

IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-D-342-DB-2018 (O&M)
Date of Decision: 15.12.2023

Ramesh & anotherAppellants

Versus

State of HaryanaRespondent

**CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL
HON'BLE MR. JUSTICE GURBIR SINGH**

Present: Mr. Prem Chand Chaudhary, Advocate, for the appellants.

Mr. Karan Sharma, DAG, Haryana.

GURVINDER SINGH GILL, J.

1. The appellants, namely, Ramesh and Naresh @ Bablu assail judgment of conviction and order of sentence dated 09.02.2018 passed by the learned Sessions Judge, Kaithal, whereby they have been held guilty of having committed offences under Sections 365 and 302 read with Section 34 IPC in FIR No.327 dated 18.09.2017 registered at Police Station Pundri and sentenced to undergo imprisonment as under:

Offence/ U/s	Imprisonment	Fine	In default of payment of fine, imprisonment
Section 302 read with Section 34 IPC	Imprisonment for life	Rs.1,00,000/- each	Simple Imprisonment for 10 months
Section 365 read with 34 IPC	Rigorous Imprisonment for 2 years	Rs.10,000/- each	Simple Imprisonment for 1 month

2. It is the case of prosecution that a telephonic intimation was received by Police Post Pundri on 12.09.2017 from Police Station Pundri regarding admission of one Arun in Government Medical College and Hospital, Sector-32, Chandigarh having sustained injuries in a quarrel. On 13.09.2017, ASI Raj Kumar reached the said Hospital and sought the opinion of the Doctor regarding fitness of Arun to make a statement, but he was declared unfit to make statement. ASI Raj Kumar again visited the Hospital on 15.09.2017, but even on the said day, Arun was declared unfit to make statement. ASI Raj Kumar, thereafter, contacted Vishal, brother of Arun, on 16.09.2017 and also on 17.09.2017, but was informed by Vishal that his brother Arun was still unconscious. Statement of Vishal was recorded on 18.09.2017, wherein he alleged that his elder brother Arun owed some amount to Ramesh and Bablu though he did not know as to on what count his brother owed the said amount. The complainant (Vishal) alleged that on 06.09.2017, Ramesh and Bablu had come to their house on a motor-cycle and had enquired about the whereabouts of Arun and that the complainant had informed them that Arun was away to market. The complainant further stated that Arun, however, did not return home that day and it was around 5.00 PM on 07.09.2017 that Arun returned home and that he was having a large number of injuries on his body and that Arun disclosed that Ramesh and Bablu had taken him from market on 06.09.2017 on the pretext that they were going to have a party in a hotel and that he was taken to a *Dhabha* (road side eatery) where they consumed liquor and that Bablu slapped him and had demanded money from him. The complainant further stated that his brother Arun further disclosed that the aforesaid persons took him

ahead of Village Teontha on the bank of water distributory on a motor-cycle and gave beatings to him with *Danda* and also gave him fist and kick blows and it was later when two persons came on a motor-cycle that the assailants ran away from the spot and some passer-by left the complainant's brother on main road from where the complainant's brother managed to return home on a tempo. The complainant took his brother to Hospital at Pundri, but on account of complications, he was got admitted in Government Medical College and Hospital, Sector-32, Chandigarh on 12.09.2017, but he did not regain consciousness and that on 17.09.2017, the complainant got his brother admitted in Mukut Hospital, Sector-34, Chandigarh and that he (Arun) ultimately succumbed to injuries on 20.09.2017.

3. The matter was investigated by the police during the course of which post-mortem examination of the dead body was got conducted. The police visited the place of occurrence and also recorded the statements of the witnesses in terms of Section 161 Cr.P.C. Both the accused were arrested on 20.09.2017. During the course of interrogation, they suffered disclosure statements on 21.09.2017 and confessed their guilt. While accused Ramesh disclosed that after the incident he had gone to the residence of his sister Kela at Village Kalheri and that he had concealed the *Danda* in her house, Naresh @ Bablu in his disclosure statement stated that he had also gone to the residence of his sister Nirmala at Village Bastara and that the motor-cycle used by them and the *Danda* used by him have been kept concealed by him in the fields of his sister. However, when the accused were being taken to the disclosed places for getting the recoveries effected, they resiled from their previous statements

and suffered fresh disclosure statements, wherein Naresh stated that he had kept the motor-cycle and the *Danda* in a room constructed near tubewell in the fields of Jagdish and Ramesh disclosed that he had kept concealed the *Danda* at the back of the room constructed near the tubewell installed in the fields of Jagdish. Pursuant to said disclosure statements, the motor-cycle and the *Dandas* were got recovered by the accused.

4. Upon conclusion of investigation, challan was presented against the accused, which was committed by the Illaqa Magistrate to the Court of Sessions vide order dated 20.12.2017. The Court of Sessions, upon finding that the evidence collected prima facie shows that the accused had committed offences punishable under Section 302 IPC and Section 365 read with Section 34 IPC, framed charges against the accused on 19.01.2018 to which the accused pleaded not guilty and claimed trial.
5. The prosecution in order to establish its case examined as many as 13 witnesses. PW-1 Krishan Kumar stated that he is running a *Dhabha* (road side eatery) under the name & style of '*Dhabha Mitran Ka*' at Pundri-Kaithal road and about 3 months back, deceased Arun alongwith 2-3 boys had come to his *Dhabha* at about 11.00 PM and had taken dinner. However, he stated that he could not tell as to who was accompanying the deceased Arun on the said day and that the accused present in the Court were not the said persons. The said witness was permitted to be cross-examined by the Public Prosecutor, but nothing substantial elicited during cross-examination.

6. PW-2 Vishal, who is the complainant and brother of the deceased, has stated in tune with the version set-forth in the FIR to the effect that on 06.09.2017, Ramesh and Bablu had come to their residence and had taken along his brother Arun with them and that when his brother returned home on the next day, he (Arun) had disclosed that Ramesh and Bablu had taken him to road side *Dhabha* and they had consumed liquor and later he was taken to a bank of water distributory and was given beatings and it was when two motor-cycle riders came there that the assailants fled away from the spot leaving him there. PW-2 Vishal further stated that his brother had disclosed that some passer-by helped him and took him to the main road and left him there and from where he took a lift in a tempo and returned to home. PW-3 Jagdish, who is the uncle of the deceased Arun, has also stated identically, as stated by the complainant Vishal, regarding deceased having disclosed to him about the manner in which the accused had given beatings to the deceased Arun.
7. PW-4 ASI Rambir stated that on 18.09.2017 pursuant to receipt of written intimation Ex.P-2, he had recorded the formal FIR Ex.P3 and had sent special reports to the Area Magistrate and to the senior police officers. PW-5 Constable Ashok Kumar stated that he had remained associated with the investigation with Inspector Ranbir Singh and that on 21.09.2017, the accused had suffered disclosure statements regarding concealment of motor cycle and weapons of offence by them and that later both of them resiled from the said statement and disclosed a different place where they had kept the motor-cycle and the *Dandas* concealed. He further stated that pursuant to such disclosure statements, the accused had got the motor-cycle and two *Dandas* recovered. PW-6 Somdutt, who had

prepared the scaled site plan of the place of occurrence proved the same as Ex.P14. PW-7 Pawan Kumar, who was the registered owner of the motor-cycle bearing registration No.HR75A-0731, stated that he had sold the said motor-cycle to Naresh and handed over all the documents to him, but Naresh did not get the ownership transferred in his name.

8. PW-8 SI Raj Kumar stated that on 12.09.2017, when he was posted as ASI in Police Station Pundri, a telephonic message was received from the Police Post situated in the Government Medical College and Hospital, Sector-32, Chandigarh as regards admission of Arun and that he had proceeded to the said Hospital and sought opinion of the Doctor regarding fitness of Arun on 13.09.2017 and 15.09.2017, but said Arun was declared unfit to make statement. He stated that later he had contacted Vishal, brother of Arun, telephonically on 16.09.2017 and 17.09.2017 and was informed that his brother was still unconscious and that it was thereafter he recorded the statement of Vishal on 18.09.2017. PW-9 SI Ishwar Singh, who had also conducted part of the investigation, stated with respect to the same. PW-11 Inspector Ranbir Singh, who is the Investigating Officer, has stated in detail in respect of the investigations conducted in the matter and has proved various documents prepared during the course of investigation. He stated that upon conclusion of investigation, final report under Section 173(2) Cr.P.C. was prepared on 13.12.2017 and was presented in the Court.
9. PW-10 Dr. Kavita Goel, who was part of the Medical Board which had conducted post-mortem examination of the dead body, deposed about the same and proved the post-mortem report as Ex.P24. PW-12 Dr. Kanwar

Singh Bhinder, Senior Resident, Department of General Medicines, GMCH, Sector-32, Chandigarh proved the case summary as Ex.P-29. PW-13 Major Dr. Rajiv Gupta, Mukut Hospital, Sector-34, Chandigarh stated about the condition of Arun while he was admitted in the said Hospital.

10. Upon conclusion of the prosecution evidence, statements of the accused were recorded in terms of Section 313 Cr.P.C. wherein entire incriminating evidence against them was put to them to enable them to explain the same, but the accused denied the entire case of the prosecution in *toto* and pleaded false implication. The accused, however, did not lead any evidence in their defence.
11. The learned trial Court, upon appreciating the evidence, held that the prosecution had successfully established the charges framed against accused and accordingly, convicted and sentenced the accused for offence punishable under Sections 365 and 302 read with Section 34 IPC vide impugned judgment. Aggrieved by the same, the accused have preferred the present appeal.
12. Learned counsel for the appellants, while assailing the impugned judgment, has vehemently argued that it is a case based totally on circumstantial evidence and that there is no eye-witness to the occurrence in question. It has been submitted that although the prosecution claimed that two persons had helped the injured (Arun) and had taken him from the place of occurrence and had left him on the main road and that thereafter the injured (Arun) had taken a lift in a tempo to his home, but none of the said persons have been examined as a witness. Learned

counsel further submitted that the trial Court fell in error in relying upon the statements of PW-2 Vishal (complainant), brother of the deceased and PW-3 Jagdish, uncle of the deceased although even the said persons, who are closely related to deceased, are not eye-witnesses and at best, it could be said that the deceased had suffered some kind of oral dying declaration before them to which no credibility or sanctity can be attached particularly when there is no other evidence to corroborate the said dying declaration. It has further been submitted that although the prosecution examined one Krishan Kumar, *Dhabha* owner, as PW-1, but the said PW also resided in the witness-box and did not identify the assailants to be persons, who had come to his *Dhabha* on the day of occurrence with the deceased Arun. It has further been submitted that even the motive, as alleged in the FIR that the deceased owed some money to the assailants, is not proved as neither the complainant nor the uncle of the deceased stated anything with regard to the alleged motive and that there is no other evidence to show that the deceased owed any amount to the accused/appellants. It has further been submitted that there is a delay of about a week in lodging the FIR, which has virtually remained unexplained which also would prove fatal to the case of the prosecution. Learned counsel has, thus, submitted that the impugned judgment of conviction and order of sentence are not sustainable and has prayed for setting aside the same and for acquittal of the accused/appellants.

13. On the other hand, learned State counsel, while opposing the appeal, has submitted that the statements of the complainant PW-2 Vishal, brother of the deceased and PW-3 Jagdish, uncle of the deceased cannot be discarded solely on the ground that they happen to be related to the

deceased and that it is well-settled that even an oral dying declaration can well be taken into account and is not to be discarded. Learned State counsel has further submitted that the delay in lodging FIR cannot be said to be fatal to prosecution in every case and as a matter of fact the delay in the present case had occurred as the deceased was admitted in the Hospital and had not been declared fit for couple of days for recording his statement and it was subsequently after a couple of days, that the police chose to record the statement of his brother Vishal on the basis of which FIR in question was lodged. Learned State counsel has, thus, prayed for dismissal of the appeal.

14. We have considered the rival submissions addressed before this Court and with the assistance of learned counsel have also perused the record of the case.
15. While the medical evidence led by the prosecution does show that it is a case of homicidal death, but there is hardly any evidence to establish that it is the appellants, who are the author of the injuries inflicted upon the deceased leading to his death. The reasons for such opinion are delineated in the forthcoming discussion. The injuries found on the dead body, as are mentioned in the post-mortem report Ex.P-24, are reproduced hereinunder:

- “1. Whole body was swollen up.
2. Multiple dark black crusted healed superficial lacerated lesions, size 1 centimeter x 1 centimeter on whole chest, abdomen, both hands, both legs and back approximately 75-100 in numbers.
3. Body colour was dark black to yellow pigmented.
4. A deep punctured wound of size 0.5 centimeter round sharp edges on right side of neck for I/V cannula for central line management.

5. On head dissection, swelling of brain tissue was showing cerebral edema.”
16. The cause of death, as has been opined by the Medical Board, reads as under:

“After post-mortem examination, in our opinion that the cause of death in this case was Septic shock followed by its complications and multiple organ failure which was ante-mortem in nature and sufficient to cause death in ordinary course of life.”

17. It is mainly the testimonies of PW-2 Vishal (complainant) and PW-3 Jagdish, who are brother and uncle of the deceased respectively, on which the prosecution banks to establish its case. Both the aforesaid witnesses have stated with regard to what was narrated to them by the deceased, when he returned home after having sustained injuries. The deceased died after about two weeks of the said incident. The position regarding admissibility of an oral dying declaration is fairly well-settled inasmuch as while the same can be taken into account, but unlike a dying declaration recorded by the Magistrate in the presence of a Doctor, the Court has to act cautiously while considering the reliability of an oral dying declaration that too made before the near relatives of the deceased. Hon'ble the Supreme Court in Balbir Vs. Vazir, (2014) 12 SCC 670 held as follows:

"It is well settled that an oral dying declaration can form the basis of conviction if the deponent is in a fit condition to make the declaration and if it is found to be truthful. The courts as a matter of prudence look for corroboration to oral dying declaration."

Hon'ble the Supreme Court in Waikhom Yaima Singh Vs. State of Manipur, (2011) 13 SCC 125, while dealing with a case of oral dying declaration underlined the importance of evidence regarding fitness of declarant. The relevant extract reads as follows:

- "19. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about this dying declaration is that, firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.
20. There can be no dispute that the dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact words are not available. They differ from witness to witness."
18. In the instant case, this Court finds that there is hardly any other evidence to lend corroboration to the oral dying declaration in the nature of statements of PW-2 Vishal (complainant) and PW-3 Jagdish, brother and uncle of the deceased. The only piece of evidence on which the prosecution had laid hands was in the nature of CCTV footage stated to have been collected from the cameras installed at '*Dhabha Mitran Ka*'. However, the said CCTV footage has not been proved on record. Although the owner of the said *Dhabha*, namely, Krishan Kumar was examined by the prosecution as PW-1, but he completely resiled while in

the witness-box and categorically stated that the accused present in the Court were not accompanying the deceased when the deceased had come to his *Dhabha*.

19. Other than the aforesaid witness, this Court is left with the recovery of a motor-cycle and two *Dandas* (sticks) at the instance of the accused pursuant to their disclosure statements. Though the factum of recovery of the motor-cycle and *Dandas* (sticks) at the instance of the appellants can be taken into account, but the recoveries of the said *Dandas* (sticks) are not shown to be stained with any blood nor is there any other blood stained cloth or blood stained soil. The said factum of recovery of *Dandas* shorn of any other evidence would not advance the case of the prosecution in any manner.
20. It is well-settled that in a case of murder, motive takes a back seat, but in a case based solely on circumstantial evidence, motive certainly assumes importance. In the present case, although the complainant did allege a vague motive in the FIR to the effect that his brother (deceased) owed some amount to the appellants though it was not known as to on what count, he owed the said amount, but no evidence to substantiate the said motive has been led. Rather, this Court finds that the testimonies of PW-2 Vishal and PW-3 Jagdish, brother and uncle of the deceased, are absolutely silent with regard to motive. Consequently, the case of the prosecution stands weakened on the said count as well.
21. Now coming to the effect of delay in lodging of FIR, while the occurrence in the instant case is stated to have been taken place on 06.09.2017 and it was on 07.09.2018 that the deceased had allegedly disclosed to his brother

Vishal (complainant) and also to his uncle as regards the injuries inflicted to him by the accused, but it remains unexplained as to why the said factum was not disclosed by the complainant (Vishal) or by the uncle of the deceased to the police and they waited for a week for doing so. Rather, it is the case of prosecution itself that upon finding that the Doctor had declared Arun (deceased) unfit to make statement on 13.09.2017 and 15.09.2017, PW-8 Raj Kumar had telephonically contacted the complainant Vishal, brother of the deceased on 16.09.2017 and 17.09.2017, but interestingly, the only information collected from Vishal is with respect to the fitness of Arun and no details with respect to occurrence were ever recorded. It was only on 18.09.2017 that the FIR was lodged on the basis of statement made by Vishal. While it is well-settled that delay *ipso facto* would not lead to discarding the case of prosecution, but delay is a fact, which would put the court on caution and the evidence led would be required to be scrutinized minutely so as to be assured that the FIR is not a result of an afterthought. In the instant case, the delay in lodging the FIR will certainly assume humongous importance, given the fact that it is a case based on circumstantial evidence and that there is no eye-witness to the occurrence and the prosecution mainly banks upon the oral dying declaration allegedly made by two persons, who are closely related to the deceased. Under these circumstances, the factum of delay in lodging the FIR is also a fact, which corrodes the credibility of the prosecution story.

22. As an upshot of our discussions made above, we are of the opinion that the oral dying declaration in the shape of testimonies of PW-2 Vishal (complainant) and PW-3 Jagdish, who are closely related to the deceased

and which are shorn of any other corroboration, cannot be relied upon so as to held that it is the appellants, who had murdered the deceased.

23. Consequently, we are unable to affirm the findings of conviction of the appellants recorded by the trial Court and the same are hereby set aside. The appeal merits acceptance and is hereby accepted. Both the appellants are acquitted of all the charges framed against them. They shall be set at liberty forthwith, if not required in any other case.
24. Pending application, if any, stands disposed of as well.

(GURVINDER SINGH GILL)
JUDGE

15.12.2023
Vimal

(GURBIR SINGH)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No