



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

NEUTRAL CITATION NO: 2022/DHC/004209

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Reserved on: 17th August, 2022
Pronounced on: 12th October, 2022

CRL.A. 85/2019 & CRL.M.B. 436/2022

DINESH KUMAR @ KHALI

..... Appellant

Represented by: Mr. Siddharth Yadav, Advocate.

versus

STATE

..... Respondent

Represented by: Ms. Shubhi Gupta, APP for State with
Inspector Rajiv Kumar, P.S.
Mangolpuri.

CRL.A. 107/2019 & CRL.M.A. 11427/2021

DEEPAK KUMAR @ CHINTU

..... Appellant

Represented by: Mr. Nishank Tyagi, Advocate with
Mr. Gaurav Jain, Advocate.

versus

STATE

..... Respondent

Represented by: Ms. Shubhi Gupta, APP for State with
Inspector Rajiv Kumar, P.S.
Mangolpuri.

CRL.A. 307/2019

SURESH @ HANUMANT

..... Appellant

Represented by: Ms. Rebecca John, Sr. Advocate with
Ms. Aishwarya Rao (DHCLSC), Ms.
Praavita Kashyap, Mr. Pravir Singh &
Mr. Chinmay Kanojia, Advocates.

versus

STATE

..... Respondent



Represented by: **NEUTRAL CITATION NO: 2022/DHC/004209**
Ms. Shubh Gupta, APP for
State with Inspector Rajiv Kumar, P.S.
Mangolpuri.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This common judgment shall dispose of the above captioned appeals, assailing the judgment of the learned Trial Court dated 29th October, 2018 convicting all the three appellants for offence punishable under Section 302/34 IPC and in addition convicting appellant Dinesh Kumar @ Khali for offence punishable under Section 25(1B) (a) and 27(1) of the Arms Act, 1959 and order on sentence dated 20th November, 2018 awarding the following sentences:

- a. Dinesh Kumar @ Khali - rigorous imprisonment for life and a fine of Rs. 20,000/- (in default, SI for one year) for offence punishable under Section 302/34 IPC; rigorous imprisonment for two years and a fine of Rs. 2,000/- (in default, SI for two months) for offence punishable under Section 25 (1B) (a) of the Arms Act; rigorous imprisonment for three years and a fine of Rs. 3,000/- (in default, SI for three months) for offence punishable under Section 27 (1) of Arms Act. All sentences to run concurrently.
- b. Deepak Kumar @ Chintu - rigorous imprisonment for life and fine of Rs. 15,000/- (in default, SI for nine months) for offence punishable under Section 302/34 IPC.



c. Suresh @ Hanumant - ~~NEUTRAL CITATION NO: 2022/DHC/1004209~~ rigorous imprisonment for life and fine of Rs. 15,000/- (in default SI for nine months) for offence punishable under Section 302/34 IPC.

The Incident

2. As per the case of the prosecution, on 16th May, 2012 at about 01:25 a.m., Duty Constable Dalbir Singh at SGM Hospital gave a message at PS Mangolpuri through telephone that one Angad Yadav has got admitted Nagender Yadav in the hospital who had received bullet injury at his house. The said information was lodged vide DD No.8A and marked to SI Sachin Mann who along with Constable Vinod Kumar visited the hospital where he collected the MLC of Nagendra Yadav. As per the MLC, the said patient was opined '*unfit for statement*'. No eyewitness was found at the hospital. The police officials, including Inspector Satya Prakash, went to the place of occurrence i.e. P-7/165, Mangolpuri, Delhi and called the crime team who inspected the place of occurrence. SI Sachin Mann prepared the *rukka* and got FIR no. 185/2012 registered under Section 307 IPC and 27 of the Arms Act. From the spot one blood-stained bed-sheet and scissors were seized and were duly sealed, rough site plan was prepared and statements of Ram Singh Yadav and Angad Yadav were recorded. On 16th May, 2012, information was received from RML Hospital regarding the death of Nagendra Yadav during treatment. Further investigation was marked to Inspector Satya Prakash who got the body of the deceased shifted to the mortuary and added offence under Section 302 IPC to the FIR.

3. The Investigating Officer (IO) Inspector Satya Prakash also recorded statements of Smt. Bindu wife of deceased, who stated that the deceased, after being shot in the middle of the night, had told that the



appellants had shot him. On 17th May, 2012, the IO effected the arrest of appellant Dinesh Kumar and Deepak and recorded their disclosure statements. Later, the weapon of offence i.e. country made pistol (*katta*) with empty cartridge was recovered at the instance of appellant Dinesh. On 23rd August, 2012, IO effected the arrest of appellant Suresh and recorded his disclosure statement.

4. The case was committed to the Court of Sessions and charges were framed under Section 302/34 IPC against all three appellants and a separate charge under Section 25/27 of the Arms Act against appellant Dinesh, to which they pleaded not guilty and claimed trial. The prosecution examined 24 witnesses; statements of appellants were recorded under Section 313 Cr.P.C. Though the appellants chose to lead evidence in their defence, however, despite opportunity they did not examine any witness and accordingly, vide separate statement of their learned counsels recorded on 27th August, 2018 to the effect that the accused persons do not want to lead any evidence in defence, the same was closed.

Submissions by the Appellant

5. The appellants, through learned counsel appearing on their behalf, contended that the impugned judgment convicting the appellants and subsequent order on sentence suffered from great perversity and was erroneous. The appellants contended that the testimonies of PW-1, PW-2 and PW-10 were inconsistent and unreliable and learned Trial Court had wrongly placed reliance on them for convicting the appellants. Further the ballistic report (Ex.PW-15/A) was not taken into account which would show that the bullet extricated from the body of the deceased was not fired from the recovered weapon. The alleged dying declaration of



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the deceased could not be relied upon since PW-1, PW-2 and PW-10 who had testified to that effect were closely related to the deceased and therefore, the dying declaration was manipulated and doctored by these interested witnesses. The MLC of the deceased (Ex. PW-6/A) was ignored which shows that the deceased was conscious, oriented condition and was reported walking and despite the same, the alleged dying declaration was not made to the doctor who examined the deceased at the first instance. The motive taken into account by the learned Trial Court of previous enmity ignored the fact that a fight of the deceased had taken place with one accused Bheema wherein Bheema was arrested as he had shot the deceased one or two months prior to the alleged date of incident of the present case. Further, PW-1, the wife of the deceased, had not told the names of the accused persons to anyone till the afternoon of 16th May, 2012 despite her having met relatives and neighbours and her conduct is, therefore, suspicious in this regard. The police did not bother to collect the clothes of PW-10 who allegedly had taken the deceased from the spot to the hospital on a motor bike and therefore would have corroborated the authenticity of the statement of PW-10 that they were present at the spot. As per PW-1 statement, PW-2 and PW-10 were sleeping in another room of the house of PW-1 at the alleged time of incident. However, PW-2 and PW-10 stated that they were in their respective houses and only after hearing the cries of PW-1 came down and took the deceased to the hospital. PW-10, Angad who took the deceased on his motorcycle to the hospital, stated in his cross-examination that the deceased had not disclosed anything to him or in his presence.

6. It was submitted on behalf of appellant Suresh that he was not named in the FIR and that the FIR was recorded at 3:25 a.m. on 16th



May, 2012 while the incident is stated to be between 12.30 a.m. – 01.00 a.m. The counsel for appellant Suresh further contended that there was no eyewitness to the said incident since PW-1 was sleeping at that time, PW-2 and PW-10 came to the spot later, PW-22 Sandeep, a neighbour was allegedly washing clothes at that time and when he came out of the house, he only saw three persons leaving the house though he did not see their faces. The counsel for appellant Deepak Kumar contended that as per the prosecution witnesses, there was existing enmity between the deceased and appellant Dinesh only and therefore, to rope appellant Deepak Kumar under common intention to murder deceased was untenable. He contended that appellant Deepak Kumar was convicted solely on the assumption that he was accompanying the main accused Dinesh at the time of the commission of the offence. The counsels for the appellants *inter alia* relied upon the following judgments to support their contention that mere presence during commission of an offence is not sufficient to invoke Section 34 IPC:

Rangaswami v. State of Tamil Nadu 1989 AIR 1999 SC 1137; ***Chhotu & Ors v. State of Maharashtra*** 1997 AIR 1997 SC 3501; ***Harjit Singh & Ors v. State of Punjab*** AIR 2002 SC 3040; ***Parasa Raja Manikyala Rao & Anr v. State of Andhra Pradesh*** (2003) 12 SCC 306; ***Jasdeep Singh alias Jassu v. State of Punjab*** (2022) SCC OnLine SC 20; ***Paniben (Smt.) v. State of Gujarat*** (1992) 2 SCC 474

They have further relied upon *inter alia* the following decisions on the issue of authenticity and reliability of dying declaration:

Khushal Rao v. State of Bombay AIR 1958 SC 22; ***Paparambaka Rosamma & Ors v. State of Andhra Pradesh*** (1999) 7 SCC 695.



7. In response to the contentions of the appellants, the learned Additional Public Prosecutor (APP) submitted that as per PW-1 and PW-2, appellant Dinesh had visited the house of the deceased previously on the occasion of Diwali and abused and threatened the deceased, which was corroborated by PW-10 as well. The motive of a previous enmity was, therefore, clearly evident. The learned APP heavily relied upon the dying declaration of the deceased which was made to PW-1 and PW-2. As per the MLC, the attending doctor opined that the deceased was conscious, oriented and came in walking when he was first brought to SGM Hospital by PW-2 and PW-10 proving that the deceased was in a conscious state of mind and all dying declarations made by him before his admission in the hospital was while in proper senses. PW-22 had also corroborated the fact that after hearing gunshot, he saw three persons running away at about 12:30 a.m. on the date of the incident. It is contended that as per PW-10, the deceased was first taken to SGM Hospital and thereafter to RML Hospital where he was declared dead during treatment. As per the timeline, the incident happened at about 12:30 midnight in the intervening night of 15th and 16th May, 2012 and the deceased was then examined at SGM Hospital at about 01:05 a.m. He was thereafter removed to RML Hospital and admitted there at about 03:05 a.m. and was declared dead at about 03:40 a.m. Thereafter, PW-2 and PW-10 returned to the place of incident where the police officials were already present and their statements were recorded by PW-18 along with the statement of PW-1 at about 08:30 a.m., as mentioned in DD No.17A. The sequence of events would show that there was no time for PW-1, PW-2 and PW-10 to deliberate and fabricate a story regarding the incident in order to falsely implicate the applicants. As regards common



intention of all the appellants, the learned APP relied upon the decision of **Ashok Kumar v. State of Punjab** AIR 1977 SC 109 to contend that all the appellants had together gone to the house of the deceased and shot him. At these late hours, they had no business to be present at the spot and even though appellant Dinesh had fired upon the deceased, the presence of the others at the spot shows pre-meditation and common intention and the principle of agency under Section 34 was corroborated by the testimony of PW-22. As per the IO PW-24, all three appellants were found to be missing from their homes post the incident and were arrested on the basis of secret information received on 17th May, 2012 and 18th August, 2012. Their attempt to evade arrest and being on the run was evidently conduct which would implicate them for the crime.

The Evidence

8. The evidence relevant for the assessment of this case, is *inter alia* as under:

8.1 PW-1, Smt. Bindu, the wife of the deceased, testified that she knew all the three appellants, as appellant Dinesh Kumar was residing in gali No. 8 while they were residing in gali No. 7 in the same locality and other two appellants used to roam around with the appellant Dinesh Kumar. She stated that the appellant Dinesh Kumar visited their house on the festival of Diwali in the year 2010 and started abusing her husband and called him outside the house and was carrying a beer bottle at the time which he broke at the door of the house and left abusing and threatening her husband. At that time, he was accompanied by 4-5 persons. On the intervening night of 15th and 16th May, 2012, while they were sleeping along with other family members in their house, she heard the sound of a



cracker at about 12:30 a.m. Upon waking up she saw that her husband was calling her by her name and was coming from the gate in a bending position crying with pain. When she switched on the light, she saw that blood was oozing from his abdomen. Upon asking her husband as to what happened, he told her that appellant Dinesh had shot him, and he was accompanied two associates Deepak and Suresh. PW- 1 raised an alarm and her tenants and neighbors reached along with PW-2, her brother in-law Ram Singh and PW-10, her nephew Angad. PW-2 and PW-10 took her husband on the motorcycle of PW-10. She stated that PW-2 and PW-10 were sleeping in the other room of the house when she raised the alarm.

- 8.2 In her cross examination, PW-1 stated that she left her house on foot for the hospital and when she reached SGM Hospital she came to know that her husband had been referred to some other hospital and then, while she was on the way, the police met her, and she told the name of all the three appellants to the police. She further stated that earlier in the month of April, 2012, her husband had received bullet injuries in an incident and had told her that he had strong suspicion regarding the role of appellant Dinesh behind the said incident which happened in April, 2012 but out of fear had not named him to any authority. She identified appellant Dinesh and appellant Deepak in the court. In her cross-examination, she stated that the police had arrested someone for the incident of April, 2012 but she did not know the name and her statement had not been recorded in that matter. She denied that there was any quarrel between her husband and PW-10 because of her. She could not tell the names who were present in our house when the husband



was being removed from the hospital, but she stated that many people had arrived, and she had not disclosed the names of the appellant at that moment considering the condition of her husband and because she was inconsolable. She stated that SGM hospital was at a distance of 15–20 minutes walk and her statement was recorded by the police at her house in the afternoon of 16th May, 2012.

8.3 PW-2 Ram Singh Yadav, the elder brother of the deceased testified that on that night he was sleeping inside his house when he heard cries coming from the side of the gali. He woke up and in the meantime PW-10 also reached the gali from his house and they went to the house of their brother and upon entering they found him lying on the single bed with blood oozing out from the abdomen and he was crying in pain and PW-1 was weeping. Thereafter, they removed him to the hospital. He stated that he was sitting with the injured deceased on the motorcycle which was being driven by PW-10 and they got him admitted to the hospital. When the doctors of the SGM hospital told them that the condition of the injured deceased was very serious and told them to take him to RML hospital, an official ambulance was arranged, and he was shifted to RML. He stated that later when he, along with PW-10, reached his house, he had mentioned the name of the three appellants to the police stating that they were revealed to him by the deceased brother while they were on the way to the Hospital. He also stated that in 2010, one day prior to the festival of Diwali, appellant Dinesh had come to the house of his brother under the influence of liquor and was carrying beer bottle in his hand which he broke on the gate of the house and quarreled with his deceased brother.



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Beside this the deceased had shared with PW-2 that he was apprehending danger to his life from the three appellants on several occasions prior to the incident. In his cross-examination he confirmed that two months prior to the incident his brother was shot by someone, but no one was arrested in the case and no case was registered as per his knowledge. The deceased had also told the doctor that the appellant Dinesh had shot him, and PW-10 was not there at the time when the deceased had told the doctor. He denied the suggestion by the defence counsel that there was a quarrel between his deceased brother and PW-10 because of PW-1 on the suspicion that PW-1 was having illicit relations with PW-10 or that PW-10 had threaten the deceased at any point of time.

- 8.4 PW-10, Angad Yadav, the nephew of the deceased (the deceased was mama / maternal uncle) stated that he was residing in front of the house across the gali of the house of the deceased and heard cries at about 12:30 a.m. When he came out, he and PW-2 rushed towards the house of the deceased and saw the gate already opened and when they went inside the deceased was lying in the pool of blood and bleeding and his aunt (PW-1) was weeping and stated that the deceased has received gunshot injury and should be removed to the hospital. Thereafter, he took him to the hospital on his motorcycle along with PW-2 and on the way when PW-2 asked the deceased, he told him that he had been shot by appellant Dinesh who had come with '*Chintu and Suresh*'. When they were told by the doctors at RML hospital that it is a police case and they will hand over the dead body to the police, they returned to the house and met the police. He confirmed that the deceased was having differences with appellant Dinesh for the last several years. In the



cross-examination, PW-10 ^{NEUTRAL CITATION NO: 2022/DHC/004209} stated that the deceased was in a position to talk when he was removed to SGM hospital but he himself had no conversation with him and it was only PW-2 who had conversed with the deceased on the motorcycle while on his way to the hospital.

- 8.5 PW-22, Sandeep (neighbor of the deceased) stated that around 12:30 at midnight he heard cracker type noise and on coming out from his house he saw three persons running out, while two of them went on one side and one to the other side. Thereafter, he came to know someone had fired upon the deceased. He stated that he had not seen the face of the assailants.
- 8.6 PW-12, Dr. M. Das, CMO at S.G.M Hospital, medically examined the victim Nagender Yadav and prepared the MLC Ex. PW-6/A.
- 8.7 PW-10 Dr. Shailesh Gupta of RML hospital stated that when the deceased was brought with a gunshot injury, treatment was started but the condition was very poor and within 10 minutes of arrival patient deteriorated, CPR was started but the patient could not be revived, and he was declared dead at 3:40 a.m. A death summary report (Ex. PW-10/A) was prepared by Dr. Darshan Nayak whose handwriting and signature he identified, Dr. Nayak having left the hospital and not available. Subsequently, he filled the death report Ex. PW-10/B in respect of the deceased.
- 8.8 PW- 13, Dr. Munish Wadhawan who conducted the *post mortem* on the deceased, testified that there was a firearm entry wound 2.2 cm x 1.6 cm present over left side of abdomen 10 cm below the nipple. The cause of death was hemorrhagic shock as a result of injury to internal organs due to firearm injuries and injury No. 1 mentioned



in the report was sufficient to cause death in ordinary course of nature.

8.9 PW-15, Sh. V. R Anand, the Ballistic Expert at Forensic Science Laboratory (FSL), Rohini testified that he had received the sealed parcels containing one bullet, swabs, country made pistol 0.315 inch bore and one 8 mm/0.315-inch cartridge case. Upon examining the said exhibits he stated that the country made pistol Ex. F-1 was in working order and was test fired successfully and the fired empty cartridge Ex. EC-1 corresponded to the bullet Ex. EB-1 taken from the laboratory stock. The bullet was test fired and test fired cartridges were marked as TC-1 and TC-2 and recovered bullets were marked as TB-1 and TB-2. He opined that the individual characteristic of firing pin and breach face marks present on EC-1 and on TC-1 and on TC-2 were found identical and hence EC-1 had been fired through the country made pistol Ex. F-1. The striation marks present on EB-1 and TB-1 and TB-2 were found insufficient and no opinion could be given. On the swabs, he opined that no opinion could be given due to insufficient data.

8.10 PW-20, Dr. C.K Durga of RML Hospital opined that the cause of death was *cardio-pulmonary* arrest with gunshot injury in the chest with left *hemothorax with cardiac tamponade*. He had opined this on the basis of the hospital records since the death summary was under the signature of the Dr. Nayak who was no longer with the hospital.

8.11 PW-18, SI Sachin Mann stated that on receipt of DD No. 8A, he went with constable Vinod to SGM Hospital where he found that the deceased was found unfit for the statement by the doctor. Later,



he went to the spot with PW-11 Constable Vinod and PW-24 Inspector Satya Prakash and seized and sealed blood-stained bed sheet and one piece of scissors as Ex. PW-1/A and PW-1/B. The crime team was also called. Subsequently, he was part of the investigation alongwith PW-24 and apprehended appellants Dinesh and Deepak. As per their disclosure statements, appellant Dinesh @ Khali led them to recovery of country made pistol from near bushes at NDPL office, Industrial Area Phase-1, Mangol Puri and thereafter led them to a road going towards railway line and from the nearby bushes took out one country made pistol 0.315 bore. Before the proceedings, 4-5 passersby were asked to join the investigation, but no one joined the same. Further, in his cross-examination he stated that when he reached at deceased's house there was sufficient lighting in the street and around the other houses nearby.

8.12 PW-24, Inspector Satya Prakash (IO) stated that pursuant to DD No. 8A when he visited the Hospital and later to the place of incidence, DD No. 17A was recorded regarding death of Nagender Yadav. He conducted the raid on the absconding appellants. Appellant Dinesh and Deepak were apprehended while coming from the side of Peeragarhi Flyover, Outer Ring Road after a small chase and pursuant to the disclosure by appellant Dinesh, country made pistol was recovered from near the bushes of NDPL Office, Mangolpuri which had one empty shell. Before the proceedings, 4-5 passersby were asked to join the investigation, but no one joined the same. Further, in his cross-examination he stated that when he reached NDPL office at about 9:30 pm there was sufficient lighting. Thereafter both Dinesh and Deepak pointed out the place of



incident and at that time PW-I was also present whose statement was recorded.

8.13 PW-5 Retd. SI Mahender Singh, deposed that public persons were asked to join the investigation at the time of arrest & at the time of recovery, but none agreed to join the same.

8.14 Since absconding appellant Suresh was not traceable, NBWs were issued and on the basis of information received at the police station vide DD No.20A (Ex. PW-24/B), appellant Suresh was arrested by the police of PS DBG Road. On 21st August, 2012, PW-24 got issued production warrants of appellant Suresh and on 23rd August, 2012 reached the concerned Court where appellant Suresh was formally arrested.

8.15 CW-1 HC Bablu Lal, the court witness, testified that on 27th August, 2015 he was posted at P.S. Mangolpuri and process under Section 82 Cr.P.C. qua appellant Dinesh was assigned to him for execution. When he reached the house P-8/164, Mangolpuri, Delhi it was found locked. Thereafter, proclamation was made in the locality and statement of neighbor Gaurav were recorded and process was pasted on the outside of the house.

Analysis

9. After appreciating in detail the evidence on record and contentions of the counsels for the parties, this Court is of the considered view that the prosecution has been able to prove the guilt of the appellants beyond reasonable doubt, for *inter alia* the following reasons:



- 9.1 The death of the deceased was clearly homicidal having received a gunshot injury which led to the *cardio-pulmonary* arrest as per the deposition of PW-20 and PW-10.
- 9.2 The anchor of the prosecution's case is the dying declaration made by the deceased to PW-1, his wife, at his home, just after having been shot and still bleeding from the injury received; and later to PW-2, his elder brother who took him on the motorcycle to SGM Hospital in the injured condition. The dying declaration has to be therefore, examined in this crucible of facts and the applicable law.
- 9.3 As regards the testimonies of PW-1 and PW-2, there is consistency on the fact that they had been told by the dying deceased that he had been shot by appellant Dinesh who was accompanied by the other two appellants. Both PW-1 and PW-2 knew all the three appellants since they were residing in the same area. Moreover, PW-1 and PW-2 had both stated that the deceased had existing quarrel with appellant Dinesh who had come to his house in the year 2010 prior to the incident in intoxicated condition and abused and threatened the deceased.
- 9.4 PW-10 Angad Yadav's testimony, that he was not privy to disclosure made by the deceased to PW-2, has to be seen in the context that he was the one driving the motorcycle on which they took the critically injured deceased to the hospital and may not have been in a position to hear the details of the conversation between PW-2 and the deceased. Therefore, if his testimony is disregarded as being 'hearsay', his deposition to the extent that PW-2 had a conversation with the deceased on the bike and at the hospital, would have to be considered.



9.5 Also relevant for the purposes of examining the dying declaration is the condition of the deceased at the time of giving the dying declaration. Both PW-2 and PW-10 stated that the deceased was in a position to talk when they took him to the hospital. As per the MLC Ex. PW-6/A, the deceased was brought and examined at 1:05 a.m. on 16th May, 2012 and was conscious and oriented and reported in the hospital “walking”, the pulse of the deceased was recorded as 100 bpm and blood pressure was recorded 100/60 mmHg and there was an entry wound in the chest but no exit wound. The MLC otherwise records (as part of the proforma) that he was unfit for statement and should be reviewed with SR Surgery.

9.6 It is worthwhile adverting to the principles of law settled by various judgments of the Hon’ble Supreme Court. Relevant extracts of *inter alia* the following decisions would be instructive for our examination:

i) Atbir v. Govt. (NCT of Delhi), (2010) 9 SCC 1

“22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction



unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration”

(ii) *Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116:*

“21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.



(2) *The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage, or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.*

(3) *The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.*

(4) *It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.*

(5) *Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.”*



9.7 On the issue of proximity of dying declaration, the Hon'ble Supreme Court in *Sharad Birdhichand Sarda (supra)* propounded on the basis of principles encapsulated in Section 32 (1) of the Indian Evidence Act, extracted as under for the ease of reference.

Sec 32 (1) When it relates to cause of death. — When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

9.8 Enumerating the principles, therefore, applicable for reliance on a dying declaration, as culled out from the above decisions:

- (a) It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated.
- (b) The rule requiring corroboration is merely a rule of prudence. Merely because a dying declaration does not contain all the details as to the occurrence, it is not liable to be rejected.
- (c) The court must be satisfied that the deceased was in fit state of mind to make the statement. The deceased must have had a clear opportunity to observe and identify his assailants.
- (d) The deceased should be making the dying declaration without any influence or rancour.



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(e) It has to be seen whether it was the first statement in the point of time made by the injured and whether his statement was consistent if he had subsequent opportunities to make a dying declaration.

(f) Whether the dying declaration was made at the earliest opportunity and was not the result of tutoring by interested parties.

9.9 From an analysis of the evidence stated above and applying the principle of law as culled out, this Court notes as under:

firstly, dying declaration in itself can be the sole basis of conviction, even though, in this case, the dying declaration has been testified to and corroborated by PW-1 and PW-2;

secondly, the dying declaration of the deceased did specifically name the three assailants and the act of shooting by appellant Dinesh but was not expected to contain all further details and cannot be disbelieved on that count;

thirdly, the deceased was not totally impaired till much later when he was shifted from SGM Hospital to RML since he was taken on a motorbike by PW-2 and PW-10 and the MLC Ex. PW-6/A dated 16.05.2012 prepared by PW-12 where the time of examination is 01:05 a.m. the doctor opined that the deceased was conscious oriented and was reported in walking. Subsequently since the deceased probably started deteriorating in the hospital the proforma filled (*fit/unfit for statement*) of the MLC was ticked for *unfit for statement*. Also as is evident from testimony of PW-12 Dr. Das, post arrival first at SGM hospital he was given initial treatment and



reviewed with surgery and then referred to higher centre and shifted by ambulance to RML Hospital. As per testimony of PW-20 Dr. C.K. Durga (and the MLC and OPD Registration Card Ex. PW-20/A) he was received at 3:05 a.m. as unconscious and gasping. On examination, general condition of the deceased was very poor. Within 10 minutes of arrival, deceased deteriorated, emergency resuscitation was done, CPR was started but despite all the efforts, deceased could not be revived. Thereafter, he was declared dead at 3:40 a.m. However, it is quite evident that he was in a conscious state at the time when he came to the hospital and therefore, both his dying declarations made prior to arrival in hospital to PW-1 and PW-2 were in a conscious and oriented state;

fourthly, there was an opportunity for the deceased to observe and identify his assailants. He was outside of the gate when he was shot and as per the testimony of PW-18 there was sufficient lighting in the street when he had reached the house of the deceased that night. PW-1's testimony in this regard in her cross examination is also relevant where she volunteered that there was a street light outside their house at some distance;

fifthly, deceased did not seem to be under any influence of either PW-1 or PW-2 while making the dying declaration since he was in a condition when he was badly injured and bleeding. It would be untenable to assume that having been shot by some other assailants, he would have conjured up the names of appellants herein in particular to state that they were the ones who were responsible for his condition;



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sixthly, not only the deceased made the dying declaration at the point of time i.e. when his wife discovered him and he came struggling with the bullet injury from the gate to his house but also subsequently when he was being taken to the hospital on motorbike by PW-2 and PW-10;

seventhly, in the sequence of events when the dying declarations were made, it would not be justifiable to presume that the deceased would have been tutored in such a chaotic and critical state of affairs when he was severely injured. PW-1 and PW-2 would not have any reason to tutor the deceased in the situation when PW-1 was inconsolable, and PW-2 was worried about rushing the deceased to hospital for his immediate treatment in order to save his life.

9.10 Reliance on the dying declaration is further corroborated by the clear motive that the appellants had for killing the deceased. There is clear consistency in testimonies of PW-1 and PW-2 and in fact PW-10 that appellant Dinesh had some enmity / rancour with the deceased and as per PW-1 and PW-2 had threatened and abused the deceased at the house of the latter on previous occasion in 2010.

9.11 On the issue whether PW-2 and PW-10 can be relied upon being interested witnesses, it may be noted that the Hon'ble Supreme Court in ***Waman and Others Vs. State of Maharashtra (2011) 7 SCC 295*** held that just because certain persons are interested witnesses or relatives of the deceased, does not render their testimonies unreliable and unacceptable.

“15. In Sarwan Singh v. State of Punjab [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] , a three-Judge Bench of this Court, while



considering the evidence of an interested witness held that: (SCC p. 376, para 10)

'10. ... it is not the law that the evidence of an interested witness should be equated with that of a tainted [witness] or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of the interested [witness has] a ring of truth such evidence could be relied upon even without corroboration.'

16. *The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution was the brother of the wife of the deceased and was living with the deceased for quite a few years. This Court held that: (Sarwan Singh case [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] , SCC p. 379, para 16)*

'16. ... But that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true.'

9.12 Now coming to the submission made by the learned counsels for the appellants that statement of PW-1 was recorded much later and therefore, she could have manipulated and doctored the point of dying declaration. On a careful examination of the testimonies, it is evident that the events leading to death of the deceased had happened from about 12:30 a.m. till 3:40 a.m. when death of the deceased was reported. In the intervening time while rushing back and forth from the hospital, PW-1 stated that she indicated the names of the appellants to the police, however her formal statement was recorded later.

9.13 There is no reason for this Court to disbelieve that in the intervening time PW-1 and PW-2 ought to have disregarded saving



the life of the deceased and would have focused on giving statement to the police at that time. Statement of PW-2 was recorded after PW-2 and PW-10 came back from the hospital and PW-1 was recorded the next day, a few hours after the deceased was reported dead by the hospital. There was also no reason to suspect that even by the morning of 16th May, 2012 when the initial investigation was being monitored and recorded by the police, they would have conjured up the names of these three appellants as an attributed a dying declaration to them.

9.14 In *State of Rajasthan v. Wakteng* (2007) 14 SCC 550, the Hon'ble Supreme Court notes that a dying declaration can be the basis for conviction since great solemnity and sanctity is attached to the words of a dying man because of a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. But the court did caution that one has to be careful to examine the circumstances surrounding that statement and that it should lead to a conclusion that the dying declaration was true and voluntarily before it becomes sufficient for the purposes of conviction.

9.15 As regards the submission that the other appellants besides appellant Dinesh could not be held guilty under the principle of agency under Section 34 and common intention, this Court is of the view that once the dying declaration which is duly corroborated by two witnesses is to be believed, the issue of being exculpated for there being no common intention on the part of appellants Deepak and Suresh, Dinesh having shot the deceased, is not sufficient to presume their innocence.



9.16 The observations of the Hon'ble Supreme Court in *Krishnamurthy alias Gunodu and Others Vs. State of Karnataka* (2022) SCC OnLine SC 230 are instructive in this regard:

“12. In *Suresh v. State of Uttar Pradesh*, R.P. Sethi, J. in his concurring judgment (for himself and B.N. Agarwal, J.) on the question of common intention has observed:

‘38. Section 34 of the Penal Code, 1860 recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Penal Code, 1860 (hereinafter referred to as “the Code”) is the element of participation in absence resulting in the ultimate “criminal act”. The “act” referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.



40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word “act” used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in SatruganPatar v. Emperor held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.”

14. This “criminal act” under Section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the “ultimate criminal act” normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention, every person, who has committed a part of the criminal act with the common intention, will be responsible for the offence. It was accordingly held in Afrahim Sheikh (supra) as under:



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'8. ...Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which s. 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 or 35 again come into play. Here, the common intention was to beat Abdul Sheikh, and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in s. 299, I.P.C. applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and s. 34 also speaks of intention.

(emphasis supplied)

9.17 It is worth noting that these three appellants had together with pre-meditation, gone in the wee hours of the night to the house of the deceased and confronted him pursuant to which appellant Dinesh shot the deceased and then all three ran away from the scene. Moreover, their subsequent conduct of absconding from that area is also relevant to bring home the case of the prosecution. It is quite clear from the decisions cited above of the Hon'ble Supreme Court that Section 34 IPC can be invoked against persons accompanying the main assailant if they were part and parcel of the overall act



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which resulted in the offence even though they may not have individually committed that act which resulted in the offence. Each of those who participated would be responsible under Section 34 IPC for the “*total effect produced*”.

Conclusion

10. In light of the above discussion and analysis, this Court is of the view that the guilt of the appellants is proved beyond reasonable doubt and therefore, the judgment of the learned Trial Court is upheld both on conviction of the appellants and the order on the sentence.

11. Appeals are accordingly dismissed.

CRL.M.B. 436/2022 in CRL.A. 85/2019 and CRL.M.A. 11427/2021 in CRL.A. 107/2019

12. In view of dismissal of the appeals, the aforementioned applications are disposed of as infructuous.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

OCTOBER 12, 2022/sm