

Feeling aggrieved by the aforesaid judgment of conviction and order of sentence, the appellant-convict has filed the present appeal.

In pursuance of notice issued by the Court, learned State counsel made appearance on behalf of the State. Even the lower Court record was requisitioned.

We have heard learned counsel for the appellant as well as learned State counsel and have perused the record.

At the very outset, learned counsel for the appellant has assiduously submitted that learned trial Court has erred in relying upon the statement **Ex.P4** allegedly made by Balkar Singh. In fact, it is submitted by learned counsel for the appellant that said statement has been fabricated later on, to the suitability of the prosecution version. The claim of the prosecution vis-a-vis recording of the statement, stands belied from the testimony of PW-3 Naresh Kumar and PW-4 Madan Lal, who did not

support the prosecution version. In the light of the same, it is submitted that

the statement **Ex.P4**, as such, has no sanctity and the same cannot be made the sole basis for conviction. In fact, it is submitted that it was a road accident case, which has been converted into a murder case, on account of Manga, father of the appellant, to have filed an application against deceased Balkar Singh. Thus, summing up his arguments, learned counsel for the appellant has made a prayer for acceptance of the appeal while setting aside the judgment of conviction and to acquit the appellant.

On the contrary, learned State counsel has refuted the claim of the appellant. It has been submitted by learned State counsel that learned trial Court has rightly appraised the material brought on record and has rightly reached the conclusion about the statement made by Balkar Singh, soon before his death, to be **dying declaration** and considering the same, it is further pointed out that incriminating role of the appellant is clearly spelt out from the said statement and therefore, the statement **Ex.P4**, can be treated as dying declaration. Considering the same, it has been further pointed out by learned State counsel that learned trial Court has rightly made this statement as basis for conviction, even though, necessary witnesses of the prosecution have not supported the prosecution version. As such, a prayer has been made for the dismissal of the appeal.

Undisputedly, both brothers of deceased Balkar, namely Manoj Kumar and Pala sons of Roshan, have not supported the prosecution version and have turned hostile. Likewise, even PW-3 Naresh Kumar and PW-4 Madan Lal, who, as per version of the prosecution, are the witnesses to the statement of the deceased **Ex.P4**, have not supported the prosecution version. However, in this backdrop, it is pertinent to mention that soon after

the occurrence, injured Balkar Singh was taken to the hospital. He had made

statement, which has been proved as Ex.P4. It is pertinent to mention that this statement was made by Balkar Singh to SI Hem Chander, in pursuance of the opinion given by the concerned doctor attending to him namely Dr.Piyush Sharma, who has been examined as PW-7, regarding his fitness on the basis of the application Ex.P11 filed before him by the Investigating Officer. The said doctor had clearly given the opinion about the patient to be fit to make statement and it was only, thereafter, the said statement was recorded by SI Hem Chander. The endorsement of SI Hem Chander on the said application, which has been proved as Ex.P22 reveals about the proceedings, so having been conducted in this manner and also about injured Balkar Singh to have affixed his thumb impressions upon the same. Therein, it is also stated about the said statement to have been attested by Naresh Kumar and Madan Lal. At the tail-end of this endorsement, SI Hem Chander had mentioned time of completion of the said proceedings as 5.15 p.m. Furthermore, it is necessary to note that in the subsequent ruqa Ex.P15, information was given about the patient to have expired at 5.50 p.m. on 19.05.2004. This ruqa was dispatched at 5.55 p.m. This time also finds mention in the bed head ticket Ex.P13. Thus, from the aforesaid, it is evident that within less than half an hour of making of this statement, Balkar Singh had died. Thus, it was only while deceased was nearing his death, he had got recorded his statement. Keeping in view this seriatim of facts, in the post occurrence period, it can safely be taken to be dying declaration of Balkar Singh. No doubt, as submitted by learned counsel for the appellant that this statement was made to the police officer, but however, even if it be so, it cannot be outrightly rejected, more particularly,

Kumar and Madan Lal. Very true, as so pointed out, both the said witnesses have not supported the prosecution version, when they stepped into witness box but however, it is pertinent to mention that while facing cross-examination, both the witnesses have identified their signatures on the said statement. It is vague assertion raised by both the said witnesses about the police to have obtained their signatures on blank papers. Why so, they had so signed blank papers, nothing as such, has been mentioned by the said witnesses. No action had been initiated thereafter. In the light of the same, it becomes evident that these witnesses have later on, for some vested interest, resiled from the statements earlier made. However, this conduct of both these witnesses, will not dilute the impact of the statement of Balkar Singh, who was dying at the time, when his statement was recorded. In this regard, it is pertinent to mention that PW-7 Dr.Piyush Sharma had proved the MLR Ex.P9, wherein, it is stated that the time of examination of Balkar Singh, his vitals were not stable. He was conscious, breathing regularly and tachyaponea. His pulse was feeble and un-recordable. B.P. was 40/?. However, it is now submitted by learned counsel for the appellant that this medical condition of Balkar Singh, itself reveals that his condition was not stable, therefore, it cannot be taken that at the time, when statement Ex.P4 was made, he was in a fit mental condition to make statement. However, the aforesaid submission is not tenable. As already observed aforesaid, the statement of deceased was recorded, in pursuance of the opinion of fitness, having obtained from this very doctor by the Investigating Officer. Moreover, while facing cross-examination, the said doctor had replied that if trolley full of bricks passes over the chest of a person, his ability to make statement, depends upon general condition and severity of injuries suffered

by him. There is nothing in evidence that crossing over of the rear wheel of the trolley over the chest of Balkar Singh, had crushed him to such an extent, that he became unfit to make statement. This is all the more important when the specific opinion, has also obtained from the concerned doctor before recording of the statement Ex.P4.

In given circumstances, vis-a-vis the evidentiary value of dying declaration, it is important to make reference to the decision of the Hon'ble Apex Court in '**Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur, A.P., 2007(4) RCR (Criminal) 439**', wherein, it is held as under:-

“18. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

19. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is a thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be last to give untruth as he stands before his creator. There is a legal maxim "Nemo Moriturous Praesumitur Mentire" meaning, that a man will not meet his maker with lie in his mouth. Woodroffe and Amir Ali, in their treatise on Evidence Act state : "when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross-examination are dispensed with."

In this backdrop, the Court has to consider the circumstances of each case, while appraising the dying declaration. The concerned Court considering the facts and the evidence brought on record has to make an assessment of the circumstances and reach the conclusion about the truth or otherwise of the version, which is taken as dying declaration. However, it is settled principle of law that dying declaration is substantive evidence and the order of conviction can be safely recorded, on the basis of dying declaration, if it inspires confidence.

In the case in hand, as already detailed aforesaid, the statement Ex.P4 of Balkar Singh was recorded by the police officer, only after seeking opinion of the concerned doctor regarding fitness of Balkar Singh to make statement. Balkar Singh injured was brought to the hospital at about 4.15 p.m. After his medical examination, medical ruqa was dispatched at 4.30 p.m. Thereafter, his statement Ex.P4 was recorded and only thereupon, ruqa was dispatched at 5.15 p.m. and at 5.50 p.m., Balkar Singh had died. Even FIR had been got recorded at 5.30 p.m. This seriatim of facts in the post occurrence period, does not leave any ground for tutoring or prompting of Balkar Singh, who was a dying man.

Even though, it is submitted that Balkar Singh had made a false statement, as there was already an application given against him by Manga, father of appellant Pal. This application is Ex.P19. In this application, there is mention made about Balkar Singh deceased to have come to the house of Manga at 10.00 p.m., on 07.05.2004 by forcing his entry into his house. He started demanding gold and silver jewellery from wife of his son. Balkar Singh gave threat by saying either hand-over gold and silver ornaments to him, otherwise he will kill her. At that time, all the family members of

Manga were away. It is pertinent to mention that PW-10 Head Constable Kehar Singh has been examined by the prosecution, vis-a-vis the said application. However, the said witness, while facing cross-examination had stated that Ex.P19 is the same application, which was marked to him for investigation. However, he admitted the suggestion to be correct that on this application, there is no endorsement of Incharge PP that the application was given to him for investigation. Furthermore, he had stated in his cross-examination that he had gone to village Budha Khera thrice for investigating the matter mentioned in application Ex.P19. He did not record statement of any witness at the spot, during the course of investigating the application in question. Even a suggestion had been given to the said witness that no application was handed over to him nor matter mentioned in the application was investigated by him and this suggestion has been stated to be wrong. But however, giving of this suggestion (which has been, though, denied), it becomes itself evident that accused side is taking it otherwise and denying about any such application having come on record. In the light of the same, the enmity, as such, does not stand established. Rather, the said witness having been examined by the prosecution, to establish the enmity of the accused side, also does not come to the assistance of the prosecution also, as there is no endorsement made on the application regarding the receipt of the application or ear-marking of the application to the said witness. In any case, bitterness or enmity on either side, as such, does not stand established. Thus, on this count also, the submission so made, does not carry weight.

Considering the evidence in entirety, learned trial Court has

rightly reached the conclusion that the prosecution has successfully

established the guilt of the accused beyond shadow of doubt. As such, the impugned judgment merits no interference.

As such, appeal sans merit and the same is hereby dismissed.

As accused-appellant namely Pal, is on bail, his bail bonds stand cancelled and he is directed to surrender himself before the jail authorities immediately for completing remainder of sentence, failing which the concerned authority shall proceed against him in accordance with law.

(JITENDRA CHAUHAN)
JUDGE

(ARCHANA PURI)
JUDGE

January 22, 2020
Vgulati

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No