

(2009) 06 JH CK 0011**Jharkhand High Court****Case No:** None

Surendra Bengali @ Surendra
Singh Routela

APPELLANT**Vs**

The State of Bihar (Now
Jharkhand)

RESPONDENT**Date of Decision:** June 30, 2009**Acts Referred:**

- Arms Act, 1959 - Section 27
- Evidence Act, 1872 - Section 32
- Penal Code, 1860 (IPC) - Section 302, 307, 326, 34

Hon'ble Judges: Amarendra Sahay, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

Amarendra Sahay, J.

The appellant Surendra Bengali @ Surendra Singh Rautela along with two other accused namely Deepak Deo and Sudhir Ganju were put on trial. This appellant Surendra Bengali, was charged u/s 302 of the Indian Penal Code for causing death of Mahesh Pandey in furtherance of common intention with other accused persons namely Deepak Deo and Sudhir Ganju, who were charged under Sections 302/34 of the Indian Penal Code. This appellant was further charged u/s 27 of the Arms Act for possessing Pistol for using it illegally for firing at Mahesh Pandey.

Learned Trial Court, by its impugned Judgment dated 28.05.1999 in Sessions Trial No. 46/1989, convicted the present appellant Surendra Bengali, holding him guilty u/s 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced him to undergo rigorous imprisonment for life u/s 302 of the Indian Penal Code and further for a period of three years rigorous imprisonment u/s 27 of the Arms Act. The other two accused Deepak Deo and Sudhir Ganju were acquitted by the Trial

Court holding that the prosecution failed to prove the charges leveled against them. It is against this impugned Judgment of the Trial Court, the present appeal has been filed by the appellant.

2. The facts in short are that one Prem Kumar lodged a Fardbeyan on 23.07.1988 at 9:15 P.M. alleging therein that at about 9:00 P.M., he and his maternal uncle namely Mahesh Pandey were in their house. At that time, one Sudhir Gajju, a neighbour came and called Mahesh Pandey. On such call, Mahesh Pandey went out of the house and went near Vasundhara Cinema and started talking near a beetle shop. Immediately thereafter, the accused Surendra Bengali and Deepak Deo came there on a motorcycle which was being driven by Deepak Deo whereas the appellant Surendra Bengali was a pillion rider. It is said that this appellant Surendra Bengali fired two shots from his pistol on Mahesh Pandey. Deepak Deo also shot one fire from his fire arm. Mahesh Pandey, after receiving fire arm injuries, fell down on the ground and thereafter, the accused persons fled away towards Kutcheri. Due to firing, the people of the locality became terrorized and they started fleeing away hither and thither. The cause of occurrence was said to be enmity between Mahesh Pandey and Surendra Bengali (appellant). The injured Mahesh Pandey was removed to Rajendra Medical College and Hospital, Ranchi.

On the basis of the Fardbeyan, the case u/s 307, 326/34 of the Indian Penal Code and Section 27 of the Arms Act was registered against the three accused persons but when the victim Mahesh Pandey died in course of treatment in the Hospital, subsequently, Section 302 was also added subsequently.

3. The Police took up the investigation and on completion thereof, submitted chargesheet. Thereafter, cognizance of the offence was taken and the case was committed to the Court of Sessions where the charges were framed and thereafter, the accused persons were put on trial.

4. In course of Trial, altogether six witnesses were examined on behalf of the prosecution and some documents were also adduced in evidence which were marked Exhibits.

5. The victim who was admitted in the Hospital for treatment, made a Dying Declaration on 23.07.1988, which was recorded by the Judicial Magistrate at 11:00 P.M. in presence of the treating Doctor.

6. Learned Trial Court, on the basis of the evidence and materials on record, convicted and sentenced the appellant, as already noticed above.

7. Mr. H.S. Prasad, learned Counsel appearing for the appellant, submitted that the whole case of the prosecution hinges on the so called Dying Declaration of the victim Mahesh Pandey which has been marked as Ext.-3. The alleged Dying Declaration of the deceased was allegedly recorded at Rajendra Medical College and Hospital, Ranchi on 23.07.1988 at 11:00 P.M.. He further submitted that the alleged

two eye witnesses P.Ws.-1 and 2 i.e. the mother and sister of the deceased did not support the case of the prosecution and were declared hostile. P.W.-3 is the Doctor who held the postmortem examination, whereas P.W.-4 is the witness of seizure and P.W.-6 is the Investigating Officer, therefore, there is no other material except the alleged dying declaration of the victim to connect the appellant with the alleged occurrence.

8. Mr. H.S. Prasad, learned Counsel further submitted that the Dying Declaration is liable to be discarded from consideration as the same is neither signed by the victim nor it bears the certificate of the Doctor to the effect that at the time of making such declaration, the victim was in a fit state of mind to make such statement. Lastly he submitted that the Dying Declaration ought to have been recorded in a question and answer form which has not been done in this case. In view of these serious infirmities, the dying declaration cannot be taken into consideration for holding the appellant guilty for the charge. There being no other evidence on record to corroborate the Dying Declaration, the appellant deserves to be acquitted.

9. On the other hand, Mr. V.S. Sahay, learned APP for the State, submitted that the Dying Declaration (Ext-3) made by the victim is itself sufficient to convict the appellant since the same is perfectly legal and valid. He submitted that the law does not require that the Dying Declaration should bear the signature of the victim nor the dying declaration requires any corroboration, if the Court finds it to be genuine and trustworthy.

10. In view of the facts stated hereinabove and the points raised by the parties, this Court has to consider as to:

- i. Whether a Dying Declaration can be made the sole basis to convict an accused. If yes, when and under what circumstances?
- ii. What are the requirements for the admissibility of a Dying Declaration in evidence?
- iii. Whether Dying Declaration should require thumb impression of the maker? signature or the
- iv. Whether a certificate of the Doctor is essentially required regarding the fact that the maker was in a fit state of mind to make such statements/ declaration?
- v. Whether Dying Declaration essentially requires corroboration by other evidence.

For searching the answer to the above questions, let us examine the case laws on this point.

11. The Supreme Court, as far back as in 1958, in the case of Khushal Rao Vs. The State of Bombay, has held that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no

opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. The necessity for corroboration arises when in a given case, the Court comes to the conclusion that a particular dying declaration was not free from infirmity. (Emphasis is mine)

12. In a leading case of [Harbans Singh and Another Vs. State of Punjab](#), the Supreme Court has held that it is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. (Emphasis is mine)

13. It is a settled law that Section 32(1) of the Evidence Act is exception to the general rule that hearsay evidence is not admissible evidence unless evidence is tested by cross examination. When a statement is made by a person, as to the cause of death or any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased is called dying declaration. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration enjoys almost a sacrosanct status as a piece of evidence coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. Reference in this regard may be made in the case of [Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh](#).

14. In the case of [P.V. Radhakrishna Vs. State of Karnataka](#), the Supreme Court has laid down certain principles for acting upon a dying declaration. Relevant extracts from paras 10, 12 and 15 of the said Judgment are reproduced here-in-below.

The general rule is that all oral evidence must be direct. The eight clauses of Section 32 of Evidence Act are exceptions to the general rule against hearsay. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eyewitness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the

sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party 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 is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentiri - a man will not meet his Maker with a lie in his mouth. (Para-10)(Emphasis is mine)

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. (Para-12) (Emphasis is mine).

Moreover, the state of mind was proved by the testimony of the doctor who was present when the dying declaration was recorded. In the aforesaid background it cannot be said that there was any infirmity. Further, if the person recording the dying declaration is satisfied that the declaration is in a fit medical condition to make a dying declaration then such a dying declaration will not be invalid solely on the ground that it is not certified by the doctor as to the condition of the declarant to make the dying declaration. (Para-15).

15. So far as the question as to whether a dying declaration should be recorded in a question answer form, the Supreme Court, in the case of Ram Bihari Yadav Vs. State of Bihar and Others, has held that it cannot be said that unless the dying declaration is in question answer form, it cannot be accepted. Having regard to the sanctity attached to a dying declaration, as it comes from the mouth of a dying person though, unlike the principle of English law, he need not be under apprehension of death, it should be in the actual words of the maker of the declaration. Generally, the dying declaration ought to be recorded in the form of questions and answers, but if a dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker, the mere fact that it is not in question-answer form, cannot be a ground against its acceptability or

reliability (Emphasis is mine).

16. On behalf of the appellant, a Judgment of the Supreme Court in the case of Paparambaka Rosamma and Others Vs. State of Andhra Pradesh, has been cited in support of the contention that certification of the Doctor is essentially required to show that the patient was in a fit state of mind to make the statement and in absence thereof, a dying declaration can not be accepted.

No doubt this view was taken by the three Judges" Bench of the Supreme Court, but the said decision has already been overruled by the subsequent five Judges" Bench of the Supreme Court in the case of Laxman Vs. State of Maharashtra, wherein, it is held that the Judgment in the aforesaid case of Paparambaka Rosamma and Ors. v. State of A.P. (Supra) was not correctly decided. The view taken in the case of Koli Chunilal Savji and Another Vs. State of Gujarat, has been upheld, wherein it was held that the dying declaration of the deceased cannot be ignored merely because the Doctor had not made the endorsement that the deceased was not in a fit state of mind to make the statement in question.

In the aforesaid case of Koli Chunilal Savji and Anr. v. State of Gujrat (Supra), the Supreme Court has also held that the requirements of endorsement by a Doctor is only a matter of prudence and the ultimate test is whether the dying declaration is voluntary and truthful. Before recording the dying declaration, the officer concerned must find that the injured was in a fit state of mind to make the statement and if the Magistrate is satisfied about the condition of the patient, such statement can be reliable.

17. In a recent decision of the Supreme Court in the case of Sher Singh and Another Vs. State of Punjab, the Supreme Court, relying on its earlier decision in the case of Koli Chunilal Savji and Anr. v. State of Gujrat (Supra) and Laxman v. State of Maharashtra (Supra) held that the acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason, the requirement on oath and cross examination are dispensed with in the case of dying declaration. Since the accused has no power of cross examination, the Court would insist that the dying declaration should be such a nature as to inspire full confidence of the Court in its truthfulness and correctness. It is for the Court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit.

18. The decision cited by the counsel for the appellant in the case of Arvind Singh Vs. State of Bihar, is not applicable in the facts and circumstances of the present case since in that case, the dying declaration was made by the victim - daughter only before her mother implicating her husband and in-laws in a case of dowry death. It was held in the said case that the mother of the deceased was an interested witness and therefore, in such a case, medical certification of the fitness of mind of the

maker was held to be required whereas, in the present case, the dying declaration has been made in the Hospital in presence of the Doctor and has been recorded by the Judicial Magistrate, who cannot be said to be an interested witness and therefore, this Judgment of the Supreme Court is of no help to the appellant.

19. The other decision cited on behalf of the appellant i.e. the case of Kanchy Komuramma v. State of A. P. is also not applicable in the facts of the present case since that was a case of dowry death and the girl who received the burn injuries made the dying declaration in presence of the Magistrate but the same was not found reliable because the mother of the victim specifically stated that the condition of the patient was not good and that she was not in a fit condition. In such a situation, the dying declaration was held to be not reliable, whereas, in the present case, the facts are quite different. In this case, we do not find any infirmity in the dying declaration of the victim, rather we are of the view that the dying declaration is genuine and truthful.

20. From the evidence led by the prosecution during the trial, it appears that at the request of the Investigating Officer and the orders of the Chief Judicial Magistrate, Ranchi, P.W.-5 Subhash Chandra Prasad, Judicial Magistrate, recorded the dying declaration of the victim Mahesh Pandey at Rajendra Medical College and Hospital, Ranchi on 23.07.1988 itself at 11:00 P.M., wherein the victim specifically stated that he was shot at by the appellant Surendra Bengali at 9:00 P.M. The victim spoke only few sentences. The dying declaration was recorded in presence of the Doctor attending the victim and he has also put his signature therein. The dying declaration also bears the certificate of the Judicial Magistrate to the effect that the statement was recorded by him and it was given by the victim voluntarily at death bed and it was true statement.

21. P.W.-5, Judicial Magistrate, in his evidence, has specifically stated that the Doctor had orally stated before him that the victim Mahesh Pandey was in a fit state of mind to give the statement. The dying declaration has been adduced in evidence and has been marked as Ext. - 3.

22. The dying declaration was made only after 2/3 hours of the occurrence and the victim died in the morning of 25.07.1988. whereas, the postmortem was done on the same day. P.W.-1 Rampati Devi, the mother of the deceased and P.W.-2 Tanuja Kumari, sister of the deceased, though have been declared hostile by the prosecution since as stated by this witness in their evidence, they did not see the assailants, but from their evidence, at least this fact has been established that the deceased came out of his house at the relevant time and date and within half an hour, these two witnesses heard the sound of firing and on hearing the sound of firing, they came out of their house and found Mahesh Pandey lying injured due to fire arm injuries. Thereafter, the victim Mahesh Pandey was removed to the Hospital where in course of the treatment, he died.

23. It was this appellant, who shot fire from his pistol on the deceased, has clearly been stated by the victim in his dying declaration. The injuries found on the person of deceased, as stated by the Doctor who held the postmortem examination, fully corroborates the statements of the victim made in the dying declaration.

The following injuries were found on the person of the deceased.

(i) Wound of enterance 1 x 1/2 cm. stitched on the left chest front 6 cm. below left nipple and 8 cm. left middle line. The projectile passes through chest wall perforates the diagram intestine and makes an exit wound 2 x 1 cm. on the left abdomen back, 6 cm. left to middle line;

(ii) Wound of enterance 1 x 1/4 cm. on the right abdomen upper part 3 cm. right to middle line, the projectile passes through abdominal wall injured the stomach mesentery and makes an exit wound 1 x 1/2 cm. x 3 1/4 cm. on the left lateral chest.

24. P.W.-5 - Shri S.C. Prasad, the Judicial Magistrate, stated in his evidence that on 23.07.1988, he recorded the dying declaration of Mahesh Pandey at Rajendra Medical College and Hospital, Ranchi at 11:00 P.M.. The dying declaration which is in few sentences, are quoted here-in-below:"

iwNus ij mlus eq>s dgk dh eSa olqU/kjk ds ikl jgrk gwWAa lqjsUnz Ckaxkyh us eq>s xksyh ekjk gSA ukS cts jkr esa xksyh ekjkA ogkaWa ij esjh ekWa FAhA eq>s isV esa cgqr nnZ gks jgk gSA mlus esjs HAkbZ dk Hakh eMZj fd;k FAkA og pkj xksyh pyk;k Fkk

In cross examination, the Judicial Magistrate stated that he did not know Mahesh Pandey from before. The victim was identified by the Doctor. The Doctor stated before him that Mahesh Pandey was in a position to make statement.

The dying declaration not only contains the certificate of the Judicial Magistrate certifying that the statements made by the declarant was voluntary but it also contains the signature of the Doctor D.P. Bhadani and Most. Rampati Devi (P.W.-1). However, Dr. D.P. Bhadani, in spite of best efforts, could not be examined since he left Ranchi as has been stated by the Investigating Officer P.W.-6 Arun Kumar Singh in his evidence.

25. From a close scrutiny of the dying declaration made by the victim (Ext. - 3) wherein it has specifically been stated by the victim before the Judicial Magistrate - P.W.-5 that the accused Surendra Bengali shot fire on him. He also stated that Surendra Bengali had killed his brother also. After stating these few sentences, the deceased uttered that he was feeling serious pain in his abdomen and thereafter, did not say anything. The Judicial Magistrate specifically stated that Dr. Bhadani, who was attending the injured, told that the injured was capable of making the statements and thereafter he recorded whatever was stated by the injured.

26. In view of the facts stated above, in our view, the genuineness and truthfulness of the dying declaration made by the victim and recorded by the Judicial Magistrate

in presence of the Doctor cannot be doubted.

27. So far as the point raised on behalf of the appellant that the dying declaration should contain the signature or the thumb impression of the maker is concerned, in our view, the same is devoid of any merit. u/s 32 of the Evidence Act, when the 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, in cases in which the cause of that person's death comes into question, such statements, oral or in writing, made by the deceased to the witness, is a relevant fact and is admissible in evidence.

Section 32 and its Sub-clause (1) is quoted here-in below:

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.

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 in the following cases:

(1) When it relates to cause of death. - When the 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, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them 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.

...

28. In view of the discussions and findings above, we hold that

a. A dying declaration can be made the sole basis to convict an accused if the Court comes to the conclusion that the dying declaration is truthful and free from any infirmity;

b. If the dying declaration is free from infirmity and is found to be genuine and truthful, then no corroboration by any other evidence is required;

c. If the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration, then a certificate of the Doctor regarding the mental fitness of the declarant to make the dying declaration is not required.

d. Generally a dying declaration should be recorded in a Question - Answer Form but if a dying declaration is not elaborate and consists of only a few sentences and is in the actual words of the maker, such dying declaration which has not been recorded in a Question - Answer form, cannot be rejected and it can be accepted.

e. u/s 32 of the Evidence Act, a dying declaration is not required to be signed by its maker and even dying declaration made orally is admissible in evidence.

29. In the present case, as already held above, the dying declaration made by the victim Mahesh Pandey is found to be genuine and truthful and without any infirmity and therefore, in our view, the learned Trial Court has rightly relied on the dying declaration of the victim Mahesh Pandey (Ext. - 3) and held the appellant guilty for committing his murder.

30. We do not find any error in the impugned Judgment of the Trial Court. Accordingly, we hereby affirm the conviction and sentence passed by the Trial Court.

31. Consequently, the appeal is found to be without any merit. The same is hereby dismissed.