

IN THE HIGH COURT AT CALCUTTA**Criminal Revisional Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****C.R.A. No. - 377 of 1987****IN THE MATTER OF****Mritunjoy Rana @ Gora****Vs.****State of West Bengal.**

**For the Appellant : Mr. Prabir Kr. Mitra, Adv.,
Ms. Ariba Shaheb Adv.**

**For the State : Mr. Narayan Prasad Agarwal, Adv.,
Mr. Pratick Bose Adv.**

Judgment on : 17.02.2023

Subhendu Samanta, J.

The instant appeal has been preferred against the judgment and order passed by the Learned Sessions Judge, 3rd Court Medinipur on 26.08.1987 in Session Trial Case No. (v) of January 1986 arising out GR Case No. 744 of 1983 thereby convicting the appellant to undergo rigorous imprisonment for one year for offence punishable u/s 148 of IPC and also to suffer rigorous imprisonment for 5 years for his offence punishable u/s 304 part 2/149 of IPC; both sentences are ordered to run concurrently.

In a nutshell the prosecution case is that the land owners of village Dherchhara were having some problem over procurement of local agricultural labours as this labours were instigated by the local CPI(M) followers not to serve at the prevailing rate of Rs. 5.00 per day. At this the land owners stopped engaging the local labours and started cultivating themselves or by way of appointing outside labours. This enraged the CPI(M) followers to protest against this and decided to loot the paddy cultivated by those land owners. On 20.11.1983 the CPI(M) followers took out a very big procession in that area and the processionists were armed with bow and arrow e.t.c. The processionsits came to the field to loot away the paddy grown by the land owners and kept stocked in the field after cutting the same. As the land owners including Kartik Patra protested against such of act thus the procesionsit they started shooting arrows from their bows; and arrow shoot by the appellant hit on the chest of Kartik Patra and another by arrow short by another processionists namely Khagen Patra hit on the leg of Baren Poyra. Both of them were removed to the hospital. Baren Poyra somehow saved but Kartik Patra was succumbed to his injury on 30.11.1983. Both the injured made statement before the doctor and the statement of Kartik Patra was recorded by the attending physician as dying declaration. The written complaint was filed by one Ajodhya Patra on the basis of which the case was started by the police. After completion of investigation police submitted charge sheet and all the 15 accused persons were charged u/s 148,304/149 and 304(i)/149 of IPC.

During the trial 13 witnesses were produced by the prosecution to prove the case amongst them most of the witnesses turned hostile. The dying declaration of Kartik Patra was marked as exhibit- 3. Learned sessions Judge, after hearing arguments and after perusing the materials on record acquitted all the accused persons from the case except the appellant. Learned Sessions Judge, is of view that the conviction is only based on dying declaration of deceased Kartik Patra.

Learned Advocate for the appellant submitted before this court that the order of conviction passed by the Learned Sessions Judge, against the present appellant is not at all based on the facts and circumstances of this case. He further argued that the dying declaration of Kartik Patra which was marked as Exhibit 3, has no evidentiary value in the eye of law. he further argued that the dying declaration cannot be the sole ground for conviction in this case while no witness uttered a single word against the present appellant. He further argued that the prosecution has measurably failed to prove the case beyond reasonable doubt for which all the 14 accused persons were acquitted from this case. Learned Sessions Judge, has mislead and misappreciated the facts and circumstances of this case and he passed the order of conviction only on the basis of dying declaration which is not permissible in the eye of law.

He further argued that the dying declaration was not coupled with a certificate of the attending doctor; so, the dying declaration has no value in the eye of law. He further argued that the dying declaration in this case was recorded by the doctor who was deposed as PW 7 the doctor admitted that he did not endorse any certificate regarding the mental condition of the patient before recording the dying declaration.

Learned Advocate for the appellant further argued that the order of conviction passed by the Learned Sessions Judge, solely on the basis of the dying declaration is not at all correct appreciation of law. He argued that the Hon'ble Supreme Court in several Judgments has made several direction that the conviction can not only the sole basis of a dying declaration.

He cited several decision in that score. They are-

2002 SCC (Cri) 1575 (Ramilaben hasmukhbhai khristi and Anr.Vs. State of Gujarat)

In this case the Hon'ble Supreme Court has held that-

Under the law dying declaration can from the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of such a dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

None of the dying declarations in the present case contained any certificate by the doctor about the mental fitness of the injured to make a statement although the doctor was always available. In two dying declarations it was only indicated that the deceased was conscious. No amount of subsequent statement of the doctor can supplement the endorsement of certificate while recording the dying declaration. The first two statements had been recorded in quick succession without waiting for the Magistrate to arrive even though steps had been taken for recording of the dying

declaration by the Magistrate. There are deviations from statement to statement consistency is conspicuously missing. In two dying declarations he had stated about being beaten by the accused persons but no such injuries are found in any report. There was no eyewitness to the incident. No corroboration was there from any corner. Looking to all the facts and circumstances of the case, it must be held that it is not a case in which conviction can be recorded only on the basis of the dying declarations which fail to inspire confidence. The prosecution story as put forward does not inspire confidence on the basis of the material placed on record. All the three appeals are therefore allowed and the conviction and sentence passed against the appellants are set aside. They shall be set free forthwith unless wanted in any other case.

2002 SCC (Cri211) Panchdeo Singh Vs. State of Bihar) in this judgment the Hon'ble Supreme Court has held that

Dying declaration itself can be treated as a substantive piece of evidence and can be the basis of an order of conviction and sentence without there being any corroboration provided, however, the same brings forth a sense of confidence and trustworthiness in the mind of the court. The issue thus becomes as to whether the dying declaration has been able to bring about the confidence thereon or not-is it trustworthy or is it a mere attempt to cover up the laches of investigation: it must allure to

the satisfaction of the court that reliance ought to be placed thereon rather than a distrust the confidence of the court is the summon bonum and in the event of there being any affirmation thereto in the judicial mind question of any disbelief or distrust would not arise. In the event however of there being some infirmity, howsoever negligible it be the court unless otherwise satisfied about the credibility thereof ought to look for some corroboration, if however it is otherwise question of requirement of a corroboration would arise: dying declaration alluring confidence of the court would be a sufficient piece of evidence to sustain conviction. There is no format as such of dying declaration, neither the declaration need be of any longish nature and neatly structured. As a matter of fact, perfect wording and neatly structured dying declaration may bring about an adverse impression and create a suspicion in the mind of the court since dying declarations need not be drawn with mathematical precision-the declarant should be able to recollect the situation resulting in the available state of affairs.

2003 SCC (Cri) 246 Chacko Vs. State of Kerala) in this case Hon'ble Supreme Court has held that

It is very difficult to accept the prosecution case that the deceased who was of about 70 years and had suffered 80% burns could make a detailed dying declaration after 8 to 9 hours of the burning giving minute particulars as to

the motive the manner in which she suffered the injuries. This, itself creates a doubt as to genuineness of the dying declaration. Further in the absence of any certificate by a competent doctor as to the mental and physical condition of the deceased to make such a dying declaration, it is not safe to rely on the same. Although it is not always necessary that a dying declaration should be certified by a doctor before reliance could be placed on the same but then in the absence of any such certificate, the courts should be satisfied that from the material on record it is safe to place reliance on such uncertified declaration. In the instant case it is not as if the doctor was not available. The doctor who treated the deceased in the first instance was available at the time when the deceased allegedly made the dying declaration still he had neither given a certificate as to the condition of the deceased nor has he attested the said document. That apart, a perusal of the dying declaration shows that the contents of the documents were so arranged as to accommodate the space which was above the thumb impression which is not a normal way of recording a statement if the same was genuine. This is also a ground to suspect the genuineness of the document. Then again, on the day of occurrence at about 5.30 p.m. the police had known that it was the appellant who had committed this crime but in the inquest report which was drawn on the next

day in column 12 corresponding to the name of the suspect, it was specifically mentioned "No" meaning thereby that the officer who drew this document did not have the knowledge that it was the appellant who had caused the injury. This was the very same person (PW 5) who had scribed the dying declaration. The above factor coupled with the manner in which the incident had been recorded in the dying declaration certainly creates a doubt as to the genuineness of the dying declaration. The fact that the doctor, had recorded that "patient conscious, talking "in the wound certificate by itself would not in any manner further the prosecution case as to the condition of the patient to make the dying declaration nor does his oral evidence as also that of the investigating officer made in the court for the first time would in any manner improve the prosecution case. In view of the fact that the courts below have solely relied on the dying declaration without noticing these doubtful circumstances and there being no other evidence in support of the prosecution case, it is unsafe to place reliance on the evidence adduced by the prosecution to base a conviction.

On the basis of the above mentioned citations Learned Advocate for the appellant submits that the Judgment of Conviction passed by the Learned Sessions Judge, is liable to be set aside and the appellant is liable to be acquitted.

Learned Advocate appearing on behalf of the state submits that the prosecution has produced as many as 13 witnesses. Amongst them, the doctor has deposed as PW 7. He deposed before the Learned Sessions Judge, that the patient, i.e. Kartik Patra was mentally fit and alert to state the facts at the time of recording of dying declaration. It was duly collected by the I.O. of this case and it was produced before the Learned Sessions Judge, which was marked as Exhibit 3. There are no circumstances for which the dying declaration can be disbelieved. No further circumstances was placed before the Learned Sessions Judge that, why the deceased Kartik Patra shall utter the name of the present appellant at his death bed. He further pointed out that the judgment of the Learned Sessions Judge, is well founded on the appreciation on the facts and circumstances of this case so, it cannot be set aside.

Heard, the Learned Advocates perused the Judgment and law laid down by the Hon'ble Apex Court. The Hon'ble Supreme Court in all the cases has formulated the principle that the dying declaration can form the sole basis of conviction if it is free from any kind of doubt. The mental fitness and alertness of the maker of the dying declaration is very much necessary. So, the Hon'ble Apex Court has make it clear that before the dying declaration can be taken to be the sole evidence for the purpose of conviction certain safeguards like certificate of medical officers, evidence of any attending nurse, the test report of physical and mental alertness of the maker of the dying declaration has to be looked into.

In this case the dying declaration was marked as Exhibit 3. I have perused the dying declaration. It appears from the dying declaration that it was signed by the medical officers and there is no endorsement/certificate regarding the mental and physical fitness of Kartik Patra at the time of recording of dying declaration. However, it appears that one Malati Addhya, an attending nurse, was present at the time of recording of the statement wherein she made an

endorsement that she was present at the time of recording of the dying declaration of Kartik Patra. Such Malati Addhya deposed as PW 8 before the Learned Magistrate. Surprisingly it appears that Malati Addhya PW 8 was only tendered by the prosecution of cross-examination of the defence. Consequently the Cross- Examination of PW 8, Malati Addhya was declined by the defence. Thus it appears from the evidence of prosecution that the person who stated to be present at the time of recording of the dying declaration stated nothing before the Sessions Judge, moreover, PW8 did not identify his signature over the dying declaration; no statement of PW 8 was forwarded by the prosecution to prove that the deceased Kartik Patra was physically fit and mentally alert to make such statement.

Learned Sessions Judge, in passing the order of conviction has placed his full reliance on Exhibit 3 on the ground that a person in death bed cannot lie. Learned Sessions Judge, has ignored the evidence of PW 6 who stated that while Kartik Patra was being taken to the hospital he was told by PW6 that he was hit by the appellant.

So, in this case there was a prosecution witness who deposed that the Kartik Patra was tutored to speak the name of the appellant but the Learned Sessions Judge has ignored his version on the ground that Kartik Patra cannot lie at his death bed. On appreciating all the evidences on record and also appreciating the dying declaration. Let me consider whether the Exhibit 3 can be treated as a substantive piece of evidence so that on the basis of which the conviction of appellant can be well founded.

The nature of dying declaration recorded in this case is appears to be peculiar. The dying declaration was recorded by PW 7 who admitted in his cross examination that he could not remember whether the dying declaration was read over to the patient or not. He also admitted he did not made any endorsement or any noting in dying declaration. PW 8 who alleged to be present at the time of

recording of some dying declaration stated nothing before the Sessions Judge.

Prosecution did not state any circumstances for which it can be presumed that the dying declaration could not be recorded in presence of Magistrate. Whats the hurry for the doctor to record dying declaration? – unanswered.

Considering the entire circumstances and also considering the guidelines of Hon'ble Apex Court as mentioned above, it is the fact that the dying declaration cannot be said to be substantive piece of evidence as the oral evidences are not actually corroborating the factum of recording of the dying declaration. The certificate of the doctor is also missing; the witness who was allegedly present at the time of recording dying declaration kept herself mum, while she had a duty to speak. It creates doubt whether the dying declaration is actually the mental Act of the deceased or not. More over the evidence of PW 6 create the confusion. Considering the entire circumstances I am of view that the dying declaration in this case as mark as Exhibit 3 cannot be said to be a substantive piece of evidence on the basis of which the order of conviction can be passed upon.

Thus after considering the entire aspect, evidences on record and also after perusing the judgment law of Hon'ble Apex Court I am of a view that the order of conviction passed by the Learned Sessions Judge solely passed on the basis of the dying declaration is not at all correct appreciation of facts and circumstances of this case. I find merits to entertain the instant appeal and the impugned Order and Judgment passed by the Learned Additional Sessions Judge, is liable to be set aside

The Criminal appeal is allowed. The impugned order passed by the Learned Sessions Judge in Session Trial Case No. (v) of January 1986 arising out GR Case No. 744 of 1983 is hereby set aside.

The Appellant namely Mrityunjay Rana Alias Gora is hereby acquitted from the case.

The appellant is on bail, he has said liberty at once.

The sureties standing in his favour are also released.

CRA is disposed of any Order of stay passed by this court during the continuation of this instant Criminal Appeal is here by also vacated.

(Subhendu Samanta, J.)