



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

% Reserved on: 24th May, 2023
Decided on: 26th June, 2023

+ **CRL.A. 1195/2018**

JITENDER alias VIKASH alias ALLU Appellant
 Represented by: Mr.Vineet Dhanda, Amicus Curiae
 with Mr.Vinay Yadav and
 Ms.Gurleen Kaur, Advocates.

versus

THE STATE OF DELHI Respondent
 Represented by: Ms.Shubhi Gupta, APP for the State
 ACP Suresh Kumar with Inspector
 Satender Pal Singh.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By this appeal, the appellant challenges the judgment of the learned Trial Court dated 22nd September, 2018 whereby the appellant was held guilty for murder of one Ankit @ Gulu ("deceased"). The appellant also challenges the order on sentence dated 24th September, 2018 whereby the appellant was directed to undergo rigorous imprisonment for life along with fine of ₹10,000/- in default whereof simple imprisonment for 1 year for offence punishable under Section 302/34 of the Indian Penal Code, 1860 ("IPC"). Co-accused Ravi @ Tati was acquitted of the charge.

2. Brief facts of the prosecution case are that information was received from SRHC Hospital by Ct. Parambir (PW-5) that the deceased was admitted

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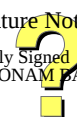
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in the hospital with the history of gun-shot injury which was recorded vide DD No.2B (Ex.P-9) which was marked to SI Jaibir (PW-22). Accordingly, SI Jaibir along with HC Mehtab reached the hospital where the deceased was found admitted and was fit for statement. SI Jaibir recorded the statement of the deceased (Ex.P-12). As per the deceased, on the intervening night of 4th-5th November, 2017, he was getting ready for a meal with his friends Ranbir @ Lala son of Sh. Pratap Singh, Amit @ Kanhaiya son of Gopal Ram and Sonu son of Nanak Chand at a room near stairs at the godown of Ranbir @ Lala situated at 33 foota Road, Village Bakoli, Delhi. At about 11.30 PM, Vikas @ Allu who was a resident of Alipur and who was well known to him came at the said room with his three friends and stated *"tu aaj kal Jitender Gogi ka bada saath de raha hai"*, and in the meanwhile, the three friends of Vikas @ Allu told Vikas *"time nahi hai, goli maar saale ko"* and immediately after saying this, Vikas @ Allu took out a pistol from the right pocket of his pant and fired three shots at him. After getting struck with the bullet, he fell down from the chair and Vikas @ Allu ran away with his friends. Ranbir @ Lala, Sonu and Amit @ Kanhaiya took him to Raja Harish Chandra Hospital, Narela in a car. He further stated that Vikas @ Allu had shot him with the intention of killing him and that he can identify those three persons.

3. After recording the statement, SI Jaibir went to the spot, i.e. godown of Ranbir @ Lala and inside the said room, two empty cartridges were found lying on the floor and blood was also found lying on the left side of the empty cartridges. SI Jaibir prepared the rukka on the statement of the deceased on which FIR No.502/2017 dated 5th November, 2017 under Section 307/34 IPC





and 25/27 Arms Act, 1959 was registered at PS Alipur (Ex.P-5). Crime team was called at the spot and exhibits were seized. Thereafter, SI Jaibir went to LNJP Hospital where the deceased was under treatment and at the hospital, eye-witnesses Ranbir @ Lala, Sonu and Kanhaiya met him who were taken to the police station and their statements were recorded. Efforts were made to trace the accused persons but no clue was found. On 9th November, 2017, information was received vide DD No.30B (Ex.P-25) regarding death of the deceased. Thereafter, the dead body was sent for post mortem examination and after the post mortem examination, the dead body was handed over to the relatives of the deceased.

4. Dr. Kishore Singh Thakur (PW-2) along with Dr. Dheeraj Buchade conducted the post mortem examination on the dead body of the deceased on 9th November, 2017 and tendered the post mortem report (Ex.PW-2/A). It was opined:

“VIII. PROBABLE TIME SINCE DEATH:

About six hours from MLC timing of ‘declaring dead’ at Lok Nayak hospital and is consistent with postmortem findings.

IX. EXTERNAL EXAMINATION

1. *Firearm ammunition wound in the form of laceration of the skin (making a gutter), measuring 1.4 cm x 0.4 cm x subcutaneous deep, horizontally present over lateral aspect of right side abdomen, 17 cm lateral to midline and 10 cm above right superior iliac spine, with dark brown scabbed abrasion collar of 0.2 cm diameter present over anterior aspect. The wound is surrounded by bluish contusion of size 8 cm x 6 cm. The width of wound is 0.4 cm anteriorly, decreasing as extending backwards and is 0.2 cm posteriorly. The depth of the wound at the anterior aspect is 0.2 cm and becomes superficial as extending backwards and is 0.1 cm posteriorly. The direction of*



the wound goes backward, horizontally and towards left to right. The distance of wound from the right heel is 116 cm.

Evidence of Surgical Intervention:

1. *Surgically stitched firearm ammunition wound of 8 cm in length horizontally present over right side fronto-temporal region of head with blackish brown scabbed abrasion of size 1.5 cm x 1 cm present 4 cm from midline and 5 cm above right eyebrow. Medial end of surgically stitched wound is 2 cm from midline and 5.5 cm above glabella and lateral end of wound is 13 cm above right angle of mandible. On exploration, it was found to communicate with the bullet track.*

Track of the bullet: The bullet traversed through the scalp layers causing extravasation of blood in them. It then traversed the entire thickness of the right frontal bone causing entry hole in the bone with surgical repair in situ, measuring 05 cm in diameter with rough margins.

Surgical repair present over duramatter with black stitches in situ and underlying gel foam in situ. It then entered the brain through and through, at the right frontal lobe, causing a cortical laceration measuring 2 cm x 3 cm and then passed through the basal surface of right frontal lobe causing extensive damage and hemorrhagic contusion-necrosis of the brain parenchyma of right frontal lobe throughout the track. It exited the brain causing a laceration measuring 2.5 cm x 3 cm over the basal surface of right frontal lobe.

The bullet then had penetrated the dura causing a defect of size 1.5 cm in diameter in the dura. The bullet then traversed through the base of the skull at superior surface of orbital cavity making a punched out hole measuring 1.6 cm in diameter with rough margins.

The bullet then traversed the orbital cavity lacerating right eyeball causing haemorrhagic contusion of right eyeball with bone chips and blood clots in situ and exited through opening of right eye. Extravasation of blood present throughout the surrounding tissues.

The distance between the firearm entry wound to right heel was





168 cm and exited through right eye at the distance of 162 cm from right heel, i.e the exit wound is at a lower level than the entry wound by 6 cm. The track of the bullet within the head is directed from left to right, downward and forward.

2. *Surgically stitched laparotomy wound of 23 cm length vertically present over abdomen in midline, with upper end of wound is 5 cm below xyphoid process with 20 surgical stitches in situ. On removal of the laparotomy wound stitches, at the upper end a circular wound (firearm arm entry wound?), with surgically debridement present in situ, 5 cm below xyphoid process in midline. On exploration, it was found to communicate with the bullet track.*

The track of the bullet goes lacerating skin, subcutaneous tissue, muscles of abdominal wall, peritoneum, greater omentum through and through, penetrating wall of stomach with surgical repair in situ and their a metallic jacketed deformed bullet of size 0.5 cm-0.8 cm x 1.1 cm found at the fundus of stomach. The wound is directed downwards, backwards and towards left. The firearm entry wound is 127 cm above right heel.

The bullet was marked "X" at the base of the bullet, sealed and handed over to the investigating officer.

3. *Surgical drainage wounds, 2 in number, measuring 1.5 cm in length present over both side of front of abdomen. Right side drainage wound is situated 10 cm outer to midline and cm below umbilicus. Left side drainage wound is situated 11 cm outer to midline and cm below left nipple.*

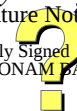
X. INTERNAL EXAMINATION

A) Head

Scalp: Extravasation of blood was present in the layers of scalp in frontal region.

Skull: Fracture of vault of skull as mentioned in the surgical intervention no.1.

Effusion of blood was present at fractured margins. Meninges: Dura as described before. Subdural hemorrhage was present involving right and left temporo-parietal region. Thin layer of subarachnoid





haemorrhages were present over right frontoparietal lobe and right temporal lobe. Brain: Track of the bullet present in the parenchyma as described above seen as hemorrhagic contusion necrosis and pulpefaction of the brain parenchyma, with multiple petechial hemorrhages in the vicinity and surrounding the tract. Rest of brain parenchyma was congested and edematous with obliteration sulci and flattening of gyri. Weight was 1472 grams.

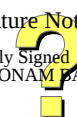
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OPINION:

Cause of death in this case is septicemic shock as a result of antemortem infection of multiple internal organs subsequent upon antemortem injury to abdomen and head produced by projectile of firearm.

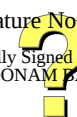
Injury no.1, and surgical intervention 1 and 2 are caused by ammunition of a rifled firearm weapon i.e bullet.”

5. Thereafter, it became known that the accused Ravi @ Tati was arrested in another case FIR No.499/2017 at PS Netaji Subhash Place and with the permission of the Court, the said accused was interrogated and was arrested vide arrest memo Ex.P-43 by Insp. Vishal (PW-24). The appellant was evading arrest and process under Section 82 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”) were obtained, however, on 30th January, 2018, information was received vide DD No.79B regarding arrest of the appellant by special staff in case FIR No.58/2018 at PS Prashant Vihar. And after seeking permission of the Court, the appellant was interrogated and thereafter, arrested vide arrest memo Ex.P-30. Disclosure statement (Ex.P-31) of the appellant was also recorded. Upon completion of investigation, charge-sheet was filed and the appellant and Ravi @ Tati were charged for offence punishable under Section 302/34 IPC. To prove its case, the prosecution examined 25 witnesses.





6. Learned counsel appearing on behalf of the appellant assails the impugned judgment on the ground that there are material discrepancies between the statements of PW-7, PW-22 and PW-25 which dents the case of the prosecution. As per HC Mehtab (PW-7), when he and SI Jaibir reached the hospital, they met the doctor who told them that the condition of the deceased was serious and that the deceased was in the 'emergency ward' of the hospital with the mask on nose and mouth. However, as per Jaibir Malik (PW-22), on reaching the SRHC Hospital, he found the victim to be fit for statement without discussing it with doctor, and he further stated that he first saw the deceased at the operation theatre and that there was no mask on the face of the victim. It was further contended that as per SI SachinMaan (PW-17), a country made pistol along with two live cartridges in the magazine were found in possession of the appellant, however, there is no mention of the pistol in the personal search memo of the appellant. Furthermore, PW-17 stated that the pistol was put in a plastic container and an FSL Form was filled, however, no pistol was sent for FSL examination which shows grave lapses in the investigation by the police. It was further pointed out that as per the disclosure statement, the appellant had stated that he can get the weapon and the car used in the commission of offence recovered, however, the police never acted on this information, and no weapon was recovered. All these facts clearly show shoddy investigation on the part of the police. It was further contended that the fact of deceased having made the dying declaration is itself doubtful on account of three bullet injury having been inflicted on him. Even otherwise, no independent witness has signed the dying declaration and even Dr.Mukesh





Bharati (PW-25) denied having known the contents of the dying declaration. Furthermore, as stated above, the material discrepancies in the testimonies of PW-7, PW-22 and PW-25 also creates doubt on the veracity of the dying declaration. It was further contended that one bullet was recovered from the body of the deceased at the time of the post mortem meaning thereby that the said bullet was lodged in the abdomen of the deceased for more than four days and therefore, septicemia, which was deceased's cause of death, was due to non-removal of the bullet from the body. Accordingly, it was submitted that in view of the aforesaid submissions, the prosecution has failed to establish its case beyond reasonable doubt for which the benefit of doubt must go to the appellant. Therefore, the impugned judgment and order on sentence must be set aside and the appellant be acquitted.

7. Learned APP appearing on behalf of the State submits that the impugned judgment of the learned Trial Court is well reasoned and is based on proper appreciation and facts of circumstances for which the same must be upheld and consequently, the present appeal must be dismissed. To support her contention, learned APP relies upon following facts:

- i. That the deceased was admitted at the SRHC Hospital on the intervening night of 4th-5th November, 2017 where vide MLC (Ex.P-25), the deceased was found 'conscious and oriented' pursuant to which statement of the deceased was recorded by SI Jaibir(PW-22). In the dying declaration given by the deceased he has categorically named the appellant. Further, qua the fitness of the appellant at the time of making the statement, Dr. Mukesh

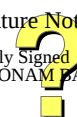




Bharati (PW-25), in his examination in chief stated “*the patient was fit for statement*” and in his cross examination, he stated that the statement of the injured was recorded in his presence.

- ii. That the deceased in his statement had mentioned that Vikas @ Allu who was a resident of Alipur had fired three gun shots at him and PW-22 categorically stated in his cross examination that there was no other Vikas @ Allu in Village Alipur. Thus, there is no dispute regarding the identity of the appellant as well.
- iii. That as per the post mortem report (Ex.PW-2/A), the cause of death was opined to be “*septicemic shock as a result of antemortem infection of multiple internal organs subsequent upon antemortem injury to abdomen and head produced by projectile of fire arm*”. Even in his cross examination, Dr. Kishore Singh Thakur (PW-2) categorically stated that the *septicemia set in due to injury sustained by the injured and not during the treatment* which confirms that death of the deceased was because of gun shot injury received by the deceased at the hands of the appellant. Reliance was placed on the decision in CrI.A.6/1993 Chattar Singh vs. State of Himachal Pradesh.

8. Learned APP further submitted that there was neither any embargo on the police officer to record a dying declaration nor there is any prescribed format of recording the same. What is required is that the person recording the statement must satisfy himself that the injured was conscious and in fit state of mind and in the present case, the doctor had opined in the MLC that the

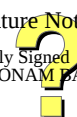




deceased was conscious and oriented and even was present at the time when the statement was recorded. Further, reliance was placed on the decisions in (2006) 7 SCALE 662 Rajendra & Ors. vs. State of Maharashtra, (2002) 6 SCC 701 Laxman vs. State of Maharashtra and (1958) AIR 22 Kushal Rao vs. State of Bombay.

9. Having heard both the parties at length and perusing the record, following evidence emerges.

10. Sonu (PW-3) deposed that 3-4 months ago, at about 8.30-9 PM, deceased called him and requested to bring dinner and reached the godown situated at Village Bakoli where he met the deceased at about 9.30 PM and he handed over the dinner to him. At the godown, two other friends of the deceased were also present there. Deceased asked him to bring a packet of cigarette and accordingly he went out and came back to the godown after purchasing a pack of cigarette, when he saw the deceased lying on the ground and fire shot on his body. He along with the other friends of the deceased lifted him, brought him outside the godown and put him in a Santro Car which belonged to one of the friends of the deceased. The deceased was taken to SRHC Hospital where after examination, the deceased was sent to another hospital in the ambulance. He stated that he did not accompany the deceased to the other hospital and went back to his house. He further stated that two days after the incident, he went back to the hospital where the deceased was admitted and that he did not see who had fired shots on the deceased. As he was resiling from his previous statement, he was declared hostile. In his cross





examination, he denied the suggestion that SI Jaibir recorded the statement of the deceased in the OT.

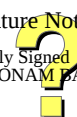
11. Ranbir @ Lala (PW-10) deposed that 2-3 persons came at Plot No.157, Khasra No.78, Village Bakoli and fired upon the deceased. He and Kanhaiya were present in the room and Sonu was not present as he had gone to purchase cigarette. He made a call at No.100 from his mobile No.8285190231 and thereafter, the deceased was taken to SRHC Hospital in a Santro Car belonging to Vikas. The deceased was referred to another hospital. At the hospital, he met the police official who took him to PS Alipur and on the next day, his premises was inspected by the police and thereafter, he was relieved. He further stated that his signatures were obtained on many papers by the police and he was unaware as to what was written on those papers. As he was resiling from his previous statement, he was declared hostile. In his cross examination, he denied the suggestion that SI Jaibir recorded the statement of the deceased in the OT. He denied having seen the person who had fired on the deceased and stated that he was under the influence of liquor and had not seen the assailant.

12. SI Jaibir (PW-22) deposed that on the intervening night of 4th-5th November, 2017, he received DD No.2B regarding admission of deceased at SRHC Hospital by Sonu @ Nanak Chand with fire arm injury on which he along with HC Mehtab reached the hospital where the deceased was found admitted and was fit for statement. He recorded the statement of the deceased (Ex.P-12) which was read over, explained to and signed by the deceased. Thereafter, he went to the scene of crime i.e., Ranbir's godown where blood



was found lying on the floor and two empty cartridges were also found lying on the left side of the blood. Rukka was prepared and FIR got registered. Crime team was called at the spot and exhibits were lifted. Thereafter, he went to LNJP Hospital where the deceased was under treatment and he also met eye-witnesses Ranbir @ Lala, Sonu and Kanhaiya. Thereafter, he along with all the eye-witnesses reached the crime scene and prepared the site plan (Ex.P-41) and, thereafter, recorded the statements of the eye-witnesses at the police station. Efforts were made to search the accused person but no clue was found. On 9th November, 2017, information vide DD No.30B regarding the death of the deceased was received and the body was sent for post mortem examination. In his cross examination, he stated that he did not meet the doctor before recording the statement of Ankit as Dr.Mukesh Bharati was treating the deceased at that time. He stated that the doctor informed him that there were chances of his survival. He further stated that he saw the deceased for the first time when he was in operation theatre at SRHC Hospital. The deceased was not operated at the time when he met him but was bleeding and doctors were treating him. The deceased was speaking at that time and there was no mask on his face. He further stated that the CMO had declared the patient fit for the statement on the MLC, but did not specify the time for the same. He further stated that the deceased did not disclose the father's name, address, age or description of the appellant.

13. Insp. Vishal (PW-24) deposed that on 3rd January, 2018, the investigation in the present case was handed over to him. After obtaining permission from the Court, he interrogated the accused Ravi and thereafter,





arrested him vide arrest memo Ex.P-43 and also recorded his disclosure statement (Ex.P-44). Accused Bunty was evading arrest and therefore, process under Section 82 Cr.P.C. against him. On 30th January, 2018, he received information regarding arrest of the appellant by Special Staff in case FIR No.58/2018 at PS Prashant Vihar and after seeking permission from the Court, he interrogated the appellant and arrested him vide arrest memo Ex.P-30 and also recorded his disclosure statement (Ex.P-31). Upon completion of investigation, he filed the charge-sheet.

14. HC Mehtab (PW-7) corroborated the version of SI Jaibir. However, in his cross examination, he stated that when he along with SI Jaibir reached the SRHC Hospital, first of all, they met the doctor but do not remember his name and the doctor told them that the condition of the deceased was serious. The deceased was in the emergency ward of the hospital situated on the ground floor and was not operated when they reached the hospital. He further stated that Ranbir @ Lala, Sonu and Kanhaiya were present near the deceased when they met the deceased in the emergency ward. He further stated that one mask was also found on the nose and mouth of the Ankit. He further stated that the wound of the deceased was bandaged.

15. Dr. Mukesh Bharati (PW-25) deposed that on 5th November, 2017, at about 12.05 AM, the deceased was brought by Sonu with the history of fire arm injury. He stated that the deceased was "*conscious and oriented*" and that the deceased was fit for statement. He opined the nature of injury as grievous and prepared the MLC (Ex.PW-25/P-47). In his cross examination, he stated that the patient did not tell him the name of the assailant. He further stated that

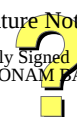




at the time of examination, the patient was fit for statement and that the IO did not call him at the time of recording the statement of injured. However, statement of injured was recorded in his presence. He further stated that the IO was asking the patient as to who caused injury and how it happened. The IO did not record his statement under Section 161 Cr.P.C. and did not obtain his signature. Oxygen mask was put on the mouth of the patient.

16. In his statement under Section 313 Cr.P.C., he denied having made any disclosure statement to the police and stated that he was innocent and was being falsely implicated in the present case.

17. As noted above, the case of the prosecution is based on the dying declaration made by the deceased which was recorded by SI Jaibir which was treated as the *rukka*, based whereon FIR was registered. In his statement Ankit @ Gullu, the deceased, which is now treated as a dying declaration Ex.P-12 stated that he was residing at H.No. 97, Village Bakoli, Delhi. On 4/5th November, 2017 at night he along with his friends Ranbir @ Lalas son of Shri Pratap Singh, Amit @ Kanhaiya son of Gopal Ram and Sonu son of Nanak Chand were sitting in the room near the stairs of the godown of Ranbir @ Lala and preparing to take their dinner. At around 11.30 PM, Vikas @ Allu who was a resident of Alipur, whom he knew very well, along with his three friends came to Ranbir's godown to them and stated to the deceased/ Ankit that he was giving too much support to Jitender Gogi. In the meantime, three persons accompanying Vikas @ Allu stated to Vikas that they had no time and he should fire. On this Vikas @ Allu took out a pistol from his right pant pocket and fired at him three times. On receiving the gunshot injuries, he fell down





and Vikas @ Allu and his friends ran away. His friends Ranbir @ Lala, Sonu and Amit @ Kanhaiya took him to the Raja Harish Chandra hospital in the car and thereafter, the Police arrived.

18. This statement of the deceased on which FIR was registered was duly signed by the deceased and the challenge laid to the statement to be treated as dying declaration was that the treating doctor did not certify that the injured was fit to make the statement. In this regard MLC of the deceased Ex.PW-25/P-47 is relevant wherein it notes that at the time of admission on 5th November, 2017 at 12.05 AM the patient was conscious and oriented. Further, Dr. Mukesh Bharti (PW-25) appeared in the witness box and deposed that the patient was fit for statement at the time of examination. He further stated that even though he did not note the time when he declared the patient fit for statement, however at the time of examination patient was fit for statement. He clarified that the statement of the injured was recorded in his presence and that IO was asking the injured as to who caused him injury and how it happened. Thus, in view of this deposition of Dr. Mukesh Bharti (PW-25) and even in cross-examination the fact that the statement was not counter-signed by Doctor or that oxygen mask has been put on the mouth, does not vitiate the dying declaration.

19. Supreme Court in the decision reported as (2022) 8 SCC 576 Uttam Vs. State of Maharashtra, succinctly culling down the legal principles on reliance on a dying declaration, held:

“12. In KundulaBala Subrahmanyam v. State of A.P. [KundulaBala Subrahmanyam v. State of A.P., (1993) 2 SCC 684 : 1993 SCC (Cri) 655] , this Court had highlighted the significance of a dying

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declaration in the following words : (SCC p. 697, para 18)

“18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration.”

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14. In Paniben v. State of Gujarat [Paniben v. State of Gujarat, (1992) 2 SCC 474 : 1992 SCC (Cri) 403] , on examining the entire conspectus of the law on the principles governing dying declaration, this Court had concluded thus : (SCC pp. 480-81, para 18)

“18. ... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. [Munnu

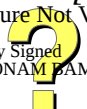
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Raja v. State of M.P., (1976) 3 SCC 104 : 1976 SCC (Cri) 376])

(ii) *If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav [State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552 : 1985 SCC (Cri) 127] ; Ramawati Devi v. State of Bihar [Ramawati Devi v. State of Bihar, (1983) 1 SCC 211 : 1983 SCC (Cri) 169] .)*

(iii) *This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor [K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618 : 1976 SCC (Cri) 473] .)*

(iv) *Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. [Rasheed Beg v. State of M.P., (1974) 4 SCC 264 : 1974 SCC (Cri) 426])*

(v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P. [Kake Singh v. State of M.P., 1981 Supp SCC 25 : 1981 SCC (Cri) 645])*

(vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. [Ram Manorath v. State of U.P., (1981) 2 SCC 654 : 1981 SCC (Cri) 581])*

(vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. KrishnamurtiLaxmipati Naidu [State of Maharashtra v. KrishnamurtiLaxmipati Naidu, 1980 Supp SCC 455 : 1981 SCC (Cri) 364] .)*

(viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the*





statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar [Surajdeo Ojha v. State of Bihar, 1980 Supp SCC 769 : 1979 SCC (Cri) 519] .)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanhau Ram v. State of M.P. [Nanhau Ram v. State of M.P., 1988 Supp SCC 152 : 1988 SCC (Cri) 342])

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan [State of U.P. v. Madan Mohan, (1989) 3 SCC 390 : 1989 SCC (Cri) 585] .)”

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16. In Lakhan v. State of M.P. [Lakhan v. State of M.P., (2010) 8 SCC 514 : (2010) 3 SCC (Cri) 942] , where the deceased was burnt by pouring kerosene oil on her and was brought to the hospital by the accused and his family members, the Court noticed that she had made two varying dying declarations and held thus : (SCC pp. 518-19, paras 9-10)

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The



deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon.

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18. In *Sher Singh v. State of Punjab* [*Sher Singh v. State of Punjab*, (2008) 4 SCC 265 : (2008) 2 SCC (Cri) 783], this Court has held thus : (SCC pp. 271-72, para 16)

“16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration

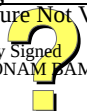
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must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise."

19. It is thus clear that in cases where the court finds that there exist more than one dying declarations, each one of them must be examined with care and caution and only after satisfying itself as to which of the dying declarations appears to be free from suspicious circumstances and has been made voluntarily, should it be accepted. As observed in the judgments quoted above, it is not necessary that in every case, a dying declaration ought to be corroborated with material evidence, ocular or otherwise. It is more a rule of prudence that courts seek validation of the dying declaration from attending facts and circumstances and other evidence brought on record. For the very same reason, a certificate by the doctor that the declarant was fit to make a statement, is treated as a rule of caution to establish the truthfulness of the statement made by the deceased.

20. In *KundulaBala Subrahmanyam* [*KundulaBalaSubrahmanyam v. State of A.P.*, (1993) 2 SCC 684: 1993 SCC (Cri) 655], this Court had observed that if there are more than one dying declarations, then the court must scrutinise each one of them to find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying on the same. At the end of the day, each case must be decided on its own peculiar facts. There can be no hard and fast rule on evaluation of the evidence brought before the court, including the surrounding circumstances at the time when the deceased had made the dying declaration. The focus of the court is of ensuring the voluntariness of the process, of being satisfied that there was no tutoring or prompting, of being convinced that the deceased was in a fit state of mind before making the dying declaration, of ascertaining that ample opportunity was available to the declarant to identify the accused.



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22. *However, if a dying declaration suffers from some infirmity, it cannot be the sole basis for convicting the accused. In those circumstances, the court must step back and consider whether the cumulative factors in a case make it difficult to rely upon the said dying declaration. In this context, it would be profitable to refer to NallapatiSivaiah [NallapatiSivaiah v. SDO, (2007) 15 SCC 465 : (2010) 3 SCC (Cri) 560] , wherein this Court held as under : (SCC pp. 482-84, paras 46 & 52)*

“46. It is the duty of the prosecution to establish the charge against the accused beyond reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. The evidence of the Professor of Forensic Medicine casts considerable doubt as regards the condition of the deceased to make a voluntary and truthful statement. It is for that reason non-examination of Dr T. Narasimharao, Casualty Medical Officer, who was said to have been present at the time of recording of both the dying declarations attains some significance. It is not because it is the requirement in law that the doctor who certified about the condition of the victim to make a dying declaration is required to be examined in every case. But it was the obligation of the prosecution to lead corroborative evidence available in the peculiar circumstances of the case.

52. The dying declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a dying declaration depends upon not only the testimony of the person recording the dying declaration—be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at a proper

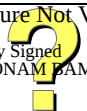
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conclusion. The court must satisfy itself that the person making the dying declaration was conscious and fit to make statement for which purposes not only the evidence of persons recording the dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.”

20. The dying declaration of the deceased based whereon the *rukka* was prepared is also claimed to be contrary to the statements of the other eye-witnesses, namely, Sonu (PW-3) and Ranbir @ Lala (PW-10). However, Sonu though he has turned hostile, is duly supported by the version of the eye-witness Ranbir @ Lala who stated that at the relevant time he along with Ankit/ the deceased and Kanhaiya were present in the room and Sonu had gone to purchase the cigarette. He admitted making a call at 100 number from his mobile No. 8285190231 and that Ankit was taken to the hospital where he met the Police official who took him to the Police Station. Though this witness turned hostile to the extent of identifying the assailants, however fortified the incident happening at his plot No.157, Khasra No.78, village Bakoli where the deceased was fired. Similarly, Sonu who appeared as (PW-3) stated that he had gone to purchase the cigarette at that time and when he reached the godown he saw Ankit @ Gullu lying on the ground and fire shot was there on his body including on his head. Two friends of Ankit @ Gullu were present who were weeping and that they all took Ankit in the Santro car to the hospital. Even if this witness or Ranbir has failed to identify the assailants, the identity of assailants is well-established from the dying declaration of the deceased, which was given when he was in a fit state to make the statement, as stated by





Dr. Mukesh Bharti as well. Further, version of these witnesses and the deceased also is fortified and supported by the crime team report Ex.P-17 which found blood and two lead of 7.65 MM at the spot besides two empty cartridge cases of 7.65 MM.

21. It is also contended on behalf of the appellant that the death of the deceased was due to *septicemia* as the bullet had not been removed from the body, however this fact stands clarified by the deposition of Dr. Kishore Kumar Thakur (PW-2) who clarified in cross-examination that the *septicemia set in due to injury sustained by the injured and not during the treatment* and thus it was wrong to suggest that patient died as he was not properly treated or that *septicemia* developed due to the reason that he was not treated properly.

22. In view of the cogent and convincing dying declaration of the deceased based whereon the FIR was registered promptly, and the evidence of PW-25/ Dr. Mukesh Bharti in whose presence the statement was recorded and who stated that patient was fit for statement, this Court finds no error in the impugned judgment of conviction and order on sentence passed by the learned Trial Court.

23. Consequently, the appeal is dismissed.

24. Copy of the judgment be uploaded on the website of this Court and be also communicated to the Superintendent Jail for updation of record and intimation to the appellant.

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(POONAM A. BAMBA)
JUDGE

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