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Court No.7

Criminal Appeal No. 3207 of 2007

1. Vidya Ram alias Viddham
2. Dharm Pal alias Dharam Singh
3. Shyam Lal alias Sua Lal ….......Appellants

Vs

State of U.P. …........Respondent

For Appellant : Sri Arvind Kumar Srivastava

For Respondent : Sri Amit Sinha, AGA

Hon'ble Pritinker Diwaker, J.
Hon'ble Ali Zamin, J.

Per: Pritinker Diwaker, J

(7.5.2019)

1. This appeal arises out of impugned judgement and order dated 21.04.2007 passed by the Additional Sessions Judge, Court No.4, Budaun in Sessions Trial No. 750 of 2004, convicting the appellants under Section 302/34 of IPC and sentencing them to undergo rigorous imprisonment for life with a fine of Rs. 10,000/- each, in default thereof, to undergo six months additional rigorous imprisonment.

2. As per prosecution case, deceased Radhey Shyam Maheshwari was a practising lawyer and was also an active politician. He was also a Secretary of District Level Committee of Congress Party. Deceased accused Chob Singh was earlier a Block President of Congress Party and looking to his anti party activities, he was expelled from the party and since then he was having inimical relation with the deceased. It is said that on 19.4.2004, when the deceased was going to the house of Advocate, Rajendra Pal Gupta in relation

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to some political activities, at about 8:15 am, present appellants and the deceased accused Chob Singh apprehended him and at that time accused Dharm Pal was having an iron rod with him, whereas the other three accused persons were carrying country made pistols. It is said that first blow was given by Dharm Pal with the said rod and then the deceased accused Chob Singh exhorted for killing the deceased and then the remaining accused persons caused firearm injuries to the deceased. After seeing the incident, certain persons reached to place of occurrence and when they exhorted, accused persons fled away from the spot. Within ten minutes of the incident written report Ex.Ka.1 was lodged by Rakesh Kumar Maheshwari (PW-1), nephew of the deceased, based on which FIR was registered under Section 307 of IPC against four accused persons including appellants. Injured was taken to Community Health Centre, Ujhani, District Budaun, from where he was shifted to District Hospital, Budaun and then he was taken to a private hospital at Bareilly, where he died at about 2:00 pm during treatment. In the meanwhile, when the injured was in the District Hospital at Budaun, his dying declaration Ex.Ka.13 was recorded at 10:50 am by the Executive Magistrate (PW-7).

3. After the death of the deceased, inquest on his dead body was conducted vide Ex.Ka.2 on 19.4.2004 and the body was sent for post-mortem which was conducted on the same day vide Ex.Ka.12 by Dr. S.K. Garg (PW-6).

4. As per Dr.R.K. Agarwal (PW-5) of District Hospital, Budaun, who did the medical examination of injured, following injuries were found on his body:

> *"1) Firearm wound entry on the Rt side of chest 8cm below the medial end of the Rt clavicle of size 4cm x 1.5cm margins of wound inverted. No blackening or tattooing present. Depth of the wound not probed.*
>
> *2) Firearm wound of exit on the Rt side Lower chest 12cm below the lower end of scapula of size 4.2cm x 1.6 cm x depth not probed margin of wound everted. No blacking or tattooing present.*

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5. Autopsy Surgeon has noticed following injuries on the body of the deceased including one gunshot injury and two lacerated wounds:

> *"1) Lacerated wound 3cm x 0.5cm x scalp deep on back of Rt side of head 10cm behind Rt ear.*
>
> *2) Lacerated wound 4cm x 0.5cm x scalp deep on back of head 6cm above Rt ear.*
>
> *3) Firearm wound entry 3cm x 2cm chest cavity deep c tattooing all around of margins of wound present on front of Rt side chest 5cm from Rt nipple 3 O'clock position margins straight on the side and c abrasion on that side dissection of margin is oblique.*
>
> *4) Firearm wound of exit with everted margin 1cm x 1cm x abdomen cavity deep not opened on back of Rt side abdomen 16cm lower inferior end of scapula."*

According to autopsy surgeon, cause of death of the deceased was shock and haemorrhage due to ante-mortem firearm injuries.

6. While framing charge, trial judge has framed charge against the accused appellants and the deceased accused Chob Singh under Section 302/34 of IPC, whereas against accused appellant Shayam Lal, additional charge was framed under Section 25 of Arms Act and he was tried for the said offence in Sessions Trial No. 157 of 2006. During the pendency of the trial, accused Chob Singh expired and the trial court proceeded with the case of remaining three accused persons.

7. So as to hold accused appellants guilty, prosecution has examined nine witnesses. Statement of accused persons were recorded under Section 313 of Cr.P.C., in which they pleaded their innocence and false implication.

8. By the impugned judgment, the trial judge has convicted accused appellants under Section 302/34 of IPC and sentenced them as mentioned in paragraph 1 of this judgment. However, the trial court has acquitted accused Shyam Lal @ Sua Lal of the offence under Section 25 of the Arms

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Act. Hence this appeal.

9. Learned counsel for the appellants submits:

(i) that as per FIR and the statement of Rakesh Kumar Maheshwari (PW-1) and Jamshed Sadik (PW-2), the so called eye-witnesses, first blow was given by accused Dharm Pal with an iron rod, but no such injury has been found on the body of the deceased.

(ii) that lacerated wound, found on the body of the deceased, could have been sustained by him while he was being shifted to District Hospital, Budaun or while he was being taken to Bareilly in a private hospital.

(iii) that statements of Rakesh Kumar Maheshwari (PW-1) and Jamshed Sadik (PW-2) are not trustworthy.

(iv) that language of dying declaration *prima facie* shows that the same is nothing but a concocted piece of evidence. Learned counsel submits that no one in his dying declaration would say that he is making statement on oath.

(v) that considering the nature of injuries sustained by the deceased, he would not have been in a position to make a dying declaration and this fact is evident from the medical report of the deceased.

(vi) that once in the police station the deceased was present at the time of lodging the FIR, at that place itself either his 161 Cr.P.C. statement could have been recorded, or FIR itself could have been registered at the behest of the deceased.

(vii) that in support of his contention, learned counsel has placed reliance on the judgments of the Supreme Court in the cases of **Darshan Singh and Ors. vs. State of Punjab.**[1] and **Bijoy Das**

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1 AIR 1983 Supreme Court 554

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vs. State of West Bengal[2].

10. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that:

(i) that conviction of the appellants is in accordance with law.

(ii) that dying declaration Ex.Ka.13 of the deceased appears to be fully reliable and trustworthy; the same has been duly certified by the Doctor and most importantly, recorder of dying declaration i.e. the Executive Magistrate, has duly supported the prosecution case. State counsel has further argued that 161 Cr.P.C. statement of the deceased was recorded at 9:00 am at CHC, Ujhani, Budaun and after his death, the said statement is to be treated as his dying declaration.

(iii) that Rakesh Kumar Maheshwari (PW-1) and Jamshed Sadik (PW-2), two eye-witnesses to the incident, have duly supported the prosecution case and the statement of these two eye-witnesses have been duly supported by the injury/medical report of the deceased vide Ex.Ka.11 and his post-mortem report vide Ex.Ka.12.

11. We have heard learned counsel for the parties and perused the record.

12. Rakesh Kumar Maheshwari (PW-1) is a nephew of the deceased and the informant, while supporting the prosecution case, he has stated that on the date of incident, at about 8:00 am, deceased had gone to the house of Advocate, Rajendra Pal Gupta and on the way, he was apprehended by four accused persons including the appellants. He states that accused Dharm Pal was carrying an iron rod with him, whereas other accused persons were carrying country-made pistols. After abusing the deceased, first blow was given by accused Dharm Pal with an iron rod and then other accused persons caused firearm injuries to him. He states that after hue and cry

2 (2008) 4 SCC 511

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raised by us, other persons came there and when they exhorted them, accused persons fled away from the spot. He has further stated that on an earlier occasion, deceased accused Chob Singh was expelled from the party on account of his anti party activities and, therefore, he was having inimical relation with the deceased. He states that he took injured Radhey Shyam Maheshwari to police station and lodged the FIR. Considering the medical condition of the deceased, he was sent to CHC, Ujhani, Budaun along with two police constables from where he was referred to District Hospital, Budaun and in the hospital diary statement of his uncle was recorded. From Budaun deceased was taken to Bareilly in a private hospital, where he succumbed to his injuries. In lengthy cross-examination, this witness remained firm and nothing could be elicited from him. He has reiterated as to the manner in which deceased was done to death by the accused persons.

13. Jamshed Sadik (PW-2) is another eye-witness to the incident, while supporting the prosecution case, he has stated that accused Dharm Pal was carrying an iron rod with him, whereas other accused persons were having country-made pistols, first blow was given by Dharm Pal as a result of which deceased fell down and then all the accused persons caused firearm injuries to him resulting his death. This witness was also subjected to lengthy cross-examination but he remained firm and nothing could be elicited from him.

14. Shakti Singh (PW-3) conducted the inquest on the body of the deceased. R.L. Yadav (PW-4) prepared a check FIR.

15. Dr. R.K. Agarwal (PW-5) medically examined the deceased Radhey Shyam Maheshwari vide Ex.Ka.11 at District Hospital, Budaun and he found injuries on the body of the deceased as mentioned at paragraph no. 4 of this judgment.

16. Dr. S.K. Garg (PW-6) conducted post-mortem on the body of the deceased and found number of injuries as mentioned in paragraph 5 of this judgement.

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17. Ram Gopal (PW-7), is the Executive Magistrate, who recorded the dying declaration vide Ex.Ka.13 of the deceased. He has stated that before recording dying declaration of the deceased, he obtained a certificate from the Doctor that the deceased was in a fit state of mind to make the statement and then whatever was stated by the deceased, he recorded the same. The dying declaration reads as under:

> "मृत्यु पूर्व बयान
>
> मै राधेश्याम महेश्वरी s/o श्री राम चरन नि0 वाजार कला उझानी तह0 बदायूं जिला बदायूं बहलफ बयान करता हूं कि मै चार साथियों के साथ राजेन्द्र पाल वकील साहब के घर जा रहा था। कल शाम को ही यह वायदा हुआ था कि आढत पर 8 ½ बजे दफतर खोलेगे तो चावी लेने जा रहा था कि रास्ते में चोब सिंह, विद्याराम व सुआ व धर्मपाल मिल गये और मुझे डंडे से मारने लगे गोली भी मारी और भाग गये। गोली सुआ और धर्मपाल ने मारी। बयान सुनकर तस्दीक किया "

This witness has further stated that before recording the dying declaration of the deceased, he administered an oath to him.

18. Vijai Singh Tyagi (PW-8) is the Investigating Officer. In his cross-examination when he was confronted with 161 Cr.P.C. statement of the deceased, he has stated that at Community Health Centre, Ujhani at about 9:00 am, he recorded the diary statement of the deceased, wherein he informed him as to the manner in which he was subjected to injury by all the four accused persons. He states that after completion of statement, deceased told him that he was not in a position to make any further statement and, therefore, he stopped the same.

19. Daya Ram Gangwar (PW-9) is a Police Constable, who assisted during investigation.

20. Close scrutiny of the evidence makes it clear that on 19.4.2004 when the deceased was going to the house of Advocate, Rajendra Pal Gupta in relation to some political activities, at about 8:15 am, present accused appellants and the deceased accused Chob Singh apprehended him and at that time accused Dharm Pal was having an iron rod with him, whereas

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other three accused persons were carrying country made pistols. It is said that first blow was given by Dharm Pal with the iron rod and then deceased accused Chob Singh exhorted for killing the deceased and then remaining accused persons caused firearm injuries to the deceased. Rakesh Kumar Maheshwari (PW-1), an eye-witness to the incident immediately took the injured to police station which was just about one and half kms. away from the place of occurrence. On the basis of written report lodged by him, FIR Ex.Ka.8 was registered and considering the serious condition of the deceased, he was referred to CHC, Ujhani where his diary statement was recorded at 9:00 am. From CHC, Ujhani, the deceased was referred to District Hospital Budaun where he was medically examined vide Ex.Ka.11 by Dr. R.K. Agarwal (PW-5) and thereafter the Executive Magistrate was called and dying declaration of the deceased Ex.Ka.13 was recorded. From District Hospital, Budaun, the deceased was shifted to a private hospital, Bareilly, where he succumbed to his injuries.

Incident has been witnessed by Rakesh Kumar Maheshwari (PW-1), nephew of the deceased and Jamshed Sadik (PW-2), an independent witness. Both these witnesses have duly supported the prosecution case and have deposed as to the manner in which deceased was done to death by the accused persons. We have no reason to disbelieve the statement of these two eye-witnesses, who despite their lengthy cross-examination, remained firm in the court. Minor contradictions in the statements of the witnesses are required to be ignored considering the fact that those contradictions do not go to the root of the matter and do not affect their version otherwise. Law in this respect is very clear.

21. In **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, (1983) 3 SCC 217**, the Supreme Court, while considering the minor contradictions in the statement of the witnesses, held as under:

> "5 … … … We do not consider it appropriate or permissible to enter upon a reappraisal or re-appreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons

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are obvious:

> (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed in the mental screen.
>
> (2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> (3) The powers of observation defer from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
>
> (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.
>
> (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
>
> (6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in short time span. A witness is liable to get confused or mixed up when interrogated later on.
>
> (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

22. Before we consider the authenticity and genuineness of the dying declaration made by the deceased, it would be apposite to consider the legal position in respect of dying declaration.

23. In **State of Gujarat v. Jayrajbhai Punjabhai Varu**[3], the Supreme Court held as under:

> "15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A

3 (2016) 14 SCC 151

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mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

16. In the case on hand, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent herein in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of PW-1.

17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

18. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials

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in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

19. On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in- laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. 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 deceased was not as a result of tutoring, 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 assailants. 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.

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted**."**

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24. In **Gaffar Badshaha Pathan v. State of Maharashtra**[4],it was held as under:

> "5. Dr. A.U. Masurkar was the Chief Medical Officer of the hospital at the relevant time. The High Court has held that the recording of the dying declaration and story stated therein apparently appears to be false and concocted for the various reasons noticed in the impugned judgment. It has to be borne in mind that the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. The fact that the statement of the deceased was recorded at about 9.00 p.m. by the Head Constable cannot be doubted though an attempt to the contrary seems to have been made by the prosecution. The statements of the prosecution witnesses (PW 5 and PW 11) also show that the statement was recorded by the Head Constable. According to PW 5, it was only a show made by the Head Constable of recording statement, since according to the said witness, the deceased was not in a position to speak at that time. Even PW 11, a doctor in the hospital, has deposed about the recording of the statement by the Head Constable though he has not formally proved the dying declaration but has certified the correctness of the endorsement of Dr. A.U. Masurkar on the dying declaration. PW 11 was shown the dying declaration. He has deposed that the certificate recorded on the dying declaration is in the handwriting of Dr. Masurkar, Chief Medical Officer of the hospital. He has further deposed that Dr. Masurkar is in the hospital since the last 12 to 15 years and that he had degree in MS and was estimated to be an honest and expert surgeon of the area. One of the reasons which had strongly weighed with the High Court in rejecting the dying declaration is that the endorsement of the doctor is only about the deceased lady being conscious and not that she was in a fit condition to make the statement. The High Court went into distinction between consciousness and fitness to make statement. On the facts of the present case, we are unable to sustain the approach adopted by the High Court. It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of

4 (2004) 10 SCC 589

accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. Under these circumstances, the dying declaration could not have been rejected on the ground that it does not contain the endorsement of the doctor of the fitness of the lady to make the statement as the certificate of the doctor only shows that she was in a conscious state. The endorsement of the doctor aforequoted is not only about the conscious state of the lady but is that she made the statement in a conscious state."

25. In **P. Mani v State of Tamilnadu**[5], while considering the suspicious dying declaration, it has been held by the Apex Court that the conviction can be based solely on the basis of dying declaration alone, but the same must be wholly reliable and trustworthy. Para 14 of the said judgment reads thus:

"14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."

5 2006 (3) SCC 161

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26. In **Lakhan v. State of MP**[6], the Supreme Court after discussing number of judgments on the point of dying declarations summarized the law in this regard, as under:

> "20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

27. In **Shudhakar v. State of MP**[7], the Supreme Court held as under:

> "18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:
>
> > "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is 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 man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in

6 (2010) 8 SCC 514
7 (2012) 7 SCC 569

which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such

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> statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

28. In **Ramakant Mishra v. State of UP**[8], the Supreme Court observed as under:

> "9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:
>
> "*Dying Declarations* - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. U.S., Kan., 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196.
>
> Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. Fed. Evid.R. 804 (b) (2).

8 (2015) 8 SCC 299

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> 10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration."

29. If the above principles are applied in the present case, dying declaration made by the deceased appears to be fully reliable and trustworthy. There was absolutely no occasion for the deceased to falsely implicate anyone. Mere fact that in the dying declaration, a sort of oath has been administered to the deceased before recording the same, this itself would not doubt the credibility of the dying declaration and would not nullify the same. Dying declaration has been recorded by the Executive Magistrate and, if he chose the particular language for recording the same, neither the deceased can be blamed nor any fault can be attributed to the prosecution. It is again important to mention here that deceased was a practising lawyer and the Executive Magistrate might have thought using a particular language at the time of recording the dying declaration. The judgements relied upon by the learned counsel for the appellants in support of his contention in the cases of **Darshan Singh (supra)** and **Bijoy Das (supra)** are of no help to the defence as those judgments are not applicable in the facts and circumstances of the present case.

30. Apart from dying declaration recorded by the Executive Magistrate vide Ex.Ka.13, there is 161 Cr.P.C. statement of the deceased recorded on 19.4.2004 at 10.50 am by the Investigation Officer (PW-8), which is not even disputed and the Investigating Officer has been duly confronted by the defence. After the death of the deceased, his 161 Cr.P.C. statement is to be treated as his dying declaration and the same is an additional evidence against the appellants. Law in this respect is very clear.

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31. In **Rafique alias Rauf and Ors. Vs. State of Uttar Pradesh**[9]**,** the Apex Court held as under:

> "16. The important question for consideration, therefore, is whether the said statement made by the deceased can be taken as a dying declaration and reliance can be placed upon the same.
>
> 17. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of P.W.6, Investigating Officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the Investigating Officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of P.W.5 the postmortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.
>
> 18. The High Court, therefore, reached a conclusion that the deceased Zahiruddin, was in a position to speak and that the statement under Ext.Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the Investigating Officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial Court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.
>
> 19. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed upon the dying declaration and also the implication of Section 162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in *Khushal Rao vs. State of Bombay* - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and 'Phipson on Evidence' – 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the

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author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

20. The Full Bench of the Madras High Court in *Guruswami Tevar* - AIR 1940 Mad 196 in its unanimous opinion stated that no hard-and-fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patna and Nagpur also expressed the same view in the decisions reported in *Mohd. Arif v. Emperor* – AIR 1941 Pat. 409 and *Gulabrao Krishnajee v. Emperor* – AIR 1945 Nag. 153.

26. In a recent decision of this Court reported in *Sri Bhagwan v. State of U.P.* – (2013) 12 SCC 137, to which one of us was a party, the Court dealt with more or less an identical situation and held as under in paras 21 and 22:

> "21. As far as the implication of 162(2) CrPC is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned Senior Counsel for the respondent, once the said statement though recorded under Section 161 CrPC assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32(1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 CrPC. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

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> 22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162(2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected."

32. We find no substance in the argument of the defence that as the physical condition of the deceased was bad, he was not in a position to make any such dying declaration. As per prosecution case, before recording dying declaration of the deceased, the Executive Magistrate has obtained a certificate from the Doctor that the deceased was in a fit state of mind to make the statement and whatever was stated by the deceased, he recorded the same and most importantly, recorder of the dying declaration i.e. the Executive Magistrate, has duly supported the prosecution case.

We further find no substance in the argument of the defence that injuries found on the body of the deceased could have been caused to him while he was being shifted to various hospitals. The fact remains that the deceased suffered gunshot injuries and his medical and postmortem report support the prosecution case. We further find no substance in the argument

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of the defence that when the deceased himself was present in the police station at the time of lodging the FIR by Rakesh Kumar Maheshwari (PW-1), FIR ought to have been registered at the dictate of the deceased. If FIR has been recorded at the instance of PW-1, no fault can be attributed to the prosecution.

33. Taking cumulative effect of the evidence, we are of the considered view that the trial judge was justified in convicting the appellants under Section 302/34 of IPC.

34. Appeal has no substance, the same is accordingly dismissed. As all the accused appellants are in jail, no further order is required in their respect.

Date: 7.5.2019

RK/

(Ali Zamin, J)   (Pritinker Diwaker, J)