Nripendra Das Vs State of Assam

Court: Gauhati High Court

Date of Decision: July 20, 2001

Acts Referred: Penal Code, 1860 (IPC) â€" Section 300, 302, 326, 34, 340

Citation: (2001) 2 GLT 428

Hon'ble Judges: A.K. Patnaik, J; A.H. Saikia, J

Bench: Division Bench

Advocate: C.R. De, H.R.A. Choudhury and K.A. Mazumdar, for the Appellant; K. Deka, PP, for the Respondent

Final Decision: Allowed

Judgement

A.H. Saikia, J.
The appellant before us was convicted u/s 302 IPC by the learned Sessions Judge Cachar at Silchar by the impugned

judgment and order dated 31.3.1998 in Sessions Case No. 27/1997 and sentenced to suffer imprisonment for life and to pay a fine of Rs. 5000

and in default-to pay fine, further rigorous imprisonment for four years. The judgment and order dated 31.3.1998 is under challenged in this

Criminal Appeal.

2. The prosecution case as contained in the FIR, Ext.2 and emerged from the statements of eye witnesses i.e. P.W-1 and 2, in brief, is that on

17.8.1994 at about 5 P.M. when Subal Das, the younger brother of petitioner 5, Sri Sajal Das was on his way back home after watching football

match, the two accused persons namely. Sri Subhas Das son of late Pangoi Ram Das and Sri Nripendra Das (present appellant) son of Sri Sushi

Mohan Das detained Subal Das on the way. The appellant caught hold of the deceased and the accused Subhas Das stabbed the deceased in the

right side below the chests with a sharp dagger which he had in his hand causing grievous injuries to him. P.W-1 and 2 who were near the place of

occurrence saw that the appellant caught hold of the deceased and the accused Subhas stabbed the deceased. On screams when neighbouring

people came to the place of occurrence, the two accused persons including the appellant ran and fled away from the place of occurrence. P.W-5

Sajal Das the informant who was at his residence at that time hearing hue and cry ran to the place of occurrence and found the deceased Subal

Das lying in injured condition on the ground and on his asking the deceased told him that the appellant Nripendra Das caught hold of him and

accused Subhas Das dealt a dagger blow on his chest. With the help of P.W-1,2,3,4 and other neighbouring people, P.W-5 took the injured to

Katigorh Dispensary where the hospital authority referred the case to Silchar Medical College Hospital and the deceased Subhas Das succumbed

to his injuries on the way to the hospital where Doctor after examining the deceased declared him dead.

3. The FIR in this case, Ext.2 was lodged at 9 A.M. on 18.8.1994 by P.W-5, the eldest brother of the deceased. It was transcribed by one

Kripesh Das, a local Deed writer who however, was not examined at the trial. In the FIR both the accused Subhas Das and the appellant Nripen

Das were named with their parentage. According to FIR, the appellant and the other accused detained the deceased and the accused No. 1 Shri

Subhas Das stabbed the deceased with a dagger. But it was not mentioned in the said FIR that the deceased told the P.W-5. the complainant that

the appellant cought hold of him and the other accused Subhas Das stabbed him, though FIR was filed on the next morning after the occurrence.

4. Pursuant to the said FIR, investigation ensued and autopsy on the dead body of Subal Das conducted by P.W-9, Dr. B.K. Bora at Silchar

Medical College and Hospital, who at the relevant time was Professor and Head of the Department of Forensic Medicine therein. Post mortem

report as regards to the injury is extracted below;-

Body of a male with average build about 19 years of age wearing one Jin Longpant and printer underwear only. Rigor mortise present on the

limbs. There was stain of blood on the hands and body. There was application of bandages on the thorox and abdomen which were stained with

blood. Stitch were removed and found as fo flows :-

Injury:

One stab wound of 4 cm x 0.5 cm size situated on the right half of the anterior chest wall at the mid cleviculor plan and entered into the right

thorom cavity cutting the 6th/7th cenetol certiloges and ribs, inside the throresic cavity it has gone into the right lung lower lobe cutting pleurs. The

lower lobs of the right being shows stab wound of 2.5 x 0.25cm x 7 cm. The total depth of the wound from the anterior chest wall to the end point

of the wound on the lung is 15 cm approximately. The shape of the wound is spindle shaped and the length of the wound is vertically placed.

All injuries are antimortem.

Approximate time since death 36 to 48 hours.

5. The police registered a case u/s 341/302/34 IPC and after investigation and submitted cheargesheet against the two accused persons under

Sections 341/302/34 IPC showing the accused Subhas Das as absconder.

6. Shri Subhas Das the accused named in the FIR who had stabbed the deceased, as evident from the FIR as well as from the evidence of the

prosecution witnesses, could not be procured before the trail Magistrate at Silchar and he was declared absconder. As a result, the case was

committed against the appellant only for trial.

7. The Sessions Judge, Silchar on perusal of the record and hearing, prima-facie case u/s 302/34 IPC was found to have been made out against

the appellant and charge was framed and explained to him to which the appellant pleaded not guilty.

8. On behalf of the prosecution as many as 9 witnesses were examined. P.W-1 and 2 namely Nandi Das and Gopendra Das were examined as

eye witnesses giving the details of the occurrence. P.W-3, Juntu Das and P.W-4 Sukendfa Das were examined along with P.W-1 to corroborate

the dying declaration of the deceased saying that when the appellant caught hold of the deceased, the accused Subhas Das gave a fatal blow by

dagger. P.W-5, Sajal Das, the informant and elder brother of the deceased, stated about the dying declaration of deceased. P.W-6 Tridip

Thakaria was examined as the Investigating Officer. P.W-7, Sri Faizur Rahaman Borlaskar, ASI. Ghoongur Out-post held inquest examination on

the dead body of the deceased and prepared the inquest report and referred the dead body for postmortem examination to Silchar Medical

College Hospital. P.W-8 another police official involved in issuing requisition to send the injured to the Silchar Medical College Hospital when he

was brought to Katigorah P.S. P.W-9 Dr. B.D. Bora was examined who stated about the postmortem examination conducted on the dead body

of Subol Das and injury found on the person of the deceased, already narrated above.

9. The defence case was of total denial. The appellant was examined u/s 313 CrPC. In his statement recorded under the said section, the appellant

submitted that he was innocent and at the time of occurrence he was not present at his house and he was on telephone duty. In order to prove of

such alibi the defence examined 3 witnesses as D.W. 1, Ram Kr. Mollah, D.W.-2, Asish Kr. Deb and D.W.-3, Babul Ch Paul. On consideration

of the evidence of the prosecution witnesses, the Sessions Judge did not at all convince on such plea of alibi taken by the defence.

10. The trial court on appreciation of the evidence available on record, found the accused/appellant personally liable for the offence of murder and

convicting him u/s 302 IPC without the aid of Section 34 IPC and accordingly, convicted u/s 302 IPC and sentenced him accordingly vide the

judgment impugned in this appeal.

11. We have heard Mr. C.R. De, learned Sr. counsel assisted by Mrs. A. Begum, learned counsel appearing on behalf of the appellant. Also

heard Mrs. K. Deka, learned P.P. Assam.

12. The prosecution relies mainly on the evidence of P.W.-l and 2 projecting them only as the eye witnesses. According to prosecution both of the

witnesses arrived at the scene of occurrence and claimed to have been that the appellant caught hold of the deceased and other accused Subhas

stabbed the deceased. In addition, the prosecution further relies on the statement of the deceased made to P.Ws 1, 3. 4, and 5 as dying

declaration.

13. According to Mr. De, learned Sr. counsel for the appellant, his argument is of three fold-firstly, whether the evidence of P.W. - 1 and 2 can be

accepted as eye witnesses to prove the fact of Caught hold of the deceased''; secondly, whether the appellant can be convicted on the basis of

dying declaration of the deceased as claimed by the prosecution, while the deceased was not in a position to give such declaration as evident from

the medical evidence and thirdly, that there was delay and defect in the FIR.

14. In support of his first contention, learned Sr. counsel has stated that the evidence of P.W. - 1 and 2 cannot be relied on for the glaring

contradictions of their evidences. P.W. - 1 said that appellant caught hold of the deceased from the front side and gagged his mouth while P.W. - 2

said that the appellant caught hold of the deceased on the right and directed the accused Subhas Das to stab the deceased and accordingly

accused Subhas Das stabbed the deceased.

15. Now to examine the veracity of the evidence of those two witnesses, let us go through the evidence of P.W-1 and 2.

16. P.W-1 said that while he was grazing cows to the south east of his house, he saw the appellant and Subhas Das came out from the L.P.

School near the jungle and attacked the deceased Subal. The appellant caught hold of the deceased and gagged his mouth. The deceased raised

alarm and P.W-1 Immediately proceeded to the place of occurrence and saw the accused Subhas assaulted the deceased with a dagger, being

asked by the appellant. The accused Subhas Das also attempted to kill P.W-1 but he made hue and cry. Then both the accused including the

appellant ran away towards the Barak river on the south. He saw deceased Subol with a dagger injury on his right side of the chest who fell down

on the ground. In the meantime, P.W-2,3,4 and 5 and one Rantu Das came to the place of occurrence. When people assembled, the injured told

them that he was assaulted by the accused Subhas with a dagger being caught hold by the appellant. In cross-examination, the said witness stated

that the appellant caught the deceased from the front side. He stated before the police that the accused and the appellant came out from the School

and the appellant caught and gagged the mouth of the deceased. He further stated to the police that the appellant asked the accused Subhas to kill

the deceased with dagger and Subhas did give the dagger blow on the deceased. The accused Subhas Das also attempted to kill him and he raised

alarm. The accused after the assault ran towards the Borak river.

17. P.W-2 adduced that on the day of occurrence at about 5 p.m. while he reached the L.P. School on his way to Borak river he saw the

appellant caught hold of the deceased on the road and directed the accused Subhas to stab the deceased. Accordingly, accused Subhas stabbed

the deceased. He raised alarm and the P.W-1 who grazing his cows near the place of occurrence also raised alarm. P.W-2 with P.W-1 both ran

towards the place of occurrence. Then the appellant and accused Subhas started running towards south of Borak river. They also chased the

accused a little further. When they came back to the place of occurrence P.W-2 saw the deceased in a pool of blood with injuries. Then he,

petitioners 1,3 and others lifted the deceased to his house. They brought bandage to the deceased and took him by a boat to Katigorh P.S. The

police sent the deceased immediately to the hospital. Thereafter, the deceased was sent immediately to the Silchar Medical College Hospital where

he died which he came to know afterwards. In cross-examination, this witness has stated that he told the police that appellant directed Subhas to

stab the deceased and appellant caught hold of the deceased and accused Subhas assaulted him with dagger.

18. Mr. De, learned Sr. counsel appearing on behalf of the appellant submits that the evidence of both P.W-1 and 2 are apparently contradictory

and cannot be believed as regards the fact of catching hold of the deceased. In course of his argument in order to dislodge the evidences of P.W-1

and 2, the learned Sr. counsel has taken us to the evidence of I.O.,P.W-6. According to P.W-6, Investigating Officer, P.W* 1 did not tell him that

the appellant and Subhas came out from the School and the appellant asked the accused Subhas to give a dagger blow on the deceased. The said

witness also did not tell him that the P.Ws 2,3,4,5 and Sajal''s mother came to the place of occurrence. P.W-1 did not tell him that the injured told

his brother that the accused assaulted him. As regards P.W-2, the said Investigating Officer, P.W-6 adduced that the P.W-2 did not tell him that

the appellant assaulted the deceased. Hence, there was clear discrepancies and inconsistencies in the evidences of P.W-1 and P.W-2 and the

same is not believable for conviction of the appellant u/s 302 IPC. That part, according to the learned Sr counsel for the appellant, the medical

evidence would pointedly show that injury recorded was only one stab wound of 4 cm x . 5 cm on the right half of the interior chest wall, when as

per evidence of P.W-1, the appellant caught hold of the deceased from the front side, how is it acceptable that injury could be caused on the right

half of the chest wall. Should this factual position be carefully scrutinised, trie evidence of the P.W-1 and 2 has no leg to stand. Therefore, on this

count alone, the appellant is entitled to acquittal on benefit of doubt.

19. In support of his submission, the learned Sr. counsel for the appellant has relied on the following authorities of the Apex Court.

(1) The State of Bihar Vs. Ram Padarath Singh and Others,

(2) AIR 1997 234 (SC)

(3) Sharad Birdhichand Sarda Vs. State of Maharashtra,

(4) Pawan Kumar and Others Vs. State of Haryana,

20. In Ram Padarath Singh''s case (supra), the Apex Court held that evidence of eye witness though not consistent with the medical evidence it can

be accepted by giving good reasons notwithstanding certain discrepancies. However, the sentence of death of the appellant in the said case was

committed to life imprisonment. Further it was held that veracity of the eye witness cannot be doubted on the ground that no independent witness

from near by the place examined by the prosecution.

21. The Apex Court in Bhogirath''s case (supra) held that the testimony of the witnesses who desposed that the accused fired pistol shot at

deceased from the close range, cannot be discarded merely because of some contradictions in the deposition when the same is corroborated by

the medical evidence.

22. The learned Sr. counsel for the appellant has placed much reliance on Sharad Birdhis''s case (supra) being a celebrated decision on

circumstantial evidence and benefit of doubt. The Apex Court laid down certain conditions which must be fulfilled before a case against an accused

based on circumstantial evidence can be fully established and those are as follows:-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned ''must or should''

and not ''may be'' established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on

any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

23. On the other hand as regards the benefit of doubt Apex Court held that where on the evidence two possibilities are available or open, one

which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.

Taking help of the ratio laid down in Sharad Birdhi"s case (supra), Mr. De, learned Sr. counsel wants to impress this Court by arguing that if the

evidentiary value of the eye witnesses P.Ws-1 and 2 are totally discarded, the conditions laid down in Sharad Birthi"s case (supra) to be fulfilled

for conviction of the appellant on the basis of circumstantial evidence which did not occur in the present case and the appellant is entitled to get

benefit of doubt.

24. The concept of benefit of doubt was also discussed in Pawan Kumar"s case (supra) and the Apex Court held that the benefit of doubt to the

accused would be available provided there is supporting evidence from the record. For creating doubt or granting benefit of doubt, the evidence

must be such which may lead to such doubt.

25. Keeping in view the ratio of all the above cited cases, we are of the opinion that those rulings would not help the appellant"s case to disbelieve

the evidence of P.W-1 and 2 making the appellant to be entitled for benefit of doubt.

26. A mere reading of the evidence of P.W-1 and 2 would testify that the appellant caught hold of the deceased allowing the accused Subhas for

stabbing. Since there is corroboration of the evidence of the two eye witnesses as regards the caught hold of the deceased by the appellant, we do

not find that the statement of these two eye witnesses can be brushed aside only for such minor contradiction. Further, it appears that these two

eye witnesses are disinterested witnesses who happened to be present at the place of occurrence by chance. It is settled position of law that any

minor discrepancies shall not negative the corroborated evidence of the witnesses.

27. Arguing the second contention, the learned Sr. counsel has vehemently urged that considering the nature of injury as per medical evidence, the

deceased was not in a position to make any dying declaration as claimed by the prosecution and as such, the conviction of the appellant on the

basis of dying declaration was not at all Justified. It is stated that as per evidence of Doctor P.W-9, it was difficult to say how long the injured

could survive out of such one injury with which a person may collapse instantly.

28. Challenging the conviction of the appellant on the basis of dying declaration of the deceased, the learned Sr. counsel has relied on a decision of

the Apex Court in Bhagwandas Vs. The State of Rajasthan, In the said case the Court observed that when from the Doctor"s evidence it was

found that It was improbable that the deceased would have been in a position either to walk or to speak so as to make a dying declaration was

found to deserve being disregarded. In the instant case, what we have found is that Doctor, the P.W-9 in his deposition, opined that it was difficult

to say how long the injured can survive after sustaining such injury. For better appreciation of the evidence of the Doctor, the relevant portion of his

deposition in cross-examination is quoted below:-

There was only one injury. It is difficult to say how long the injured can survive after sustaining such injury. He may collapse instantly. The wound

was on the right half of the chest. It is difficult to say from which side the assailant had assaulted the deceased.

From a plain reading of the said deposition, it cannot be held that the deceased was not in a position to make any statement or he died instantly.

P.W-5 specifically stated in cross-examination that the moment when he met his injured brother at the place of occurrence he was in a position to

talk.

29. Considering the evidence of the doctor, P.W-9 vis-a-vis, the P.Ws 1,3,4 and 5, we are of the considered view that the deceased was in a

position to make the said dying declaration of PWs 1,3,4 and 5. It cannot be said that having regard to the conditions of the injury, deceased was

not in a position to make any statement to be treated as dying declaration. Accordingly we art in agreement to disapprove the submission made on

behalf of the appellant that the dying declaration stated to PWs 1,3,4 and 5 cannot be accepted.

30. It is well settled that before relying upon dying declaration the Court should be satisfied that the deceased was in a fit state of mind to make

statement. Once the Court is satisfied that the dying declaration was made voluntarily and not influenced by any extrenuous consideration, it can be

accepted without any other further corroboration.

31. The Supreme Court dealing with the law of "dying declaration" in ""Uka Ram v. State of Rajasthan"" 2001 SOL 246 indicated in paragraph 6 as

follows:

Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found or who has become Incapable of giving

evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to

the court unreasonable, are themselves relevant facts under the circumstances enumerated under Sub-sections (1) to (8) of Section 32 of the Act.

When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in

cases in which the cause of that person''s death comes into question is admissible in evidence being relevant whether the person was or was not, at

the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death

comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests upon the

principle that a sense of impending death produces in a man''s mind the same feeling as that of a conscientious and virtuous man under oath -

Nemo moriturus praesumuntur mentiri. Such statements are admitted, upon consideration that their declarations made in extremity, when the maker

is at the point of death and when every hope of this world Is gone, when every motive to falsehood is silenced and the mind induced by the most

powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal maxim

Nemo moriturus praesumitur mentire"" i.e., a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a

dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it

is essential for the court to insist that dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The

Court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination.

Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind made the statement. Once the

Court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base ils conviction

without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence.''''.

32. In the instant case if we accept the evidence of the Doctor as regards the physical condition of the deceased at the time of making such dying

declaration vis-a-vis P.W-5 we can safely hold that the deceased was in a position to make his statement as regards caught hold of him by the

appellant allowing the accused Subhash to stab and at least that much physical strength and condition he retained at the time of making such

statement. Bearing in mind the evidence of P.Ws 1.3,4 and 5, the dying declaration of the deceased can be relied on beyond reasonable doubt.

33. Advancing his third condition, Mr. De, learned Sr. counsel submits that there was delay and defect in the FIR and as such the same is not

admissible under the law. He had stated that the occurrence took place at about 5 PM on 17.8.1994 and FIR was lodged on the next day i.e. on

18.8.1994 at 9AM causing a delay of atleast 16 hours. More importantly in the FIR the informant, P.W-5, did not mention that the deceased told

him that the appellant caught hold of him and asked the accused Subhash to stab him. The omission of mentioning the said dying declaration of the

deceased in the FIR has clouded the prosecution case which was manufactured only and simply to rope the appellant u/s 302/34 IPC.

34. In support of his submissions, the learned Sr. counsel relied on the decision of Ram Kumar Pandey v. Stateof M.P. reported in 1975 (Crl) 225

in which the Supreme Court held that failure to mention persons alleged to be the witnesses in the FIR was detrimental and moreso, failure"" to

mention dying declaration was also fatal. But in an another case reported in The State of Bihar Vs. Ram Padarath Singh and Others, the Apex

Court held that though the fact that the names of the eye witnesses did not appear in the FIR was relevant circumstances, evidence of each of these

eye witnesses was required to be appreciated on its own ment and the evidence of the eye witnesses cannot be rejected on the ground of non-

mentioning of the names of those eye witnesses in the FIR. Taking in view such legal position, we feel that the said case is not applicable in the

present case.

35. As regards the delay in filing the FIR the learned Sr. counsel has tried to impress upon us that the delay of 15 hours has not been explained

properly to the satisfaction of the court which itself was fatal to the prosecution case. But the deposition of P.W-5 would clearly show that he

stayed at Medical College Hospital for the night and on the following day he filed the ejahar. From the perusal of the impugned judgment it would

also appear that the Sessions Judge has observed that the brother of the deceased, the P.W-5 had to stay at Silchar Medical College Hospital

along with the dead body, he could only inform the police and the said fact itself was explanation of the delay. We are also in full agreement with

the said finding of the Sessions Judge to the effect that the delay was properly explained and there is no impediment in accepting the FIR.

36. Regarding delay in filing the FIR the Supreme Court in a recent decision of Raghbir Singh Vs. State of Haryana, held that attending to the

injured first by way of rushing of the victim to the hospital to save his life instead of first going to the police station was satisfactory explanation for

the delay in making the complaint. In another case of State of Rajasthan Vs. N.K.-The Accused, the Apex Court has emphasied as below:

..A mere delay in lodging the FIR, cannot be a ground by itself for throwing the entire prosecution case over board. The court has to seek an

explanation for delay and test the truthfulness and plausibility of the reasons assigned. If the delay is explained to the satisfaction of the court, it

cannot be counted against the prosecution.

Having regard to those decisions of the Apex Court and also finding of the Sessions Judge, we are disinclined to accept the contention of the

appellant that the delay in filing the FIR was not properly explained.

37. In addition to the above emphasised contentions, the learned Sr. counsel for the appellant has also urged that the blood clot found in the place

of occurrence where the deceased was lying sustaining injury was not seized by the police when it was the duty of the investigating officer to seize

the blood clot and non-seizure of the same has vitiated the investigation. Supporting his contention, the learned Sr. counsel has taken us to a

decision of this Court in Nasir Ahmed v. State of Assam reported in (1996) 3 GLR 27. In the said case, this Court held that it is the duty of the

Police Officer to perform a proper investigation and to place unvarnished truth before the Court and it is not part of the duty of the Police to

bolster up a false case. We are not at all impressed by the submission of the learned counsel on this point due to the fact that non-sequire and non-

examination of the blood clot has not effected the prosecution case at all which stood on its own leg on the basis of the evidence of the eye

witnesses supported by the dying declaration.

38. Supporting the conviction and sentence of the appellant, Ms. K Dekha, learned P.P., has submitted that the trial Court has passed a reasoned

judgment after careful consideration of the materials on record and the evidences of the eye witnesses as well as other witnesses adduced in the

case in hand in full details by giving very cogent reason for its finding. It is further submitted that there is no perversity and illegality committed by

the Sessions Judge in appreciating the evidence. The view taken up by the Sessions Judge is not at all perverse but quite consistent with the

evidence recorded in the case and, as such, in any event, there is no occasion to this court to Interfere with the well reasoned order of conviction

passed by the Sessions Judge.

39. Ms. K. Deka, learned P.P. also submitted that on the basis of dying declaration, a conviction can be based provided the Court can come to a

clear finding that such dying declaration was made honestly without any motive to falsely implicate any accused. In the instant case, the trial Court

has given cogent reason why dying declaration was accepted as genuine one and free from all doubts. It is submitted that taking Into consideration

the evidence of P.W-9, the Doctor, the deceased at the relevant time was in a position to make such statements to PWs 1,3,4 and 5 having

enough time to tell that the appellant caught hold of him and accused Subash dealt daggar below.

40. In a bid to claim support of her submission, learned P.P., has referred the following decisions-

(1) Mafabhai Nagarbhai Raval Vs. State of Gujarat,

(2) Om Parkash Vs. State of Punjab,

(3) Prakash and another Vs. State of Madhya Pradesh,

(4) AIR 1997 234 (SC)

(5) Pratapaneni Ravi Kumar alias Ravi and another, etc. Vs. State of Andhra Pradesh, .

(6) Gulam Hussain and Another Vs. State of Delhi,

41. The ratio of those cases is that the deceased even after sustaining the fatal injury was in a position to make statement which can be accepted as

dying declaration. ''

42. Having regard to the authorities cited by the learned P.P. above mentioned and also on appreciation of the evidences of PWs 1,3.4 and 5 we

can safely hold that the deceased, taking into account the injury sustained by him, was in a position to make the dying declaration which deserves

to be accepted as held by the sessions Judge.

43. Now it is to be examined as to whether the appellant can be convicted for the offence of murder u/s 302, IPC or for some other offence. As

discussed above, it appears from the evidence of P.Ws- 1 and 2 as well as dying declaration of the deceased that the appellant caught hold of the

deceased. If there is evidence that the appellant caught hold of the deceased till the other accused Subhash stabbed the deceased, then obviously

the appellant could be roped in for the offence of murder u/s 302 IPC with the aid of Section 34, IPC inasmuch as it can be held that the appellant

shared the common intention of Subhash to kill the deceased. But the evidence of P.W-1, the eye witness, is that the appellant caught hold of the

deceased from the front side while the evidence of P.W-9, the Doctor who carried on the post mortem on the body of the deceased, is that there

was one stab wound of 4 x 5 cm situated in the right at the anterior chest on account of which the deceased died. Since the fatal stab was given by

Subhash from the front side of the deceased, it is difficult to hold that the appellant continued to catch hold of the deceased at the time when

Subhash stabbed the deceased on his chest to kill him. In our considered opinion, therefore, the appellant cannot be said to be a participant

directly in the offence of murder u/s 302, IPC or to have shared the common intention of Subhash for committing the offence u/s 302, IPC. For

these reasons, we hold that the trial court committed grave error in holding that the appellant was personally liable for the offence of murder and in

convicting him u/s 302, IPC.

44. The factual position of the case in hand a close resemblance to a recent case of the Apex Court in Shambhu Kuer Vs. State of Bihar, The

factual matrix of the said case was the Shambu Kuer, appellant caught hold of the deceased and one Mandip gave three blows to the deceased

with a knife. Out of three accused persons one Kailash was acquitted by the trail court while other two were convicted. Mandip was convicted u/s

302 IPC while Shambu Kuer, the appellant also convicted u/s 302 IPC read with 34 IPC. during the pendency of the Appeal the accused Mandip

was released by the Government on the ground of serious illness. For which his appeal was dismissed as infructuous, On the other hand the

conviction of the appellant Shambu Kuer was upheld by the High Court with the finding that he continued to hold the deceased till the assault was

completed by Mandip. One of the three injuries on the deceased which plerched the right lunge was according to the Medical witnesses, sufficient

to cause death in the ordinary course. The Apex Court, against this back drop, held that from the mere fact that the appellant caught hold of the

deceased and scuffle with him while other accused Mandip took out a knife and commenced his assault, it cannot be inferred beyond reasonable

doubt that he showed common intention of Mandip to murder the deceased. At the best he was vicariously liable for an offence u/s 326 read with

Section 34 IPC and accordingly, allowing the appeal, the conviction of the appellant was altered to u/s 326 read with Section 34 IPC and

sentenced him to imprisonment already undergone.

45. In the instant case, as evident form the discussions of the evidences of the above mentioned P.Ws, it is undoubtedly established that while

appellant caught hold of the deceased the other accused Subhash commenced the assault on the deceased with the knife. Against such backdrop

of the case in hand, the ratio of Shambu Kuer''s case, in our opinion, is applicable in the instant case.

46. Besides, the acceptance of ''caught hold of theory'' against the appellant, as held above, has made us to ponder over another important

question i.e. whether the appellant was also involved in an offence of wrongful confinement within the meaning of Section 340 IPC. From the

meticulous appreciation of evidence it would clearly appear that though the appellant had not stabbed the deceased directly, the fact remains, as

revealed from the evidence of the prosecution witnesses as discussed above, that the appellant participated in detaining the deceased by catching

hold of him in a bid to prevent the deceased from proceeding beyond a circumscribing limit, that is, the place of occurrence, accommodating

Subhas, the accused to thrust the dagger blow. Having carefully gone through the testimony of the witnesses, we do not have any hesitation to

convict the appellant also for wrongful confinement of the deceased within the definition of Section 340 IPC punishable u/s 342 IPC. Be it noted

that it goes without saying that by no stretch of imagination, the appellant could be held guilty u/s 302 IPC and the conviction and sentence handed

down on this count by the Sessions Judge deserves to be set aside.

47. Having regard to ratio of Shambu Kuer"s case (supra) and also after going through the entirety of the factual position supported by proper

appreciation of the evidence, we hold that at the best the appellant can be convicted u/s 326/342 IPC read with Section 34 IPC instead of Section

302 IPC. Accordingly we are of the view that the sentence from life imprisonment of the appellant deserves to be altered to one u/s 326/342 IPC

read with Section 34 IPC. It is stated at the bar that the appellant has been in Jail since 31.3.1998. Since the main accused Subhas could not be

tried in view of his absconding and the appellant has already suffered an imprisonment of about 3 years 4 months, we feel the ends of justice would

be met if the sentence of life imprisonment of the appellant is modified by sentencing him to imprisonment already undergone.

For the forgoing reasons, we allow the appeal by altering the conviction of the appellant from Section 302 IPC u/s 326/342 IPC read with Section

34 IPC and he is sentenced to imprisonment for the period undergone as mentioned above.