

NON - REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1522 OF 2009**

DAYARAM & ANOTHER

...APPELLANT

Versus

STATE OF MADHYA PRADESH

...RESPONDENT

J U D G M E N T

INDU MALHOTRA, J.

1. The appellants have filed the present Criminal Appeal to challenge the order of conviction under Section 302, IPC and sentence of Life Imprisonment passed vide Judgment and Order dated 04.12.2008 by the Jabalpur Bench of the Madhya Pradesh High Court in Criminal Appeal No.206/1994. The High Court has affirmed the Judgment passed by the Sessions Court.

- 2.** The present appeal arises out of FIR No. 86/1991 lodged on 19.12.1991 at 4:20 p.m. under Sections 341, 323, 325, 307 read with 34 IPC by the deceased – Ghansu himself.

Ghansu, in his F.I.R, stated that on 19.12.1991 he had gone to Ishanagar Police Station to file a Report against appellant No.1 - Dayaram Yadav for having beaten his son Chandu. On his way back from the Police Station, at about 3:00 p.m., near Nahar ki Puliya, both the accused viz. Dayaram and Parsu Yadav were hiding in the bushes with lathis. Both of them waylaid him started hitting the deceased with lathis on his head, hands, legs and body which led to severe bleeding. Ghansu fell unconscious. The accused assumed that the Ghansu had died, and threw his body into the canal, and fled from the scene. While Ghansu was in the water, he regained consciousness and cried for help. Ghansu stated that Chouda Chamar – P.W.9, Thakur Sunla Kumar, Lula Kumhar and Ramlal Kumhar reached the site of occurrence and rescued him. Ghansu stated that the beating was given with a motive to eliminate him completely.

- 3.** Ghansu was taken to the Ishanagar Police Station where the F.I.R was lodged. Thereafter, he was taken to the Primary Health Centre, Ishanagar for treatment.

The Executive Magistrate - P.W.19 recorded the dying declaration of Ghansu at 4:55 p.m. on 19.12.1991, which reads as follows:

"I, Ghansu Yadav son of Judhiya Yadav, aged about 50 years, occupation – cultivation, resident of Pahargaon do hereby state on oath that when I was returning back to my village from Ishanagar, then, in the afternoon at nearby place of the culvert (puliya) of canal in village Pahargaon, Dayaram and Parsu, sons of Durju Yadav, both brothers, assaulted me with lathis.

Even prior to it, my son Chandu was assaulted by Dayaram. I had gone to the Police Station to register a Report. But, the Report could not be registered. Thereafter, I, with my son Chandu, was coming back and at that time, Dayaram and Parsu have assaulted me."

The medical examination of Ghansu was conducted by P.W.14 – Dr. Ramakant Chaturvedi who certified that the dying declaration was recorded in his presence and Ghansu was fully conscious and well-oriented to the time and place at the time of giving his statement.

- 4.** Ghansu was referred to the District Hospital, Chhattarpur due to his critical condition. He succumbed to his injuries at the Hospital.

5. The Post Mortem examination of the deceased was conducted by Dr. Hari Aggarwal – P.W.17 who recorded the

following injuries:

(i) Wound on the right forearm – $\frac{1}{2}$ x $\frac{1}{2}$ inch – underlying bone broken in pieces.

(ii) Wound on left forearm with contusion on medial border forearm lower $\frac{1}{3}$ – underlying bone broken in pieces.

(iii) Deep Wound on right III of 2 x 1 x 1 inches. Underlying bone of II, IV and V metacarpal broken.

(iv) Deep Lacerated Wound on scalp – 2 x $\frac{1}{2}$ inches – underlying parietal bone broken, and haematoma collection, subdural and epidural.

(v) Lacerated wound – $\frac{1}{2}$ x $\frac{1}{2}$ inches size on right leg.

(vi) Parietal bone broken.

The medical report recorded that the cause of death was shock due to head injury and other injuries.

6. The case was registered as Case No. 20/ 1992 before the Sessions Judge, Chhatarpur, Madhya Pradesh (Sessions Court).

P.W.3 – Ram Lal, P.W.4 – Balwant Singh, P.W.7 – Asha Ram, P.W.8 – Arjun, P.W.9 – Chouda Chamar and P.W.15 – Vijay Singh deposed that they heard pother of screaming and shouting of Ghansu. They went towards the canal where Ghansu was lying with severe injuries all over his

body. Ghansu told P.W.4 – Balwant Singh and other people who had gathered there that Durju Nata (father of the accused) had got the assault done on him.

In the statement of P.W.3 and P.W.4 before the Police, they deposed that when they rescued Ghansu from the canal, Ghansu told them that the present accused have injured him with lathis. The statements given by P.W.3 and P.W.4 were confirmed by the I.O – P.W.11.

However, at the time of evidence, P.W.s 3, 4, 7, 8, 9 and 15 were declared hostile by the Prosecution.

- 7.** The Sessions Court *vide* Judgment and Order dated 05.02.1994 convicted the Appellants for murder under Section 302 IPC and sentenced them to Life Imprisonment. The Sessions Court held that:

(i) The deceased – Ghansu had lodged the F.I.R [Ex-P-20] wherein the Appellants were specifically mentioned as the assailants. The F.I.R was recorded by P.W.16 – N.D Mishra who certified that the F.I.R contained the thumb impression of the deceased.

(ii) The deceased was in a state of consciousness at the time of filing the F.I.R, which is corroborated by the medical evidence of P.W.14 – Dr. Ramakant Chaturvedi, who has deposed that the medical

certificate appended to the Dying Declaration was true and correct.

The F.I.R was recorded 1 hour and 15 minutes prior to the death of the deceased.

The F.I.R was treated as the first dying declaration of the deceased.

(iii) The statement made by the deceased before the Executive Magistrate – P.W.19 [Ex-P-19], was considered to be the second dying declaration. Even though the second dying declaration does not bear the thumb impression of the deceased, the contents of the same are consistent with the F.I.R lodged by the deceased himself which bears the thumb impression of the deceased.

(iv) The dying declaration recorded by the Executive Magistrate - P.W19 and the F.I.R recorded by P.W16 are consistent and credible.

(v) The Sessions Court convicted the Accused /Appellant No.1 and Appellant No.2 under Section 302 IPC and sentenced them to Life Imprisonment.

8. Aggrieved by Judgment dated 05.02.1994 passed by the Trial Court, the Appellants filed a common appeal being Criminal Appeal No. 206/1994 before the Madhya Pradesh High Court.

8.1. The High Court *vide* the impugned Judgment and Order dated 04.12.2008 dismissed the Appeal filed by the Appellants, and affirmed the Judgment and Order of Conviction passed by the Sessions Court. The High Court held that death of the deceased was homicidal, and caused by grievous injuries on the head and other parts of the body.

8.2. From the depositions of the Executive Magistrate - P.W.19 and P.W.14 – Dr. Ramakant Chaturvedi, it is evident that the deceased was conscious at the time of recording the dying declaration. The Medical certificate was issued by P.W.14 – Dr. Ramakant Chaturvedi which was appended at the foot of the Dying Declaration that the deceased was fully conscious at the time of recording his dying declaration.

8.3. The High Court relied on the Judgment of this Court in *Laxman v. State of Maharashtra*¹ wherein this Court held that:

“3...What is essentially required is that the person who records a dying declaration 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 even without

¹ (2002) 6 SCC 710.

examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise.”

(emphasis supplied)

8.4. The High Court found that there was no inconsistency in the statement made by the deceased in the F.I.R lodged by the deceased before P.W.16 and the dying declaration recorded by Executive Magistrate - P.W.19.

The substratum of both the Dying Declarations remained consistent to the effect that both the Appellants had assaulted the deceased with *lathis* on his head, hands and legs when he was returning from Ishanagar Police Station.

The dying declaration was corroborated by the medical evidence that the Appellants had inflicted grievous injuries on the deceased, which caused his death.

The High Court dismissed the Appeal filed by the Appellants and affirmed the conviction of the Appellants under Section 302 of IPC and the sentence of Life Imprisonment.

9. The Appellants have filed a common Special Leave Petition, against the Judgment and Order of the Madhya Pradesh

High Court dated 04.12.2008. Leave to Appeal was granted

vide Order dated 13.08.2009.

10. FINDINGS AND ANALYSIS

We have carefully perused the record of the case and considered the submissions made by the Counsel for the parties.

10.1. The motive for the crime was established by the prosecution from the dying declaration of the deceased, and the deposition of the P.W.6 - son of deceased. Chandu - P.W.6 has deposed that, on the date of the incident, the Accused/ Appellant No.1 - Dayaram had abused and beaten him up and then picked up an axe to assault him, when he ran away. The assault took place since the buffaloes belonging to Chandu had got mixed up with the buffaloes of Appellant No.1 - Dayaram. Thereafter, Chandu - P.W.6 along with his father - Ghansu went to lodge a Report at the Ishanagar Police Station. While returning from the Police Station, appellant No.1 attacked his father with a *lathi* on his head, while Appellant No.2 attacked Chandu - P.W.6 on his hand with a *lathi*. P.W.6 then ran to inform Sullu and others about the incident.

P.W.6 – Chandu returned to the site of occurrence, and saw his father – Ghansu lying on a cot, surrounded by Sullu and Balwant Singh – P.W.4, who then took him to Ishanagar Police Station.

The motive behind the attack is established from the evidence of P.W.6 - Chandu.

10.2. The F.I.R was lodged by the deceased and bears his thumb impression. The F.I.R is treated as the 1st dying declaration of the deceased.

10.3. The deceased was admitted to the Primary Health Centre, Ishanagar. The deceased gave his 2nd Dying Declaration before the Executive Magistrate – P.W.19.

10.4. The examination-in-chief of P.W.s 3, 4, 7, 8, 9 and 15 records that on the date of the incident, they had heard the cries of the deceased. The deceased was found lying in the canal in an injured condition. The deceased told them of the attack by the assailants. These prosecution witnesses took the deceased to the hospital.

From their examination-in-chief it is evident that the deceased was conscious and, in a state to lodge the F.I.R. In their cross-examination, these witnesses

denied having any knowledge about the persons who attacked the deceased. They were declared hostile during their cross-examination. The testimony, prior to cross-examination can be relied upon.

Reliance is placed on the decisions of this Court in *Bhagwan Singh v. State of Haryana*², *Rabindra Kumar Dey v. State of Orissa*³ and *Syad Akbar v. State of Karnataka*,⁴ wherein it has been held that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution witnesses turned hostile. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on careful scrutiny.

This Court in *Khujji v. State of M.P.*,⁵ in paragraph

6 of the Judgment held that:

“6...The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But the counsel for the

2 (1976) 1 SCC 389.

3 (1976) 4 SCC 233.

4 (1980) 1 SCC 30.

5 (1991) 3 SCC 627.

State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and the part of the evidence which is otherwise acceptable can be acted upon.

(emphasis supplied)

This position in law was reiterated in *Vinod*

*Kumar v. State of Punjab*⁶, wherein the court held that :

“31. The next aspect which requires to be adverted to is whether testimony of a hostile witness that has come on record should be relied upon or not. Mr. Jain, learned Senior Counsel for the appellant would contend that as PW 7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination, he has taken the path of prevarication. In Bhagwan Singh v. State of Haryana⁷, it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence...”

(emphasis supplied)

The F.I.R lodged by the deceased was prompt. As per the statement of the deceased, the incident

⁶ (2015) 3 SCC 220.

⁷ (1976) 1 SCC 389.

occurred at 3:00 p.m., and the F.I.R was lodged at 4:20 p.m. by the deceased. The distance between the Police Station and the site of occurrence is about 4 kilometres. The F.I.R was lodged with promptness and the appellants were named in the F.I.R along with details of their weapons.

As per Section 32(1) of the Evidence Act, the F.I.R should be treated as a Dying Declaration.

This Court in *Dharam Pal & Ors. v. State of U.P.*,⁸ held that :

“17... The report dictated by the deceased fully satisfied all the ingredients for being made admissible as a dying declaration. To ascertain this aspect, we may refer to some of the general propositions relating to a dying declaration. Section 32(1) of the Indian Evidence Act deals with dying declaration and lays down that when a statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, such a statement is relevant in every case or proceeding in which the cause of the person's death comes into question. Further, such statements are relevant whether the person who made them was or was not at the time when they were made under the expectation of death and whatever may be the nature of the proceedings in which the cause of his death comes into question.

18. The principle on which a dying declaration is admissible in evidence is

⁸ (2008) 17 SCC 337.

indicated in the Maxim “Nemo Moriturus Praesumitur Mentire”, which means that a man will not meet his maker with a lie in his mouth. Thus it is clear that a dying declaration may be relating to :-

- a) As to the cause of death of the deceased
- b) As to “any of the circumstances of the transaction” which resulted in the death of the deceased”

“20. ...If we look at the report dictated by the deceased in the light of the aforesaid propositions, it emerges that the names of the accused and the important features of the case have been clearly mentioned in the report. It contains a narrative by the deceased as to the cause of his death, which finds complete corroboration from the testimony of eye-witnesses and the medical evidence on record...”

(emphasis supplied)

From the testimonies of P.W.3, P.W.4, P.W.7, P.W.8, P.W.9 and P.W.15, prior to cross-examination and the evidence of the Executive Magistrate - P.W.19 who recorded the dying declaration of the deceased in the Hospital and P.W.14 – Dr. Ramakant Chaturvedi, it is evident that the deceased was conscious, and in a state to give a dying declaration.

The F.I.R lodged by the deceased clearly states the names of both the Appellants, as being the assailants, and gives clear details of the incident.

10.5. The Learned Counsel for the Appellants contended that the second dying declaration, recorded by the Executive Magistrate - P.W.19 did not contain the thumb impression of the deceased, and hence could not be relied upon. The Executive Magistrate - P.W.19 has stated that the signature or thumb impression could not be taken since there were injuries on both his hands. P.W.17 - Dr. Hari Agrawal who conducted the post mortem on the body of the deceased.

Reliance is placed on the decision of this Court in *Sukanti Moharana v. State of Orissa*⁹ wherein the Court took the view that there is no reason why a dying declaration which is otherwise found to be true, voluntary and correct should be rejected only because the person who recorded the dying declaration could not affix his signatures or thumb impressions on the dying declaration.

⁹ (2009) 9 SCC 163.

11. Considering the totality of the evidence including the two dying declarations made by the deceased, which are both consistent with each other and the ocular evidence is corroborated by the medical evidence, we are satisfied that the prosecution has proved the case beyond reasonable doubt. The chain of circumstances is complete. We affirm the Judgment passed by the Sessions Court and the High Court.

In view of the aforesaid, the appeal fails and is hereby dismissed.

.....**J.**
(INDU MALHOTRA)

.....**J.**
(R. SUBHASH REDDY)

New Delhi

November 7, 2019.