

CASE NO.:
Appeal (crl.) 546 of 2000

PETITIONER:
Heeralal Yadav

RESPONDENT:
State of M.P. & Ors.

DATE OF JUDGMENT: 04/07/2006

BENCH:
H.K.SEMA & A.K. MATHUR

JUDGMENT:
J U D G M E N T

H.K.SEMA, J

This appeal by special leave filed by the complainant (PW-2) is directed against the judgment and order of the High Court dated 2.7.1999 passed in Criminal Appeal No.678 of 1995 whereby the High Court reversed the conviction and sentence passed by the Trial Court convicting the respondents for an offence under Section 302/34 IPC and sentenced them to RI for life and a fine of Rs.1000/- each and in default of payment further six months simple imprisonment.

The prosecution case in brief was that on 14.4.1993 at about 8.30 in the morning the deceased Gokul Singh son of Nirbhay Singh, who was a practicing advocate and his son Meharban Singh (PW-3) aged about 12 years went to their well in village Narval, District Shajapur. When the deceased went to answer the call of nature in the fields of Babulal Teli, all of a sudden, the accused Gokul Singh son of Amar Singh, Bhawarlal and Babulal armed with sword, farsi and dhariya and co-accused Lal Singh with knife, Chander Singh, Man Singh, Kalu Singh, Dhannalal and Lal Singh armed with lathis came on the spot and surrounded the deceased and assaulted him with their respective weapons. PW-3 Meharban Singh on seeing this incident ran to his house and told his grandfather PW-6 Nirbhay Singh at flour mill and his uncle PW-2 Heeralal Yadav (appellant herein) that his father Gokul Singh was being assaulted. On being told PW-2 Heeralal Yadav and Devsingh PW-4 went to the spot. They saw the accused persons assaulting the deceased. PW-6 Nirbhay Singh also went there and saw the accused persons running from the spot with their respective weapons. The deceased Gokul Singh was badly injured. He was put in a tractor and was taken to P.S. Agar where PW-2 Heeralal Yadav lodged F.I.R. at 9.05 a.m. which was recorded by A.S.I.

PW-1 Dr.A.S.Khan examined the deceased Gokul Singh and found the following injuries:

1. Incised wound on the central part of forehead, 2" x <" x <".
2. Incised wound on the middle side of left orbital, 3" x =" x ="
3. Incised wound on the upper part of left eyelid, 1" x <" x <".
4. Incised wound on middle part of right leg, 3" x =" x =".

5. Incised wound, 1" below injury no.4, 4" x 1" x 1/4".
6. Incised wound, 1" below injury no.5, 4" x 1" x 1/4".
7. Incised wound on the upper 1/3rd part of right leg, 1" x 1" x 1/4".
8. Incised wound on the middle part of left leg, 2" x 1" x 1/4".
9. Incised wound, 2" below injury no.8, 3" x 1" x 1/4".
10. Incised wound on the lower 1/3rd part of left leg, 3" x 1" x 1/4".
11. Incised wound on the lower 1/3rd part of left leg, 3" x 1" x 1/4".
12. Incised wound on the middle part of left forearm, 2" x 1" x 1/4".
13. Incised wound 1" middle from the injury no.12, 2" x 1" x 1/4".
14. Incised wound on the lower 1/3rd part of right forearm, 3" x 1" x 1/4".
15. Incised wound on the metacarpal bones of all fingers and thumb of right hand, 11" x 3" x 1/4".
16. Bruise on the middle part of left thigh, 5" x 1" x 1/4".
17. Incised wound on right parietal bone, 2" x 1" x 1/4".
18. Bruise on left parietal bone, 5" x 1" x 1/4".

PW-12 S.R.Parihar, then requested PW-1 Dr.A.S.Khan to record the dying declaration of the deceased as the Executive Magistrate was not available. PW-1 Dr.Khan recorded the dying declaration of the deceased at 10.30 a.m. (Ex.P.2). As the condition of the deceased was serious he was referred to District hospital, Ujjain, where he succumbed to his injuries.

On the basis of the FIR, 9 accused faced the trial for an offence under Section 302/34 before the Trial Court. The Trial Court after examining the evidence on record particularly the evidence of eyewitnesses PW-2 Heeralal Yadav, PW-3 Meharban Singh, PW-6 Nirbhay Singh along with the dying declaration recorded by PW-1 Dr.Khan convicted three accused respondents namely A-1 Gokul Singh son of Amar Singh, A-2 Bhawarlal son of Ram Singh and A-9 Badulal son of Lal Singh for an offence under Section 302/34 IPC and acquitted six other accused by giving them benefit of doubt. The High Court on appeal by the accused persons reversed the conviction of the Trial Court and recorded acquittal. Hence this appeal by special leave by the complainant, permission for which was granted by this Court.

The High Court reversed the conviction recorded by the Trial Court on the sole ground that the dying declaration does not inspire confidence. The sole question, therefore, to be determined in this appeal is as to whether the dying declaration of the deceased recorded by PW-1 Dr.Khan, inspires confidence or not?

The principle that "no man at the point of his death is presumed to lie. A man will not meet his maker with lie in his mouth" is based on sound public policy. No doubt, as the dead man would not be available for cross-examination, a duty is cast upon the Court to examine the dying declaration with care and caution as to whether the dying declaration is creditworthy for acceptance. In other words whether it inspires confidence on the basis of which alone conviction can be recorded. Similarly, it is also an accepted principle of law

that the dying declaration, keeping in view the above principles in mind, if inspiring confidence could be the sole basis for conviction.

The High Court rejected the dying declaration of the deceased recorded by PW-1 Dr.Khan. Reasoning of High Court in paragraph 8 of the judgment reads:-

"First and the foremost thing is that in the dying-declaration Ex.P-2 of the deceased recorded by Dr.Khan (PW-1) and police statement Ex.P-38 recorded by sub-inspector S.R. Parihar (PW-12) which became dying declaration after his death the deceased did not mention that he had gone with his son Meharban singh to his well and Meharbansingh was present at the time of incident. The non-mentioning of the name of this witness in dying declaration and police statement which were recorded in detail creates great suspicion about the presence of this witness on the spot. His conduct also appears to be abnormal. He saw his father Gokulsingh being assaulted by the accused persons with sword, farsi and Dhariya, he went running to his grandfather Nirbhaysingh and uncle Heeralal and told them that his father was being beaten. But it is surprising that he did not mention the names of the assailants nor these witnesses asked their names. Had this witness seen the occurrence, he would have mentioned the names of the assailants. After giving information, he did not go to the spot as to what had happened to his father. A normal man, in the above circumstances, would not stay at home, but immediately would run to see his father. We may assume that he was panicky and in a confused state of mind, when he came from the spot and narrated the incident to these witnesses, but thereafter, when he stayed at home, he must have composed and regained normalcy, even then he did not mention the names of the assailants to the house ladies."

The fallacy of the High Court, in our view, is that the High Court has not at all considered the creditworthiness of the dying declaration of the deceased recorded by PW-1 Dr.Khan. On the contrary, the dying declaration of the deceased was disbelieved on the ground that the deceased did not mention the presence of PW-3. The High Court also doubted the presence of PW-3 at the place of occurrence on the ground that he (PW-3) saw his father being assaulted by the accused with sword, farsi and dhariya but did not mention the names of the assailants nor these witnesses asked their names from him. Had he been present at the scene of occurrence he would have mentioned the names of the assailants. The High Court was further of the view that he did not accompany them to the spot to see as to what happened to his father. According to the High Court, the conduct of PW-3 was unnatural and, therefore, the dying declaration of the deceased recorded by PW-1 Dr.Khan was disbelieved.

From the above quoted reasoning of the High Court, we are unable to discern the logic of the High Court's reasoning. Presence or non-presence of PW-3 at the scene of occurrence or for that matter non-mentioning of the name of

PW-3 in the dying declaration has no connection with ascertainment of the veracity and creditworthiness of the dying declaration. In fact, the High Court did not discuss the veracity and creditworthiness of either the dying declaration recorded by PW-1 or the testimony of PW-1 Dr.Khan deposed before the Court.

The other ground on the basis of which the High Court rejected the dying declaration (Ex.P-2) as doubtful and unreliable is that PW-1 Dr.Khan did not state that the deceased was in a fit mental condition to give dying declaration and throughout remained conscious when his statement was recorded. According to the High Court as is evident from PW.1 Dr.Khan that the deceased was in semi conscious condition and his blood pressure had gone down to 90/60. The High Court has also referred to Dr.Pramod Kaushik PW-10 who conducted autopsy on the dead body and stated that due to excessive hemorrhage the deceased must have gone in shock within half an hour after the incident. PW-10 also stated that blood transfusion could not be given, as the facility was not available at Agar. Accordingly, the High Court held that in such mental condition, the recording of dying declaration by PW-1 could not be possible.

In our view, the High Court was grossly oblivious to the statement of Dr.Khan when he said that the deceased must have gone in shock at the place of incident but he recovered consciousness as he was given glucose saline and medicines.

The main attack on the dying declaration by the counsel for the accused is that considering the nature of the injury suffered by the deceased there was excessive hemorrhage and the deceased must have gone in shock within half an hour after the incident and since blood transfusion could not be given, the so called dying declaration recorded by Dr.Khan (Ex.P.2) is not reliable. According to the counsel, the High Court was justified in not relying on the said dying declaration. We are unable to countenance such submission.

Ex.P-3 is the requisition dated 14.4.1993 sought by the Investigating Officer regarding the condition of the deceased Gokul Singh son of Nirbhay Singh for recording dying declaration. There is an endorsement in Ex.P-3 by the Medical Officer Primary Health Center by PW-1 Dr.A.S.Khan that the deceased Gokul Singh son of Nirbhay Singh aged 35 years would be able to give the statement of dying declaration. In the dying declaration (Ex.P-2) the deceased in an answer to the question "who has beaten you" clearly stated that accused Gokul Singh s/o Amar Singh, Bhawar Singh s/o Ram Singh, Babulal son of Lal Singh and there were many others whose names he did not remember. He further stated that he was beaten with farsi, dhariya and lathis and badly beaten up with weapons. He further stated that he was beaten near his well and field itself. In an answer to a question "what were you doing", he stated, "I was answering call of nature there. All the people beat me with dharia, sword and farsi etc. weapons." The deceased also stated that he was giving the statement in full consciousness. He also stated that the dying declaration was not under any pressure.

Dr.A.S.Khan was examined as PW-1. He has stated that on 14.4.1993 he was posted as Medical Officer at Primary Health Centre, Agar. On that day he recorded the dying declaration (Ex.P-2). He has also admitted that he has given the fitness certificate (Ex.P-3). In cross-examination he has stated that after 9.30 a.m. his treatment started, glucose and antibiotic medicines had been given, therefore, after 9.30 a.m. he had become conscious. He denied a suggestion that the condition of the injured further deteriorated. He has stated

that the dying declaration was recorded in the operation theatre in the presence of staff and inspector (SI) and the policemen. He further stated that the relatives of the patient Gokul Singh were not inside the operation theatre. PW-1 was confronted with the principle of Samson Wright's Applied Physiology, page 152. He categorically ruled out the application of the principle.

Mr.S.K. Gambhir, learned senior counsel for the respondents, however, brought to our notice the statement of PW-2 Heeralal Yadav when he stated that when Dr.Khan took the statement of my brother I was there. According to the counsel for the respondents, this statement contradicted with the statement of PW-1 Dr.Khan that the statement was recorded in the operation theatre and the relatives of the deceased were outside the theatre. We do not see any contradiction. PW-2 only stated his presence at the hospital at the time when the dying declaration was recorded. He never stated that he was inside the operation theatre when the statement of his brother was recorded.

One of the grounds on which the High Court disbelieved the dying declaration was that Dr.Khan did not state that the deceased was in a fit mental condition to give dying declaration and throughout remained conscious when his statement was recorded. This reasoning of the High Court, in our view, is also fallacious. In the instant case, the doctor himself recorded the dying declaration (Ex.P-2). He has given the fitness certificate vide Ex.P-3 as referred to above stating that the patient was fit for recording dying declaration. Even if it is assumed that was not there, in view of the decision of the Constitution Bench of this Court in *Laxman vs. State of Maharashtra* (2002) 6 SCC 710, these would be no impediment to the creditworthiness of the dying declaration.

Counsel for the respondents referred to the *Samson Wright's Applied Physiology*, thirteenth edition and strenuously urged that if the same principle is applied and considering the nature of injuries sustained by the deceased and due to excessive hemorrhage the patient must have gone in shock within half an hour after the incident and since no blood transfusion could be given the patient was not conscious and was not in a position to give the statement. As already noted PW-1 was confronted with this principle in cross-examination and he completely ruled out the application of the principle in the present case.

Counsel also referred to the decision of this Court in *Balak Ram vs. State of U.P.* (1975) 3 SCC 219. In that case this Court did not rely upon the dying declaration because the condition of the patient was critical when he reached the hospital. Before the dying declaration was recorded an attempt was made to give him saline but even after making incisions on the hands and a leg, the attempt did not succeed. In the present case saline and glucose was administered and the deceased regained consciousness.

Counsel also referred to the case of *Paparambaka Rosamma vs. State of A.P.*, (1999) 7 SCC 695. This decision has been expressly over-ruled by a Constitution Bench in the case of *Laxman vs. State of Maharashtra* (2002) 6 SCC 710.

In the view we have taken, we are clearly of the opinion, that the dying declaration of the deceased recorded by PW-1 Dr.A.S.Khan and well corroborated with other attending circumstances inspires confidence, on the basis of which conviction could be sustained. The High Court committed grave miscarriage of justice by reversing the conviction recorded by the Trial Court. The impugned order of the High

Court is set aside. The sentence and conviction recorded by the Trial Court is restored. The appeal is allowed. Respondents are directed to be taken back into custody forthwith to serve out the remaining period of sentence. Compliance report within one month.

JUDIS