(1999) 09 MP CK 0005

Madhya Pradesh High Court (Gwalior Bench)

Case No: Criminal Appeal No. 22/97

Motilal and Others		APPELLANT
	Vs	
The State of M.P.		RESPONDENT

Date of Decision: Sept. 29, 1999

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 161, 164
- Evidence Act, 1872 - Section 32(1)
- Madhya Pradesh Police Regulations - Regulation 742
- Penal Code, 1860 (IPC) - Section 147, 149, 302, 304

Citation: (2000) 1 MPHT 229 : (2000) 1 MPLJ 270

Hon'ble Judges: R.P. Gupta, J

Bench: Single Bench

Advocate: A.K. Shrivastava, for the Appellant; B.D. Jain, G.A., for the Respondent

Final Decision: Dismissed

Judgement

R.P. Gupta, J.

Five appellants have been convicted in Sessions Trial No. 330/95 by 1st Addl. Sessions Judge, Guna vide his judgment dated 74-1997 for having committed offence u/s 304 Part I read with Section 149 I.P.C. and Section 147 of the I.P.C.. They were found to be forming unlawful assembly on 14th August, 1995 at about 5 p.m. in the area of jungle of village Jaganpur and attacked deceased Raghuvir with sharp edged and hard blunt weapons like Farsa, luhangi and lathis. The most serious injury caused was with Farsa cutting about 1/3rd front of right arm of the deceased. There were other injuries also on the right arm and leg causing sharp edged cuts and blunt weapon injuries were caused on the face and other parts of the body. Total six injuries were caused. Raghuvir died by about 6 p.m. as a result of these injuries. The appellants have been sentenced to five years'' RI each u/s 304 Part I read with Section 149 IPC and to one year''s RI u/s 147

IPC. They challenge this judgment and sentence in the present appeal.

The basis of conviction is statement of the deceased made to Head Constable Harnarayan (PW-1) at 5.05 p.m. on 14-8-1995 in the presence of Constable Bhanwar Singh (PW-2). This Head Constable (PW-1) had received information of some quarrel resulting in a person lying in a jungle of village Jaganpur, from some person, while this Head Constable was passing through Railway crossing of Bajrang Garh. This Head Constable had gone to Guna with certain police letters from Police Station Bajrang Garh which was the Police Station of his posting and Superintendent of Police''s office was situated at Guna. He was returning to Bajrang Garh at about 4.30 p.m. after performing his duties at Guna. He was informed by a person of village Jaganpur. This Head Constable met Constable Bhanwar Singh (PW-2) at the private bus stand. Constable Bhanwar Singh also belonged to Police Station Bajrang Garh. Both of them together, on the motorcycle, went to village Jaganpur and enquired about the quarrel. They could not find any grown up person and some small children, around the age of seven to eight years, informed them that a quarrel had taken place at the bank of Nalha in the jungle. They parked their motorcycle in the village and proceeded towards Nalha in the jungle in search of place of incident. They saw deceased lying in injured condition by the side of. Nalha. Harnarayan Head Constable had asked him what happened and injured was speaking at that time although he had his right hand practically cut off and his other injuries in the leg and hands were bleeding and infact he was practically crying. On enquiring, the injured stated to him that he was assaulted by Motilal, Parmal, Bhagwat, Gopal and Parvat of his village. Motilal, Parvat and Parmal hit him with Farsa and luhangi while Gopal and Bhagwat hit him with lathis. The motive for this assault was stated by him as his objection against their grazing their cattle in the grass land (beed) belonging to him. These two witnesses were present on the spot when all this was stated by the deceased Raghuvir. Harnarayan recorded this statement as Dehati Nalish as Ex. P/1, finding that the condition of the deceased was critical and apprehending as to how long he would be able to live. This Head Constable recorded another statement of injured giving it a title of ''Marnasann Kathan'', which was recorded at 17 hours and 12 minutes. The Head Constable said that the other Constable Bhanwar Singh of Police Station Bajrang Garh was present when the statement of deceased (Ex. P/1) was recorded for the purpose of recording formal first information report. Before any Investigating Officer could reach on the spot, after first information report was recorded, the injured breathed his last. The formal first information report (Ex. P/9) was recorded at Police Station Bajrang Garh at about 5.35 p.m.. It was recorded by S.P. Singh Meena, Sub-Inspector (PW-9). He started for the scene of crime but before he could reach, the injured died. The distance between Police Station Bajrang Garh and the scene of crime was about 6 kms.

On the Dehati Nalish (Ex. P/1), Head Constable Harnarayan had obtained thumb mark of the deceased, of his left hand, with the ink pad which was allegedly ordinarily carried by Head Constable while he was on duty, in his bag. The Head Constable had recorded his note to the Police Station for recording first information report on that basis. On the

statement titled as "Marnasann Kathan" also, the thumb mark of injured was obtained and Bhanwar Singh Constable had also, signed it as a witness.

When S.P. Singh Meena (PW-9) reached the spot, body was lying. He prepared inquest report (panchnama) of the body noting the injuries. He also lifted some blood soiled earth and sample of control earth from the scene of crime and sent the body for Post mortem examination.

In the statement made by injured, it had been mentioned that the assault was carried out by these five named accused armed with weapons noted above and the assault was witnessed by one Gyare and a person who was "son of Ram Charan Kori of the same village". During investigation, Investigating Officer had recorded statement of Pappu s/o Ramcharan, but, he went hostile to the prosecution case and hostile to his own statement to the police. No person by the name of Gyare was cited as a witness nor produced as witness. No questions were asked either by the prosecution or defence from the Investigating Officer as to whether there existed any person by the name of Gyare or any such person could be traced and whether any statement of such person was recorded by the Investigating Officer.

In the Post Mortem Examination conducted by Dr. Shivram Singh (PW-8) on 15-8-1995 at 10.40 a.m., the following injuries were detected :

(i) There is incomplete separation of right upper limb at the level of lower 1/3rd or forearm. The incomplete separated point attached by a tag of skin postero-medially. The margins of separated parts smooth, with clotted blood and ecchymosis;

(ii) Incised wound over right arm auteromedially horizontally middle 1/3rd part 3 cm x 0-5 x 0-5 cm with clotted blood and ecchymosis;

(iii) Lacerated wound 2-5 cm x 0-8 cm x 0-8 middle 1/3rd of right leg anteriorly with clotted blood and ecchymosis;

(iv) Bruise horizontally 5 cm x 2 cm left forearm auteromedially, red colour;

(v) Cut through of upper lip middle part with smooth margins and clotted blood 0.5 cm gap in between;

(vi) Abrasion 1 cm x 0.5 cm left through posteriorly.

Fracture of radius & ulna and fracture of right radius ulan and fracture of left ulna bone were also noticed. All injuries were found antemortem caused within 24 hours from the autopsy. Injury Nos. 1, 2 and 5 were caused by sharp edged weapon and injury Nos. 3, 4 and 6 were caused by hard and blunt object. The clothes of the deceased were sealed by the autopsy surgeon. The Autopsy was conducted by two Doctors. In the opinion of the Doctors, the death was result of haemorrhage and shock resulting from multiple injuries.

The prosecution had examined 13 witnesses in the trial. Among these witnesses, Harnarayan (PW-1) Head Constable and Bhanwar Singh (PW-2) Constable are most important witnesses for this case. Pan Bai (PW-7) mother of the deceased, and Makhan Singh (PW-12) brother of the deceased, are merely hearsay witnesses with regard to actual incident. Pappi (PW-4) eye witness turned hostile. Suresh Chandra Sharma (PW-5) is a Patwari who prepared site map. Ram Prasad (PW-6) is Chowkidar before whom Investigating Officer has seized blood stained earth and sample earth from the scene of crime and sealed it. Dr. Shivram Singh Raghuwanshi (PW-8) is an autopsy surgeon. S.P. Singh Meena (PW-9) is Investigating Officer. PW-10 and PW-13 are both Meharban Singhs, although different. They are witnesses to inquest (Panchnama) Ex. P/5. Ramesh (PW-11) was witness to the disclosure by these accused and seizure from them of weapons of assault and shirt of Motilal. However, it is unnecessary to consider the evidence of this seizure or disclosure as the recovered articles have not been examined by Forensic Experts and if examined, the reports have not been tendered in evidence, so there is no connection established between recovered articles and the crime.

The trial Court has thus, proceeded to weigh the evidence of (PW-1) and (PW-2) as to whether the deceased, before his death, gave a statement to PW-1 in the presence of PW-2 and these statements in the form of Exs. P/1 and P/2 are believable and can be acted upon as dying declaration or not. The trial Court has found the evidence of these witnesses reliable and they proved the statements made to them by the deceased before his death and held that there is no reason to doubt the truth of statements u/s 32(1) Evidence Act as dying declaration and can be the basis of conviction of these accused, for having formed unlawful assembly and common object of unlawful assembly having been, assaulting deceased for causing above injuries which resulted into the death soon after the fall, and on that basis inference of offence u/s 304 Part-I read with Section 149 IPC was taken and not for offence u/s 302 IPC.

The contention of learned counsel for the appellants is that the so-called dying declaration of the deceased, made to Head Constable Harnarayan remained uncorroborated. It has inherent weaknesses in so far as it is recorded by Head Constable who did not record if the deceased was in a fit condition to make a statement. There is no opinion of the Doctor that the deceased was able to make a statement at the time when he made that statement. Further, the witness Pappi son of Ram Charan did not support the fact that the deceased made that statement or the witnesses saw the accused assaulting the deceased although he was projected as such a witness. Then the person Gyare, who was named as present at the time of assault and who was stated to be a person of the same village, was not examined by the police either u/s 161 Cr.P.C. or as a witness. He was not traced, we do not know if such a person exists, if he does not exist then name of a false witness was introduced by the deceased; if he exists then vital witness was missed by investigating agency creating doubt in the entire prosecution case as disclosed by the so-called dying declaration. Then, it is also urged that the Dehati

Nalish purports to have thumb marks of the deceased with left thumb. It is strange that the Head Constable had the ink pad with him at that time so as to obtain the thumb marks of the deceased. It is urged that it should not be believed that the thumb marks were of the deceased. It is also urged that the Dehati Nalish is strictly not a first information report and so it does not have that value as evidence either. It is then urged that according to the story given in the dying declaration, the Head Constable had first met a person of Jaganpur, who informed him that one person was lying in a jungle of Jaganpur, that person had not been examined as witness nor was traced. It is urged that he was a vital witness as he must have seen the deceased even before the police officials reached there. Then police officials in village Jagapur inquired from some children who told them that quarrel had occurred by the side of a Nalha in the jungle. Those children had not been examined as witnesses nor cited and their names are not known. It is argued that they were also vital witnesses to the-incident. So the argument is that important and vital witnesses have not been traced or not examined and this should raise presumption against the prosecution. In the face of these weaknesses the dying declaration which is the sole evidence in this case should not be acted upon according to the argument of the counsel. It is argued that the testimony of Harnarayan, Head Constable is not very consistent in comparison to that of Bhanwar Singh regarding the exact nature of the declaration, in so far as Bhanwar Singh does not name who caused incised wound with Farm.

Counsel for the appellants has further argued that in this case, in recording the statements of the deceased which now are projected as dying declaration, the instructions as contained in M.P. Police Regulations No. 742 (c) have not been followed and therefore also the statement should not be allowed to form basis of conviction. These instructions are as under :--

"742. Case Diary - how written.-- The manner in which the case-diary should be written is indicated in the following instructions :

(a) .....

(b) .....

(c) Signing of a statement recorded.-- The only circumstances in which a statement taken down in writing by a police officer making an investigation is to be signed by the person making it, are when the deponent is in a moribund condition and the statement is practically a dying declaration. If a Magistrate is near at hand, and the declaration is one that in the event of the deceased''s death would be relevant u/s 32(1) of the Indian Evidence Act, the Magistrate should be asked to attend and record the statement of a dying person, in accordance with the provision of Section 164, Criminal Procedure Code.

If the attendance of a Magistrate cannot be secured, without the risk of such person''s death before his statement can be recorded, the investigating officer will record the dying

declaration in accordance with the following instructions :--

(1) If possible, such person shall be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a credible statement.

(2) Such statement shall be recorded in the presence of two or more credible witnesses unconnected with the police department. If such credible witnesses cannot be obtained without risk of such person''s death before his statement can be recorded, it will be recorded in the presence of one or more police officers. This rule does not apply when a gazetted officer is present.

(3) If any person is accused by the deponent of having been concerned in the transaction which threatens to result in his death, such person should be allowed to be present when the statement is recorded, if he so wishes.

(4) The statement must be headed with declarant''s name, father''s name, caste and residence and should consist of questions and answers. The answers must be taken down from the declarant''s lips, word for word exactly as he utters them, and must not be afterwards added to or corrected in any way. The date and time of recording the statement must be recorded and the statement must be signed or otherwise attested by the deponent, the recording officer and the witnesses. A Court will not place any confidence in a dying declaration which has been reduced to writing after it has been made, or which has been recorded in the words of the recording officer and not in those of the declarant himself."

The trial Court has treated the Dehati Nalish Ex. P/1 as FIR as dying declaration. It was recorded by Harnarayan Head Constable, with his comments below the report. The thumb impression of the injured was taken above his comments. The formal first information report recorded on its basis is Ex. P/9 on the same day i.e. 14-8-95 at 17.35 hours. The police Station was situated 6 k.m. away from the scene of crime and Ex. P/1 was recorded at 17.05 hours. The Head Constable started investigation soon after recording the Dehati Nalish and sending it for recording of FIR that is his note below Ex. P/1 and that is also his statement. Finding that the injuries were critical in so far as the right arm was practically cut 1/3rd above wrist, the Head Constable has proceeded to record his statement also titling it as "Marnasann Kathan", while the Constable was still with him, it is Ex. P/2. Shri S.P. Singh Meena PW-9 recorded the formal FIR Ex. P/9 and has proved it so. He proceeded to the scene of crime at once and found the injured dead. He had sent copy of this FIR to the Magistrate and other higher officials at once as stated by him on oath. He had prepared the inquest report Ex. P/5 on the same day at 18.30 hours at the scene of crime and completed it at 18.40 hours. The substance of the FIR Ex. P/9 is in fact the contents of Dehati Nalish Ex. P/1. It records that the Constable Bhanwar Singh had brought this Dehati Nalish sent by Head Constable Harnarayan in the form of the statement of Raghuvir Yadav deceased. This statement was incorporated in

FIR Ex. P/9.

The criticism" that the Head Constable did not record that the injured was in a fit state to make a statement, is without substance. Dehati Nalish is a document which is in fact statement of the injured recorded at the scene of crime by police officer finding that the injured is in a critical condition and there has been a grave offence committed against his person by somebody. If it is established as genuinely so recorded statement and on that basis investigation starts, it certainly has status of FIR. Recording of the formal FIR on its basis is a subsequent action of the police officer and only establishes that this statement was actually made as it was recorded in the prescribed proform a and registers at a particular time. The precaution to be taken at the time of recording dying declaration are not necessary for recording the statement which has status of FIR. This has been recognized by the Supreme Court of India in the case of Jai Prakash and Others Vs. State of Haryana, . It was observed in that case that the FIR given by the deceased before his death need not bear any opinion of the Doctor that lodger of the FIR was in a fit state of mind to make statement, that fact can be established. The fact that he made a statement and police official recorded it suggests his fit state of mind unless otherwise it is established and further that it makes no difference if such statement to police official by the injured was not recorded in question answer form. The statement, when recorded, was only a complaint for which neither the presence of the Doctor nor Doctor"s opinion was required. Counsel for the appellants had put reliance on a judgment of the Supreme Court Lallubhai Devchand Shah and Others Vs. The State of Gujarat, , wherein the Court said that the person who records a dying declaration must be satisfied that the dying man is making conscious and voluntary statement with normal understanding. In that case there were three dying declarations by the burnt woman; one was to number of neighbours by whom a memorandum was prepared and signed by them, second to a Doctor who recorded it in the medical paper on the basis of his note and third to a Head Constable who recorded it. The argument raised before the Supreme Court was that it was not shown that the injured at the time of making statement was in a fit state of mind to make a statement. Their Lordships said that the fit state of mind denotes consciously making a statement understanding implication of the words used. The Court said that considering facts and circumstances, and evidence in the case before them that there was no doubt that Sharda (maker of the dying declaration) was not only conscious and able to speak out, but, also that she was consciously and voluntarily making the statement, she was able to speak out only at 1 p.m., but, even between 4.00 to 4.30 p.m. when Dr. Keshavlal and the Head Constable spoke to her. In these circumstances the dying declarations recorded by the Doctor in his medical paper and also dying declaration recorded by Head Constable were accepted as trustworthy which could form basis of conviction.

This case does not help the appellants at all and in fact the law regarding value of the FIR as dying declaration has been more lucidly enunciated by the Supreme Court in the above case of Jaiprakash. The authority cited by the counsel for the appellant in fact does

not help them as Harnarayan, Head Constable has stated that he and Bhanwar Singh found one person lying at same distance from the Nalha. He went near him and he asked him. At that time he was speaking although his right hand had been cut off and he was bleeding from his injuries from the extremities. He had asked him as to who had assaulted him and then he told that Motilal, Parvat, Bhagwat, Gopal and Parmal of village Jaganpur had assaulted him of whom Motilal hit with Farsa and Parwat, Gopal, Bhagwat and Parmal hit him with lathi and Luhangi because he had asked them not to graze their cattle in his grassland.

This testimony of the witnesses inherently shows that the maker of the statement was in a fit state of body and mind to make statement although he was injured. The witness has obtained left thumb mark of the injured on the statement because his right hand was cut. He says that at 6.30 p.m. the I.O. came, but, at that time the injured was unable to speak.

This witness has explained that after recording Dehati Nalish he proceeded to record the dying declaration (Marnasann Kathan) because he thought that he might die. This was recorded in presence of Bhanwar Singh. In cross-examination he had explained that he had read out whatever statement he recorded to the injured Raghuvir and in recording the dying declaration he did not record it in question answer form as the injured was writhing with pain (TADAP RAHA THA) and so he thought he should record the statement as fast as possible, of course he questioned Raghuvir about what happened and Raghuvir had given him answer, at which he recorded the statement. He had recorded a dying declaration for the first time that day in his career in police. The Marnasann Kathan, which this witness recorded, is Ex. P/2. The witness had explained that Raghuvir was found lying about two to two and half k.m. from Jaganpur which is a small village of about 15-20 houses only. It was suggested to this witness that on Exs. P/1 and P/2, he had obtained thumb marks of accused after he was dead. He denied this.

Bhanwar Singh Constable (PW-2) has supported this testimony of Harnarayan PW-1. He had taken Dehati Nalish to Police Station Bajranggarh after the Marnasann Kathan had been recorded by PW-1. This witness had signed as a witness the document Ex. P/2 which is the Marnasann Kathan. He proves his signature on it at point "B" to "B". Ex. P/1 was recorded by Bhanwar Singh as Dehati Nalish, in the presence of this witness and within 10 minutes the Marnasann Kathan was also recorded in his presence. During the cross-examination this witness has stated that when he and Harnarayan was searching for the injured after information from the children of a village, they both heard a cry in the jungle "HAY RAM PANI PILA DO", this was about 200 ft. away, so both of them proceeded to that spot and found Raghuvir lying there about 3 to 4 yards from the Nalha.

Dr. Shiv Narayan Raghuwanshi (PW-8) was asked in cross-examination whether the deceased, when injured, could speak in spite of injuries on his lips. The Doctor said the injured could speak in spite of the lips injury.

The trial Court has appreciated all these parts of evidence and found that the deceased was in a fit state of mind to speak and know what he was saying when he made statement to Harnarayan Head Constable. The trial Court accepted these statements as genuinely recorded by Harnarayan and truthful statement of the deceased while he was alive. The objection that the deceased is not shown to have been in a fit state of mind or body to make a statement, is in fact without substance when we examine the testimony of these witnesses. The Head Constable has no reason to record what the deceased had not stated. His testimony that it was deceased who spoke out and gave the statement is acceptable. There is no reason to discard it, in spite of the fact that the deceased had died by 6.30 p.m.. We do not know at what time the injury was caused to the deceased, but, the Head Constable had noticed him at 17.05 hours and then recorded his statement as Dehati Nalish and soon thereafter his statement as Marnasann Kathan. There was no legal requirement for the Head Constable to formally record in the Dehati Nalish that the injured was in a fit state of mind to make a statement. That can be proved as such, and the statement of the Head Constable and Constable prove it. So it is fully established that Raghuvir, before his death, made a statement to the Head Constable voluntarily and while he was in a fit state of mind.

The Marnasann Kathan Ex. P/2 is similarly established by these two witnesses and mere fact that it is not in question answer form makes no difference in the peculiar circumstances of the case. It is not always that when a Marnasann Kathan is not in question answer form, it should be rejected out right as a dying declaration as in-admissible dying declaration. Section 32(1) Evidence Act does not prescribe the form of recording it. The ordinary rule enunciated by the Supreme Court is that safest course is that dying declaration be recorded in question answer form. But if it is not so recorded, the Court will see surrounding circumstances and proceed with cautious. In this case, it is preceded by the Dehati Nalish which had the value of FIR. The statement made in the FIR is substantially the same as made in the Marnasann Kathan. Even if this "Marnasann Kathan" was not there, the Dehati Nalish would be sufficient dying declaration which can be acted upon, if found to be true. Considering the entire evidence this Court finds that the trial Court has rightly believed the Dehati Nalish as dying declaration Ex. P/1 and also rightly believed the Marnasann Kathan Ex. P/2 as a dying declaration. Both these are admissible in evidence u/s 32(1) Evidence Act and are timely recorded and truthful.

The assertion of learned counsel that the Dehati Nalish Ex. P/1 could not be regarded as FIR is of consequence. His reliance on certain observations of the Supreme Court in the case of Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax, Hyderabad, at para 7 of the report is mis-quotation of the authority. In that case their Lordships found that an independent report to police had been recorded before the so-called two Dehati Nalishes and that is why the two Dehati Nalishes were not accepted as FIR. There is no general comments that the statement recorded at the scene of crime and on the basis of which investigation is proceeded by police and which in fact is first information to the police, cannot be treated as FIR u/s 154 Cr. P.C..

The further reliance by the counsel for the appellants is on the observations of the single Bench decision of this Court in case of Ramsingh v. State of M.P. cited at 1989 MPLJ 223, which says that the Supreme Court had held in the case reported in Baiju alias Bharosa Vs. State of Madhya Pradesh, that Dehati Nalish cannot be treated as evidence as a report u/s 154 Cr. P.C.. It is itself based on certain facts and circumstances peculiar to that case and the general proposition was never laid down by the Supreme Court as already noticed herein before. The Single Bench was concerned with reliability of the particular FIR and the question to be decided was whether the FIR could be treated as promptly recorded and for this reason acceptable as truthful. It had been recorded initially in the form of Dehati Nalish and then converted into an FIR. Its being recorded promptly was found doubtful. The same learned single Judge, while pronouncing in Division Bench, in a case titled Bhagatram and Ors. v. State of M.P. cited at 1990 JLJ 329, observed that in Baiju''s case the Supreme Court had not made any general proposition that Dehati Nalish cannot be an FIR and at the same time it is also observed that Dehati Nalish can be treated as Dying declaration if otherwise found truthful. So a Dehati Nalish has to be treated as FIR if it is basis of start of police investigation in a particular case, as in this case. It has the value of FIR u/s 154 Cr.P.C.

Thus, it is found that the trial Court has rightly held both the statements Exs. P/1 and P/2 as having been recorded by PW-1 on a voluntary statement of the injured before his death while injured was in a fit condition to speak consciously.

It may be noticed that the guidelines provided to investigator in Regulation 742 (c) of the M.P. Police Regulations are guidelines only and have to be tested in the light of the pronouncement of the Apex Court in various cases. In the present case it is fully proved that there was no time for calling the medical authorities or the Magistrate. The Head Constable rightly considered that, due to the bleeding injuries, the injured may not survive long and it was necessary in these circumstances to record his statement for an FIR, as well as to record his Marnasann Kathan thereafter. The necessity of such a situation is also noted in the above Regulation. There was nobody else except Head Constable or Constable at that time. So the Head Constable could not shirk his duty of recording the statement of the injured in that condition. He could not leave the spot and run away either to find a Magistrate or a Doctor or some witnesses. As already noticed, the FIR need not to be in question answer form and need not be in any formal noting from the recording police official about fitness of injured to make a statement. Since the Marnasann Kathan followed few minutes thereafter, no infirmity to the same can be imputated as two are substantially the same in all material particulars.

Thus, it is found that the trial Court has rightly accepted Exs. P/1 and P/2 as voluntary statements of the injured at the time when the injured was alive and was able to speak about who assaulted him how and why.

The criticism of counsel for the appellants is that the witness Gyare has not been traced and not produced, although his name as witness to the incident is mentioned in the

statement Exs. P/1 & P/2 and it is mentioned that Gyare is of the village, which means the same village as son of Ramcharan, that is the village of the injured. That village is small village of about 15-20 houses, so the police should have searched for Gyare, but, they did not.

This Court finds that the question regarding Gyare was not put to I.O. PW-9 Shri S.P. Singh Meena. In the absence of such a question, no inference against prosecution can be drawn. The fact remains that Pappu ''son of Ramcharan'' of that village, the alleged eye witness, has gone hostile to his statement initially made to the police regarding the incident. So, ''son of Ramcharan'' was a real person resident of that village as mentioned in the dying declaration. This is infact corroborative of the dying declaration rather than destructive. So this objection has no force.

One more objection is that whereas in Ex. P/1 there is mention that Parmal and Parvat with Luhangi and Gopal and Bhagwat with lathis attacked him while Motilal hit him with Farsa, in Ex. P/2 although there is mention that Motilal hit with Farsi, there is general mention about others that they hit with Luhangis and lathis. This cannot be called a discrepancy in the two statements.

One more factor in this case is that there is certainly a corroboration to the testimony of the Head Constable and Constable from the fact that the dead body was found lying in the jungle by the side of Nalha with its right arm cut and injuries on the other parts of the body. The medical evidence regarding injuries also provides corroboration to the statement of injured in the Dehati Nalish as well as in the dying declaration.

The criticism that the person who initially informed the Head Constable about the same incident was not traced out and children aged about 6-8 years were not traced and their statements were not recorded, cuts no ice. There was no necessity for the same. It is not the prosecution case that they were eye-witnesses to the case.

On a re-consideration and analysis of the available evidence on record and the criticism made by counsel for the appellants against it, this Court finds that the trial Court has rightly accepted that Ex. P/1 is FIR and it has to be treated as dying declaration and it is truthful which can be acted upon to return the verdict of guilt. It is confirmed by Ex. P/2 the Marnasann Kathan recorded few minutes thereafter and both are truthful.

This Court confirms the findings. It is held that the appellants have been rightly held guilty for offence punishable u/s 304 Part-I r/w 149 IPC. The cutting of an arm is such an injury that all those who formed the unlawful assembly and continued to hit the deceased, must be attributed with knowledge and intention of the same type as that of the person using Farsa and cutting the arm. The object of this unlawful assembly was clearly to cause such injuries as were likely to cause death. So all the appellants have been rightly convicted u/s 147 as well as 304 Part-I r/w 149 IPC. There is no infirmity in the sentence awarded to them. The appeal fails in toto and is dismissed. The appellants shall suffer their

sentences.