

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA Nos.102 of 2014 and 235 of 2016

Applications under Section 374 of the Cr.P.C. against the judgment dated 29th January, 2014 passed by the learned Additional Sessions Judge, Chhatrapur in Sessions Trial Case No.96/2013, 75/2009-GDC, 33/2009-FTC.

CRLA No.102 of 2014

Babu Sahoo

.....

Appellant

Versus

State of Odisha

.....

Respondent

CRLA No.235 of 2016

Babaji Behera

.....

Appellant

Versus

State of Odisha

.....

Respondent

Advocate(s) appeared in both the cases :-

For Appellants : Mr. Pulakesh Mohanty, Advocate

For Respondent : Mrs. Saswata Pattanaik, AGA

**CORAM : THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY**

JUDGMENT

22nd February, 2022

B.P. Routray, J.

1. Both the Appellants, namely Babu Sahu and Babaji Behera have come up in these appeals challenging their conviction and sentence under Section 302/34 of the Indian Penal Code (IPC) in S.T. No.96 of 2013 (S.T. No.75/09 GDC and S.T. No.33/09 FTC).

2. The deceased Sudarshan Pattanaik is a cultivator of village Padmabati under Chhatrapur Police Station. He was also engaged in land business. The appellants were fellow villagers of the deceased and for some reasons relating to land business, they had a pre existing enmity with the deceased and his family members. On 8th July, 2006 at around 1.30 P.M. the informant (P.W.8), the son of the deceased received informant from P.W.12 that his father was lying with bleeding injuries on the embankment of the tank, namely Tinigadia Bandha. He immediately rushed there and saw the deceased lying on the Bandha sustaining severe injuries. He was conscious by then and P.W.7 who was a pig heard was also present there. The deceased disclosed that while he was returning on his bicycle, the Appellants Babu Sahu and Babaji Behera, who had concealed their presence near the spot assaulted him by means of swords causing injuries to his person and each of them were armed with sword. Thereafter P.W.8 brought the deceased in an auto rickshaw to the local hospital wherefrom he was taken to MKCG Medical College and Hospital, Berhampur. On reaching at MKCG Hospital at about 5 pm, the doctors declared him dead on examination.

3. The F.I.R. (Ext.4) was lodged by P.W.8 at Chhatrapur P.S. on the same day. P.W.13, the then Sub-Inspector of Police took up the investigation. He examined the complainant, visited the spot, held inquest (Ext.1) and sent the dead body for post mortem examination. The investigation continued and different witnesses were examined. Subsequently the investigation was taken up by the I.I.C., Chhatrapur Police Station, another S.I. of Police and ultimately the charge-sheet was filed by the then I.I.C. of Chhatrapur P.S. on 20th January, 2008.

4. Both the Appellants being charged for the offence of murder faced the trial by taking the plea of denial.

5. Prosecution examined 13 witnesses in total and marked several documents as Ext.1 to Ext.7.

6. Admittedly no direct eye witness is there and prosecution case hinges on circumstantial evidence. The main circumstance is the oral dying declaration of the deceased made before P.Ws.7 and 8.

7. Besides P.Ws.7, 8 and the wife of deceased (P.W.2), other independent witnesses viz. P.Ws.1, 3, 4, 5, 6, 9, 10 and 12 were post occurrence witnesses and some of them turned hostile. P.W.11 is the doctor who conducted autopsy over the dead body on 19th July, 2006 at 1.30 pm. Upon post mortem examination he found nine injuries which were cut wounds on the right mid arm, fingers, thigh and leg. They are as follows:-

- i) One cut wound present obliquely over the entero lateral surface of right mid arm of size 7cm X 1cm X bone depth where the bones cut cleanly with surrounding extravasations.
- ii) Cut wound present almost transversely over the palmar surface of middle phalanse of medial forefingers of right hand.
- iii) Slice wound of size 7cm X 5cm X muscle deep present over the posterior surface of left mid forearm.
- iv) Cut wound of size 2cm X 0.5cm X muscle deep present over the medial surface of left little finger at its space.

- v) Cut wound of size 6cm X 2cm X muscle deep present almost transversely over the posterior surface of left lower arm 2cm above tip of elbow.
- vi) Lenier cut wound of size 7cm X 0.5cm X muscle deep present little obliquely over the lower lateral surface of right thigh 3cm above head of fibula.
- vii) Cut wound of size 8cm X 3cm X fibula bone deep present almost transversely over the upper outer surface of right leg 2cm below the lateral two head of fibula.
- viii) Cut wound of size 8cm X 1cm X muscle deep present obliquely over the outer lateral surface of right leg 4cm below external injury No.(vii).
- ix) Two cut wounds which merges with each other which form a huge cut wound of size 8cm X 3cm X bone deep present on the outer lateral surface of right leg 4cm above lateral malleones with underline bones found to have been fractured at the corresponding injuries.
- x) Three cut wounds of varing lence present almost 1.5cm apart from each other over the anterior surface of left leg at its middle with lence varying from 3cm X 0.5cm X muscle deep below 0.6cm X 0.5cm X muscle deep.

8. It is opined by P.W.11 that the injuries were ante mortem and homicidal in nature, caused by moderately heavy cutting weapons and all such injuries in combined effect are sufficient to cause death in ordinary course of nature. Further, injury No.(i) and (ix) along with

their corresponding injuries are individually fatal in nature. Injury No.(i) to (v) are defence wounds. The deceased died due to shock and hemorrhage arising out of the complications from those injuries and the time since death was around 18 to 24 hours from the time of post mortem examination. The PM report is marked as Ext.5. Considering such evidence of P.W.11 and the contents of inquest report under Ext.1 as well as the evidence of other relevant witnesses, the conclusion about homicidal death of the deceased due to the injuries narrated above as arrived by the trial court is confirmed. The Appellants also do not dispute the same.

9. To see the involvement of the Appellants in commission of the injuries on the deceased, prosecution mostly relies on the evidence of P.Ws.7 and 8. P.W.7 is a swineherd who first discovered the deceased lying at the spot in injured condition and P.W.8 reached at the deceased after receiving information from P.W.12. P.W.12 has turned hostile and did not support the prosecution version. He has also not seen the occurrence.

10. The evidence of P.Ws.7 and 8 are seen corroborative in nature. A conjoint reading of their evidence reveal that the deceased became conscious after he was administered water by P.W.7, and told to P.W.8 about the incident that, when he was returning to village the Appellants assaulted him by means of swords. It is deposed by P.W.8 that, *“when we asked my father regarding the incident, my father disclosed before us that he (my father) returning to our village Padmabati by means of a bicycle, and at the spot, the accused persons namely Babu Sahu and Babaji Behera, who were hiding there, assaulted him (my father) by means of swords, causing injuries on his*

right hand and right leg. Both the accused persons, i.e. each one was armed with sword.”

11. Thus, the main question falls that whether this oral dying declaration of the deceased made before P.W.7 and 8 is safe to rely to sustain the conviction?

12. Oral dying declaration by the deceased before the witnesses is not a new concept in criminal law jurisprudence. The Hon'ble Apex Court in the case of ***Laxman v. State of Maharashtra, (2002) 6 SCC 710*** have held that the dying declaration can be oral. In the case of ***Khushal Rao v. State of Bombay, AIR 1958 SC 22***, the Supreme Court have observed that,

“16. 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 opportunity 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.

17. 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.”

13. In ***Jagbir Singh v. State (NCT of Delhi)***, (2019) 8 SCC 779, Hon’ble Apex Court has held as follows:-

“31. A survey of the decisions would show that the principles can be culled out as follows:

31.1.(i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

31.2.(ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

31.3.(iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

31.4.(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

31.5.(v) Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

31.6.(vi) However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

31.7.(vii) In such cases, where the inconsistencies go to some matter of detail or description but are inculpatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

31.8 (viii) The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In one dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an

inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

31.9.(ix) In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?”

14. Coming to the facts of instant case, it is found that though the numbers of injuries are nine in total, but all of them are distributed in the hand, leg and thigh. No injury was there on the head, neck or chest of the deceased. It is not that the witnesses reached late at the deceased. Since the injuries are not on the vital body part of the body of the deceased, there is every chance that the deceased would have regained his sense after administration of water. So far as the state of fitness of mind of the deceased is concerned, the circumstances do not reveal anything against the same. The evidence of P.W.7, who is an independent witnesses, clearly depicts that after administering water to the deceased, he regained his sense and disclosed everything with regard to cause of his injuries before his son, i.e. P.W.8. P.W.7 has no enmity with the Appellants. His presence near the deceased immediately after the occurrence is not questioned by the defence nor is seen improbable. So no reason is found to disbelieve P.W.7.

15. P.W.8 is admittedly the son of the deceased. It is natural on the part of the deceased to disclose everything before his son. The supreme Court in the case of ***Prakash v. State of M.P. (1992) 4 SCC***

225, have observed that, *“in the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognized the assailants.”* Here the deceased is a man aged about 70 years and the Appellants were his co-villagers. Therefore no reason is there to doubt identification of the Appellants nor any reason is seen for false implication against the Appellants. The possibility of any imagination or tutoring is also ruled out in the given circumstances as narrated by the witnesses. As discussed above, the oral dying declaration made by the deceased is a well acceptable principle. Keeping in view the surrounding circumstances such a disclosure made by the deceased before his son or his fitness at the time of disclosure cannot be questioned as improbable. Therefore, as held by the learned trial Judge, the oral dying declaration of the deceased made before P.Ws.7 and 8 can be safely relied upon. The deceased has not only stated the name of the Appellants as assailants but has stated about the specific weapons used to cause the assault also. In absence of any circumstance contrary to the same, the oral dying declaration disclosed by the deceased can safely be relied upon against the Appellants.

16. It is true that neither any weapon of offence was recovered in course of investigation nor the incriminating samples were sent for chemical examination. It is submitted on behalf of the Appellants that in such circumstances since P.W.8 is a relative of the deceased, his evidence should not entirely be relied upon to sustain the conviction. Undoubtedly P.W.8 is related to the deceased being his son. But this relation with the deceased does not disqualify him from being a trusted

witness. It is well known that a relation of the deceased will never implicate an innocent leaving the real culprit. Besides, the evidence of P.W.7 also comes to play here. There is nothing to disbelieve the version of P.W.7 who is an independent witness, and his presence near the deceased at that relevant time.

17. From the aforesaid discussions, the finding of the learned trial court is confirmed that the Appellants are the assailants who caused the injuries on the person of the deceased resulting his death. As stated earlier all the injuries inflicted by the Appellants are on the right hand, thigh and leg of the deceased. In other words, those injuries are not on the vital part of the body of the deceased. As such a question arises that, whether the Appellants had the intention to kill the deceased? To answer this, it is important to have a re-look to the nature of injuries and the opinion of the autopsy doctor (P.W.11). It is the specific opinion of P.W.11 that injury No.(i) and (ix) which are the cut wounds on the lateral surface of right mid-arm and right leg respectively, are individually fatal to cause the death in ordinary course of nature. But still the question remains that if someone wants to kill another why will he hit at hand and legs instead of other vital body parts like neck, head or chest. But the opinion of P.W.11 reveals that injury No.(i) to (v) are defence wounds. Those injuries are cut wounds present on the palmar surface of middle forefingers of right hand, over the posterior surface of left mid forearm, medial surface of left little finger at its space and posterior surface of left lower arm. The oblique and sliced nature of such wounds suggest that the assault was intended to the upper body part of the deceased and probably on the neck or head which the deceased might have defended by raising his hands resulting in such obliquely cut wounds over lateral part of his mid arm and fingers. Apart

from these, injury No.(ix) was so severe that almost leg was about to detach. A close analysis of such nature of injuries does not speak in favour of the intention of Appellants. So considering the nature of weapons used, number of injuries inflicted and their severity, it can safely be concluded that the Appellants had the knowledge and intention to kill the deceased.

18. Non-recovery of the weapons of offence casts blame on prosecution. Undoubtedly the investigation conducted by prosecution is not up to mark. No explanation has been offered for not recovering the weapons and for not sending the objects for chemical examination. But this can no way benefit the Appellants because such reasons in the given circumstances are not enough to disbelieve the prosecution version. The circumstances are such and the evidence of P.Ws.7 and 8 are found so trustworthy, it is hard to disbelieve them. Independent of all lacunas in the investigation, the evidence of P.Ws.7 and 8 are above all sorts of doubt or suspicion and sufficient to be relied upon to base the conviction.

19. In the result, both the appeals are dismissed being devoid of merit.

20. LCRs. be returned forthwith.

(B.P. Routray)
Judge

(Dr. S. Muralidhar)
Chief Justice