(2022) 12 CAL CK 0008

Calcutta High Court (Appellete Side)

Case No: Criminal Appeal No. 283 Of 2021

Raja Goswami	APPELLANT
Vs	
State Of West Bengal	RESPONDENT

Date of Decision: Dec. 2, 2022

Acts Referred:

- Indian Penal Code, 1860 - Section 302
- Arms Act, 1959 - Section 25(i)(a), 27(i)
- Code Of Criminal Procedure, 1973 - Section 313
- Evidence Act, 1872 - Section 114(g)

Hon'ble Judges: Debangsu Basak, J; Md. Shabbar Rashidi, J

Bench: Division Bench

Advocate: Imtiaz Ahmed, Ghazala Firdaus, Smita Saha, Sk. Saidullah, Mithun Mondal, Saibal Bapuli, Bibaswan

Final Decision: Dismissed

Judgement

Debangsu Basak, J

1. The appellant has assailed the judgement of conviction dated April 21, 2021 and the order of sentence dated April 26, 2021 passed by the learned

Additional District and Sessions Judge, 2nd Court, Barackpore in Sessions Trial No. 02 (06) 2016 arising out of Sessions Case No. 57 of 2016. By the

impugned judgement of conviction and the order of sentence, the learned Court has convicted the appellant under Section 302 of the Indian Penal

Code, 1860 and under Section 25(i)(a)/27(i) of the Arms Act.

2. The prosecution has alleged that, on November 15, 2015 at about 7:15 P.M, the appellant took the victim to Sree Durga Sporting Club and

demanded a sum of Rs. 8,000 from him and when the victim refused to pay the money the appellant inflicted a gunshot injury near the chest of the

victim and fled away. The neighbours had taken the victim to the ILS (Nagerbazar) Hospital and subsequent to the brother of the victim being

informed, the victim was shifted to the Apollo Gleneagles Hospital for treatment. The victim had died out of gunshot injury on December 25, 2015.

3. At the trial, the prosecution had examined 14 witnesses and tendered various documentary and material evidences which were marked as exhibits

and material exhibits. The appellant had been examined under Section 313 of the Criminal Procedure Code. The appellant had claimed his innocence

in the statement recorded under Section 313 of the Criminal Procedure Code. The appellant had declined to adduce any defence witness.

4. Learned advocate appearing for the appellant has contended that, although the maker of the police complaint, being PW-1, was aware about the

gunshot injury suffered by the victim, he did not mention such fact in the First Information Report. He did not disclose the source of information or the

name of the caller while he had been examined in Court.

5. Referring to the deposition of the PW-1 learned advocate appearing for the appellant has contended that, although, the PW-1 had become aware of

the victim being shot on his refusal to pay a demand of Rs. 8,000, he did not mention such fact in the written complaint. He has pointed out that, the

written complaint was lodged subsequent to the PW-1 having a word with the victim who was his brother.

6. Learned advocate appearing for the appellant questioned the trustworthiness of the dying declaration. He has contended that, PW-6 did not make

any endorsement in the purported statement of the victim recorded by the police officer in the hospital. He has referred to Exhibit- 4 in this regard. He

has submitted that, Exhibit- 4 cannot be considered as a dying declaration.

7. Learned advocate appearing for the appellant has drawn the attention of the Court to the evidence of PW-8 who was the consultant of the hospital

and who examined the victim and conducted the surgery on him. He has submitted that, PW-8 stated that it was not possible for a patient of

tracheotomy to speak. Therefore, according to him, there was no dying declaration made by the victim on November 15, 2015 being Exhibit- 4 as

claimed.

8. Learned advocate appearing for the appellant has further contended that, PW-6 did not make any effort to record the statement of the victim or to

take his left thumb impression on the victim. Therefore, Exhibit- 4 cannot be treated as a dying declaration of the victim.

9. Referring to the testimony of PW-2, learned advocate appearing for the appellant has submitted that, the presence of PW-2 in the hospital was not

stated by PW-1 either in the police complaint or in his evidence. He has referred to the evidence of PW-14 and contended that, the so called dying

declaration came to be made by the victim PW-14 is unreliable.

10. Learned advocate appearing for the appellant has doubted the alleged recoveries of the seized articled. He has contended that, the seizures were

not made in accordance with law.

11. With regard to the dying declarations learned advocate appearing for the appellant has relied upon 2016 Volume 4 Supreme Court Cases

(Criminal) 334 (State of Gujarat vs. Jayrajbhai Punjabhai Varu), 2019 Volume 4 Supreme Court Cases 739 (Sampat Babso Kale vs. State of

Maharashtra).

12. Learned advocate appearing for the appellant has submitted that, when a prosecution witness was not declared hostile, the evidence of such

witness is binding upon the prosecution. In support of such contention, he has relied upon 2005 Volume 5 Supreme Court Cases 272 (Raja Ram vs.

State of Rajasthan).

13. On the aspect of Section 114 (g) of the Evidence Act, learned advocate appearing for the appellant has relied upon 2016 SCC Online Cal 1798

(Bapi Bagdi vs. State of WB) and 2018 Volume 3 Calcutta Law Time 624 (Shri. Kunji Mohammed vs. State WB).

14. Learned advocate appearing for the State has submitted that, there are three dying declarations made by the deceased prior to his death. All the

dying declarations are consistent. The dying declarations have identified the appellant as the murderer. He has referred, evidence of PW-1, 3 and 6

who deposed that the deceased prior to his death, identified the appellant as the person who fired the gunshot at him. He has also drawn the attention

of the Court to Exhibit-4 which contains the dying declaration.

15. On the aspect of the dying declaration made by the deceased being reliable, learned advocate appearing for the State has relied upon 2002 Volume

6 Supreme Court Cases 710 (Laxman vs. State or Maharashtra) (Laxman 2), 2019 Volume 11 Supreme Court Cases 512 (Laxman vs. State or

Maharashtra) (Laxman 1), 2012 Volume 6 Supreme Court Cases 606 (Salim Gulab Pathan vs. State of Maharashtra), 2003 Volume 11 Supreme

Court Cases 534 (Sohan Lal @ Sohan Singh & Others vs. State of Punjab) and 2009 Volume 9 Supreme Court Cases 163 (Sukanti Moharana vs.

State of Odisa).

16. Learned advocate appearing for the State has submitted that, although there is no eyewitness to the incident, the dying declaration of the victim,

the medical evidence produced at the trial, and other corroborative evidences brought at the trial, implicates the appellant. He has, therefore, submitted

that, no interference with the impugned judgement of conviction and order of sentence is called for.

17. At the trial, the prosecution had examined 14 witnesses. The complainant who had lodged the police complaint was examined as PW-1. He is the

brother of the victim and had stated in his evidence, that he lodged the written complaint. He has stated that, the victim told him that the appellant

demanded a sum of Rs. 8,000 from the victim which the victim denied to pay and as such, the appellant had shot the victim. He had identified the

written complaint which was marked as Exhibit-1. He had stated that, on November 17, 2015 the police seized one fire arm in his presence and

prepared the seizure list. He had identified the seizure list which was marked as Exhibit-3. He had also signed the inquest report which was marked as

Exhibit-3. He had identified the fire arm being Exhibit-A and the fired bullet head which was marked as Exhibit-B. He had also identified the fire arm

seized by the police.

18. PW-2 in his evidence had claimed that, the victim after being shot, came to him with the injury and told him to take the victim to hospital. He had

stated that, PW-3 had taken the victim to the hospital and that the victim did not say anything more. PW-2 had been declared as hostile. In his cross-

examination, by the prosecution, after PW-2 being declared as hostile, he had denied the fact that, the victim told him that the appellant shot the victim

with a fire arm. He had also denied the fact that, he told the police that he saw the appellant to flee from the spot.

19. PW-3 had stated that, he was chatting with PW-2 and another person when the victim came to them and told them that the victim was shot by a

gun. He had stated that, he saw the victim injured. He had taken the victim to the hospital. He had stated that, later on at the hospital, he had heard,

from the victim that he was shot by the appellant.

20. A seizure list witness regarding the seizure of the fire arm, had deposed as PW-4. He had stated that, on November 17, 2015 at around 1:00 P.M,

the police recovered one fire arms from the heap of bricks situated at Sree Durga Colony in his presence. He had identified his signature on the label

pasted on the seized fire arm.

21. PW-5 had signed the inquest of the victim. He had claimed that, he heard someone fired a gunshot at the victim thereby injuring him.

22. One of the doctors of the Apollo Gleneagles Hospital where the victim was initially admitted, had deposed as PW-6. The victim had made a

statement to the police, in his presence stating that the appellant shot him. He had identified his signature on the statement recorded by PW-14. He

had identified on such statement which was marked as Exhibit-4. In cross-examination, he had stated that, he did not make any effort to record the

statement of the injured victim.

23. An employee of the Apollo Gleneagles Hospital where the victim was operated upon, had deposed as PW-7. Such employee had witnessed the

seizure relating to the bullet. She had stated that, the bullet which was seized was recovered from the body of the victim.

24. The consultant surgeon at the Apollo Gleneagles Hospital who had operated upon victim had deposed as PW-8. He had stated that, he extracted a

bullet from the victim after conducting an operation. He had instructed the nursing staff to hand over the bullet to the designated officer of the hospital.

He had stated that victim was in the hospital till December 15, 2015 and that the victim was discharged by the patient party against medical advice.

25. The doctor who had conducted the post mortem on the dead body of the victim had deposed as PW-9. He had identified the injuries found on the

victim. He had opined that the death of the victim was due to effect of multi organ failure with Septicaemia in a case of delayed effect of gunshot

injury. In cross-examination, he had stated that, he did not find any gunshot entry injury as he got the body after one month of medical treatment after

injury.

26. The doctor who had treated the victim at Kolkata Hospital and Jain Hospital had deposed as PW-10. He had stated that, the victim was initially

admitted at Apollo Gleneagles Hospital where surgical treatment was done and was subsequently shifted to ESI Hospital at Joka.

27. The Scientific Expert of the Ballistic Division, Forensic Science Laboratory, Government of West Bengal had deposed as PW-11. He had stated

that, he examined the parcels relating to the present police case. He had stated that the fire arm which was Exhibit-A was in working order and was

fired through previously and that the bullet which marked as Exhibit-B was fired through the fire arm.

28. The police officer who had conducted the inquest report of the victim on December 25, 2015 had deposed as PW-12.

29. The police officer who had registered the complaint received from PW-1, as the present police case deposed as PW-13.

30. The Investigating Officer had deposed as PW-14. He had stated that, he examined the victim at the Apollo Gleneagles Hospital on November 15,

2015 at 11.45 P.M in presence of the attending doctor being PW-6. He had stated that, he apprehended the appellant on November 17, 2015 and

interrogated him. The appellant had led him to the weapon of offence which was kept on a pile of bricks at Sree Durga Colony. He had seized the fire

arm in presence of witnesses. He had identified the seizure list. He had stated that the appellant put his signature in the seizure list in his presence.

31. PW-14 had stated in his evidence that, he visited Apollo Gleneagles Hospital on November 16, 2015 and seized one bullet head which was

recovered from the body of the victim in presence of witnesses. He had sent the bullet head and the fire arm to the Forensic Science Laboratory,

Government of West Bengal for examination. He had also collected the report of the examination. He had recorded the statement of the victim in

presence of PW-6. He had tendered the recorded statement as Exhibit-4.

32. The appellant was examined under Section 313 of the Criminal Procedure Code where he had claimed to be innocent. He had declined to adduce

any defence witness at the trial.

33. Having adverted to the nature of the evidence led by the prosecution at the trial, it would be profitable to analyse the same. The prosecution had

established that, the victim was injured by a gunshot injury on November 15, 2015. He had been admitted to the Apollo Gleneagles Hospital where he

was operated upon. PW-8, then a Consultant Surgeon at the Apollo Gleneagles Hospital had operated upon the victim on November 15, 2015 and

removed a bullet from his body. He had stated that, the bullet was lodged just below the left kidney of the victim.

34. The victim had died on December 25, 2015. PW-9, the doctor who had conducted the post-mortem on the body of the victim, had narrated the

nature of injuries found on the body of the victim. He had stated that, the death of the victim was due to effect of multi organ failure with septicaemia

in a case of delayed effect of gunshot injury. The post-mortem report had been tendered in evidence and marked as Exhibit-7.

35. The investigating officer who had deposed as PW-14 had arrested the appellant on November 17, 2015 and integrated him. The appellant had led

the investigating officer to the weapon of offence which was kept on a pile of bricks at Sree Durga colony construction house. He had seized the

weapon of offence in presence of witnesses. The seizure list had been tendered and marked as Exhibit-2.

36. The investigating officer had seized the bullet which was recovered from the body of the victim when he visited Apollo Gleneagles Hospital on

November 16, 2015. Significantly, the victim had been operated upon on November 15, 2015 at Apollo Gleneagles Hospital. The investigating officer

had sent the bullet head and the weapon of offence which he had seized to the Forensic Science Laboratory for examination. He had identified the

bullet head which he seized from Apollo Gleneagles Hospital as well as the firearm which was seized being led by the appellant.

37. The Scientific Expert posted at Ballistic Division, Forensic Science Laboratory, Government of West Bengal, had deposed as PW-11 and proved

his report being Exhibit-10. He had established that, the weapon of offence seized was a single shot improvised pistol. He had found such pistol to be

in working order and fired through previously. He had also found the bullet that was seized at the Apollo Gleneagles Hospital subsequent to the victim

being operated and such bullet being removed from the body of the victim, to be fired through the pistol seized by the police on the appellant leading

the police to the seizure of the same.

38. The victim having succumbed to the bullet injury it can be conclusively said that, the victim was murdered on receiving a gunshot injury.

39. On November 15, 2015, when the victim had suffered the gunshot injury, he was alive. He had taken the assistance of PW- 2 and 3 immediately

after receiving the injury. PW- 2 and 3 along with others had removed the victim and admitted him at the Apollo Gleneagles Hospital where he was

operated upon.

40. The prosecution had established that, immediately after the victim suffered gunshot injury, he was in a position to speak. After being shot, the

victim had approached PW-2 and 3 with a request to take him to hospital. PW-2 who was declared as a hostile witness had acknowledged that the

victim was speaking after suffering the gun shot injury. PW-1 who is the brother of the victim had attended the victim at the Apollo Gleneagles

Hospital on receiving the news of the incident. He had stated that, the victim told him that the appellant demanded a sum of Rs. 8,000 from him and on

the victim denying paying such amount, the appellant shot him. PW-3 had also stated in his evidence that, the victim told him that he was shot by the

appellant. PW-6 who had been posted as the emergency medical officer at the Apollo Gleneagles Hospital on November 15, 2015, had stated that, the

victim recorded a statement in his presence with the investigating officer being PW-14. He had identified his signature and the official seal on the

statement so recorded being Exhibit-4.

41. The prosecution had therefore disclosed two oral dying declarations made by the victim prior to his death. Both the oral dying declarations are

consistent with the appellant having failed to draw the attention of the court to any discrepancy therein. Both the time the declarations had been made

on November 15, 2015. Apart from the two dying declarations as noted above, which the victim had made to PW- 1 and 3 he had his statement

recorded by PW-14 in presence of PW-6. Such statement had been tendered in evidence and marked as Exhibit-4. The statement that PW-14 had

recorded in presence of PW-6 is consistent with the dying declarations that the victim made to PW- 1 and 3.

42. Laxman (1) (supra) had made a reference to a larger bench with regard to conflict in views relating to non-recording of a certificate by a doctor

on a dying declaration.Such conflicting views have been resolved by the Supreme Court in Laxman (2) (supra).

43. With regard to dying declarations and their evidentiary value, Laxman (1) (supra) has observed as follows: â€

â€œ3. As against this, the learned counsel appearing for the respondent State referred to the decision of this Court in Koli Chunilal Savji v. State of

Gujarat [Koli Chunilal Savji v. State of Gujarat, (1999) 9 SCC 562 : 2000 SCC (Cri) 432] wherein the Court observed as under : (SCC pp. 566-67,

para 8)

â€œ8. It further appears from her evidence that though there has been no endorsement on the dying declaration recorded by the Magistrate with

regard to the condition of the patient but there has been an endorsement on the police yadi, indicating that Dhanuben was fully conscious. In view of

the aforesaid evidence of the Magistrate and in view of the endorsement of the doctor on the police yadi and no reason having been ascribed as to

why the Magistrate would try to help the prosecution, we see no justification in the comments of Mr Keswani that the dying declaration should not be

relied upon in the absence of the endorsement of the doctor thereon.â€â€

44. Laxman (2) (supra) has answered the reference by holding as follows: â€

â€œ5. The Court also in the aforesaid case relied upon the decision of this Court in Harjit Kaur v. State of Punjab [(1999) 6 SCC 545 : 1999 SCC

(Cri) 1130] wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a

statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application

would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the

conclusion that the observations of this Court in Paparambaka Rosamma v. State of A.P. [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] (at SCC p. 701,

para 8) to the effect that

â€œin the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much

risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declarationâ€

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the

effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate

categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in

a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in Paparambaka Rosamma v. State of A.P.

[(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] must be held to be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal

Savji v. State of Gujarat [(1999) 9 SCC 562 : 2000 SCC (Cri) 432] .â€

45. Sohan Lal (supra) has held that, when the court is satisfied that the dying declaration was made by the deceased in deffect mental condition while

making the same, it is of no consequence that there is absence of endorsement of Doctor about the fitness of state of mind of the declarant proved in

accordance with law. In that case, the prosecution had placed several dying declarations which were at variance with each other. The court had

believed one of the dying declarations to be correct and proceeded to uphold the convictions of two of the appellants.

46. Sukanti Moharana (supra) has held that, endorsement of Doctor as regards mental fitness of the deceased is a rule of prudence and not the

ultimate test as to whether or not the dying declaration was truthful or voluntary. It has also held that, there is no reason why a dying declaration

which is otherwise found to be true, voluntary and correct should be rejected only because signature or left thumb impression of the deceased could

not be taken thereon. It has also held that, dying declaration could be relied upon for the purpose of convicting an accused under Section 302 of the

Indian Penal Code, 1860. In the facts of that case, it has found that, the oral dying declaration made by the deceased before her parents and other

relatives and the dying declaration recorded by the doctor corroborated each other. The court has held that, the absence of a certificate of a doctor as

to the mental fitness of the deceased and the absence of signature of the deceased or the thumb impression of the deceased were not fatal to the case

of the prosecution, in given facts and circumstances of the case.

47. Salim Gulab Pathan (supra) has observed that, dying declaration would not lose its efficacy merely because it was recorded by a police officer and

not by a magistrate. It has noted the propositions regarding admissibility of the dying declaration in paragraph 18 which is as follows: â€

â€œ18. In Atbir v. Govt. (NCT of Delhi) [(2010) 9 SCC 1 : (2010) 3 SCC (Cri) 1110] after an elaborate consideration of several decisions of this

Court, the following propositions have been laid down with regard to the admissibility of a dying declaration: (SCC pp. 8-9, para 22)

â€œ22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of

tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The

rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the

basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is

coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.â€â€

48. In Sampat Babso Kale (supra) the Supreme Court on analysing the evidence has found that there were some doubts as to whether the victim was

in a fit state of mind to make the dying declaration or not. It has found that the victim suffered 98% burn and that trauma thereof may lead to delusion.

Moreover, the combined effect of the trauma with the administration of painkillers had to be taken into consideration and that the statement made by

the victim was not corroborated by any other evidence on record.

49. In the facts of the present case, the prosecution had relied upon to oral dying declarations made by the victim to PW- 1 and 3 as well as the

statement of the victim recorded by the investigating officer being PW-14 in presence of the Doctor on emergency duty at Apollo Gleneagles Hospital

being PW-6 on April 15, 2015. The appellant has not been able to draw the attention of the court to anything which is inconsistent between the oral

testimonies of PW- 1 and 3 and the statement recorded by PW-14 in presence of PW-6. The victim had stated that the appellant shot him, to PW- 1

and 3 and while his statement was being recorded by PW-14 in presence of PW-6. The absence of mental fitness certificate by the doctor or the

absence of the signature of the victim on his statement is not fatal to the case of the prosecution. The oral testimonies of PW- 1 and 3 have not been

established to be unreliable. The oral testimonies of PW- 1 and 3 are consistent and corroborate each other. The statement of the victim recorded by

PW-14 in presence of PW-6 being Exhibit- 4 corroborates the oral testimonies of PW-1 and 3 with regard to the dying declaration. The oral

testimonies of PW- 1 and 3 with regard to the dying declaration of the victim corroborate Exhibit-4. The appellant has not placed any material before

the court to suggest that, the victim was administered such doses of medicine so as to suffer from delusion while he was making the dying

declarations.

50. Raja Ram (supra) has held that, when, the prosecution did not declare its witness as hostile, then, the evidence given by the prosecution which is

not supporting the prosecution, will be binding upon the prosecution. In the facts of the present case, PW-2 had been declared to be hostile by the

prosecution. He had stated that, the victim told him that he was shot by a gun. He had seen the victim injured. The victim had told him to take the

victim to hospital. PW-2 had claimed that the victim did not say anything more to him. Thereafter, PW-2 had been declared as hostile.

51. PW-2 in his evidence, that is examination-in-chief or in the examination subsequent to he being declared as hostile or in the cross-examination,

claimed that, the victim did not make any statement to any of the persons present that the appellant shot the victim. All that PW-2 had stated was that

the victim did not tell PW-2 as to who shot him. That is not the same thing as saying the victim did not tell the PW- 1 and 2 that the appellant had shot

him.

52. Section 114(g) of the Evidence Act, 1872 has been relied upon on behalf of the appellant along with Bapi Bagdi (supra) and Shri Kunji Mohammed

(supra) in support of the contention that, adverse inference should be made as against the appellant for not producing evidence which could have been

produced. The appellant has not drawn the attention of the Court to any evidence which the prosecution could have produced and not produced at the

trial, and that, such evidence was favourable to the appellant. In absence of such material being placed on record or at least attention of the Court

being drawn to such aspect we need not invoke the provisions of Section 114(g) of the Evidence Act, 1872 in favour of the appellant.

53. In such circumstances, the prosecution having proved beyond reasonable doubt that, the victim had died out of gunshot injury, fired by the appellant

by a fire arm used by the appellant, we find no ground to interfere with the order of sentence imposed by the learned Trial Judge.

54. CRA 283 of 2021 is dismissed.

55. Trial Court records along with the copies of this judgement be transmitted forthwith to the appropriate Court for necessary compliance.

56. Urgent Photostat certified copy of this judgement and order, if applied for, be given to the parties on compliance of all formalities.

57. I agree.