

(2017) 11 AHC CK 0013

ALLAHABAD HIGH COURT

Case No: 2357 of 2010

Altaf

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Nov. 7, 2017

Acts Referred:

- Indian Penal Code, 1860, Section 302 - Punishment for murder

Citation: (2017) 11 AHC CK 0013

Hon'ble Judges: Narayan Shukla, Chandra Dhari Singh

Bench: Division Bench

Advocate: J.P. Mishra, Om Krishna Yadav

Final Decision: Dismissed

Judgement

1. Heard Mr. J.P. Mishra, learned counsel for the appellant as well as Ms. Usha Kiran, learned Additional Government Advocate for the State.

2. The challenge is the judgment and order dated 28.01.2010 passed by the Additional Sessions Judge, Fast Track Court No.4, Gautambudh Nagar, in Sessions Trial No. 357 of 2008. The learned Additional Sessions Judge has convicted the appellant under Section 302 of the Indian Penal Code and sentenced to imprisonment for life with a fine of Rs.10,000/- in default to undergo further simple imprisonment for one year.

3. The case of the prosecution is that the First Information Report was lodged by Dev Raj Tyagi son of Manak Chand R/o Jaunchana, Police Station Rabupura, District Bulandshahar on 25.10.1987 at 8:30 a.m. to the Police Station Rabupura, District Bulandshahar. In his first statement, he stated that while in the last night at about 10 hours, he was sleeping at home, he received information that Madan son of Ved Ram, resident of village Morara, Police Station Adampur, District Muradabad, who is servant of

Ram Kumar, was attacked with spear (Ballam) by Altaf son of Suraj Sonar. He had also stated that some altercation had been done between them about radio, about one and a half months ago. Madan had purchased the said radio, whereas one day Altaf (accused/appellant) had snatched it and had also threatened him that he and his master shall see him on any day. It was stated that when he along with village Pradhan Jagarnath Tyagi (Nobul Singh) son of Jagat Singh, Pratap son of Balwant Singh, Vijay son of Suraj Sharma and Prakash went to the tube well, then the deceased had been groaning with pain and complained that Altaf had attacked upon his stomach with spear (Ballam). Then he got him admitted in the Government hospital, where his condition was very critical, then he immediately rushed, to the Bulandshahar, Hospital, where Madan took his last breath.

4. On the basis of the statement a First Information Report was lodged. The case was investigated by the Investigating Officer. The statement of the deceased had also been recorded before his death by Dr. J.P. Sharma, Medical Officer, PHC Jaunchana, District Bulandshahar on 24.10.1987 at 11:30 p.m. The deceased in his dying declaration had stated that while he was sleeping in the tube well of his brother-in-law Sri Dev Raj, then Altaf came there and knocked the door without raising voice, he opened the door and just after coming he crept into the room with spear (Ballam) and stabbed in his stomach. He further told that about one and a half months ago, he had exchanged the radio and on that very transaction there had been some altercation with him. He also described the status of Amitabh (Altaf) as Servant of Raj Kumar Sonar during the course of recording. His dying declaration was recorded in presence of witness Jaggan Nath (Pradhan). He further stated that the injuries described in the postmortem report were possible to be caused by spear (Ballam). The postmortem report certified that the death of the deceased Madan was caused due to shock and excessive bleeding as a result of ante mortem injuries. The ante mortem injuries described by the Medical Officer reads as under:-

1. IW from S bladder (Abdomen) 3"x 1-1/2" cavity deep in middle not open up to muscles extending up to esophagus was front ikelite omentum pro-body.

5. The Police after completion of investigation filed the charge sheet holding the appellant guilty for commission of offence under Section 302 of the Indian Penal Code.

6. Jaggan Nath son of Mangat Singh (village pradhan) was examined as PW-1, he told that while in the night of 24.10.1987 at about 10 to 10:30 hours, he was sleeping at his home, Dev Raj Singh came there and woke up him and Naubat Singh, who was residing in front of his house and told that his servant Madan had been injured by Altaf with spear (ballam). PW-1 along Nawabt Singh and some other persons reached the tube well of

Dev Raj and searched Madan but he was not found at tube well. Rather he was lying in the filed of Pratap Singh, groaning with pain, in injured position. Deceased told him that Altaf had attacked him with spear (Ballam). There was some altercation between the accused and deceased with regard to Radio. He has also been the witness of recovery memo prepared by the Investigating Officer, since in his presence the white colour slippers of the deceased were recovered from the spot and those were kept in sealed cover. He identified the appellant/accused in the court, Sri Naubat Singh, who had followed the PW-1 was examined as PW-2 and he had narrated the some story as was deposed by PW-1. Sri Vijay Sharma son of Suraj Bhan was examined as PW-3. He accompanied Dev Raj Tyagi on his request at the place, where the deceased was groaning with pain and told them that Altaf had attacked upon his stomach with spear and thereafter Subhash Chand Tyagi was examined as PW-4, he had been the witness of preparation of the inquest report. He had certified the inquest report.

7. Learned counsel for the appellant Mr. J.P. Mishra has submitted that the sole evidence for commission of offence by the appellant/accused is the dying declaration of the deceased recorded by the Medical Officer. The deceased dying declaration was recorded by the Medical Officer not before the Magistrate. Therefore it cannot be said to be free from infirmities. It was not corroborated in any other kind of evidences. Therefore, the learned sessions court was not justified to hold the appellant guilty on the basis of sole dying declaration of the deceased.

8. The Hon"ble Supreme Court rendered in the case of Atbir Vs. Government of NCT of Delhi, 2010, 9, SCC 1 had considered the evidentiary value of dying declaration in detail and held that this Court in a series of decisions enumerated and analyzed that while recording the dying declaration, factors such as mental condition of the maker, alertness of mind and memory, evidentiary value etc. have to be taken into account. It has also referred to its several earlier decisions reads as under:-

9. In Munnu Raja and Another vs. The State of Madhya Pradesh, (1976) 3 SCC 104, this Court held:-

"....It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated...."

10. It is true that in the same decision, it was held that since the Investigating Officers are

naturally interested in the success of the investigation and the practice of Investigating Officer himself recording a dying declaration during the course of an investigation ought not to have been encouraged.

11. In *Paras Yadav and Ors. vs. State of Bihar*, (1999) 2 SCC 126, the Hon"ble Supreme Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. The Hon"ble Supreme Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured can be relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.

12. The effect of dying declaration not recorded by the Magistrate was considered and reiterated by Hon"ble Supreme Court in *Balbair Singh & Anr. Vs. State of Punjab*, (2006) 12 SCC 283. Paragraph 23 of the said judgment is relevant which reads as under:-

"23. However, in *State of Karnataka v. Shariff*, (2003) 2 SCC 473, this Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. This Court therein noted its earlier decision in *Ram Bihari Yadav v. State of Bihar*, (1998) 4 SCC 517, wherein it was also held that the dying declaration need not be in the form of questions and answers. (See also *Laxman v. State of Maharashtra*, (2002) 6 SCC 710)."

13. From above, it is clear that merely because the dying declaration was not recorded by the Magistrate, by itself cannot be a ground to reject the whole prosecution case. It also clarified that where the declaration is wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon. It further held that the statement of the injured, in event of her death may also be treated as FIR.

14. In *State of Rajasthan vs. Wakteng*, (2007) 14 SCC 550, the view in *Balbair Singh's* case(supra) has been reiterated. The following conclusions are relevant which read as under:-

"14. Though conviction can be based solely on the dying declaration, without any corroboration the same should not be suffering from any infirmity.

15. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction."

15. In *Bijoy Das vs. State of West Bengal*, (2008) 4 SCC 511, the Hon"ble Supreme Court after quoting various earlier decisions, reiterated the same position.

16. In *Muthu Kutty & Anr. Vs. State By Inspector of Police, T.N.*, (2005) 9 SCC 113, the following discussion and the ultimate conclusion are relevant which read as under:-

"14. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. 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."

17. The same view has been reiterated by a three Judge Bench of the Hon''ble Supreme Court in Panneerselvam vs. State of Tamil Nadu, (2008) 17 SCC 190 and also the principles governing the dying declaration has been summed up in Paniben vs. State of Gujarat , (1992) 2 SCC 474.

18. 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 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 eye-witness 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 basis of conviction, even if there is no corroboration.

19. In view of the aforesaid principles laid down by the Hon"ble Supreme Court, when we examined the facts of the present case, we found that the deceased, when PW-1, PW-2 and PW-3, on the basis of information of Dev Raj Singh, master of the deceased went to the spot, Madahn told him that Altaf had attacked on his stomach with spear (Ballam). He also told that some altercation was done between him and Altaf about one and a half months ago with regard to the radio, which establishes the motive of the accused to commit murder. The deceased stated that same very facts were recorded in his dying declaration before the Medical Officer in the hospital. The ante mortem injuries described in the postmortem examination report had established that the injuries were caused by same object, which might go into deep. The Medical Officer in his deposition has stated that the ante mortem injuries described in the postmortem report was possible to be caused by spear. All these evidences show that the statement of the deceased given before his death is well corroborated with other evidences. Therefore, we do not find any occasion to disbelieve the statement of the deceased recorded just before his death. The Supreme Court in the cases referred to above has held that the dying declaration can be the sole basis for conviction without any further corroboration, if the court is satisfied that the dying declaration was true and voluntary. There is no evidence in the case that the deceased had given his statement under pressure of anybody, therefore, is no occasion to disbelieve the statement of the deceased recorded before his death.

20. In view of the discussions made above, we do not find error in the judgment and order dated 28.01.2010 passed by the Additional Sessions Judge, Fast Track Court No.4, Gautambudh Nagar, in Sessions Trial No.357 of 2008.

21. In the result, the appeal stands dismissed.

22. Let a certified copy of this order along with lower court record be sent to the court concerned.