

(1990) 03 MP CK 0028

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 55 of 1986

Bhagatram Patidar and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 01-03-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 162, 162(2)
Evidence Act, 1872 — Section 154, 32

Citation : (1991) MPJR 73 : (1990) 35 MPLJ 770 : (1990) MPLJ 770

Hon'ble Judges : V.D. Gyani, J;S.D. Jha, J

Bench : Division Bench

Advocate : J.P. Gupta and S.K. Vyas, for the Appellant; S.S. Samvatsar, for the Respondent

Final Decision : Allowed

Judgement

S.D. Jha, J.

The appellants (hereinafter called, "the accused") challenge their conviction u/s 302 read with section 149, Indian Penal Code and section 148, Indian Penal Code and sentences respectively on the first count imprisonment for life and fine of Rs. 1000/-, in default, rigorous imprisonment for one year each and one year rigorous imprisonment on the second count substantive sentences to run concurrently awarded by the Second Additional Judge to the Court of Sessions Judge, Mandsaur by judgment dated 30-1-1986.

The accused were prosecuted by Police, Manasa, District Mandsaur. The prosecution story is that on 19-6-1984, deceased Durga was beaten by accused Bhagatram, Ambaram and Omprakash (appellants Nos. 1, 4 and 18) on quarrel over their women folk fetching water from village well. Both deceased Durga and accused Bhagatram in that connection had on 20-6-1984 lodged reports respectively Exs. P/42 and P/43 at Police Station, Manasa. While no action was taken on the report of Durga and he was asked to approach a Court of law, on report of accused Bhagatram criminal case was registered at Police Station

against deceased Durga being crime No. 234/84 under sections 341, 294, 336 and 323, Indian Penal Code and deceased Durga was arrested by Manasa Police on 21-6-1984 vide Panchanama arrest, Ex. P/63 of even date. After arrest at Manasa Police station, deceased Durga was released on bail after he had executed bond. On 21-6-1984 he was returning from Police Station, Manasa to his village Nayamal Kheda along with his brOrs. Mansingh (P. W. 19) and Gabba (P. W. 20). It is alleged that the eighteen accused persons had formed an unlawful assembly and were armed with axes, spears and sticks. Their common object was to cause death of Durga. When Durga reached near the well of one Bhuwanmali on the outskirts of the village, the eighteen accused persons in prosecution of the common object as aforesaid surrounded him and dealt him blows with weapons Carried by them all over his body. Seeing this, his two companions Mansingh (P. W. 19) and Gabba (P. W. 20) ran to Police Station, Manasa, where Mansingh lodged information, Ex. P/44, which was written down in Roznamcha by Virendra, Head Constable (P. W. 14). He deputed G.S.I. Gosar and Police Constables Lalchand and Govind Singh to the place of incident. (These three have not been examined by the prosecution), and soon thereafter, S. I. Nathu Singh (P.W. 29) along with S. D. O. Police (not examined by the prosecution) reached Manasa village at about 10.45 P.M. Durga in injured condition was found near the village temple. He gave out version of the incident, Ex. P/64-A, which was recorded as DEHATINALISI by Nathu Singh (P.W. 29). In the DEHATINALISI Ex. P/64-A, Durga had named all the accused persons as his assailants. Durga in injured condition was taken in a tractor to Manasa Civil Hospital. He was accompanied by his wife Gendibai (P.W. 22), two brOrs. Mansingh (P.W. 19) and Gabba (P.W. 20) and his father Deva s/o Dhanna (P.W. 24). As soon as injured Durga reached Manasa Hospital he breathed his last and attempt to get his dying declaration recorded proved futile. The case vide Ex. P/64-A earlier registered u/s 307, Indian Penal Code and for rioting was converted into one of murder u/s 302, Indian Penal Code with rioting. The dead body was sent for post mortem examination and after usual investigation challan was put up against the accused persons.

Before the Additional Sessions Judge on 28-1-1985 each of the eighteen accused persons pleaded not guilty to charges u/s 302, Indian Penal Code and 302/149, Indian Penal Code and section 148, Indian Penal Code. In their examination accused persons pleaded want of knowledge of all material allegations and denied the same. They examined Chandrashekhar Sarwate, Handwriting Expert (D.W. 1) to prove that signature on DEHATINALISI Ex. P/64-A did not compare with the normal admitted signature of deceased Durga and that he must not have been possessed of proper mental capacity and understanding at the time of making his signature on Ex. P/64-A. The Additional Sessions Judge relying on declaration contained in DEHATINALISI Ex. P/64-A convicted and sentenced the accused as stated above. Hence, the appeal.

Shri J. P. Gupta learned counsel for the accused/appellants did not dispute that Durga died homicidal death. He also did not dispute that a dying declaration can

form sole basis of conviction but he submitted that before this is done, it must be subjected to strictest scrutiny and closest circumspection. Emphasising circumstances to be kept in mind for judging the truth and reliability of dying declaration Shri Gupta launched multi-pronged attack on dying declaration, Ex. P/64-A of deceased Durga recorded by Nathu Singh (P.W. 29). Shri Gupta submitted that the information, Ex. P/44 by Gabba and Mansingh lodged at Police Station did not name any of the accused. The dying declaration in the case had been recorded by Nathu Singh, Investigating Officer (P. W. 29). It inspires no confidence. The use of word "EKMAT" at two places in Ex. P/64-A suggested that the Investigating Officer had put his own words because the words "EKMAT" meaning common object attracting section 141 and section 149. Indian Penal Code could not have been used by the declarant. He emphasized that in case-diary-statement of other witnesses, Nathusingh had put the names of all the accused and it is not improbable that he interpolated the names of the accused in Ex. P/64-A. Durga could not have been in fit mental condition to give out version contained in Ex. P/64-A and material on record showed that there was external hand to touch up the matter. The declaration was not read over to Durga. His signature on the same was doubtful. It had to be seen in the background of enmity between the parties. Durga could not have seen the assailants. The dying declaration was not in accord with later statement made by him to his father Dewa (P.W. 24) and was, therefore, inconsistent. It was inconsistent with the medical evidence also. It was not recorded in form of questions and answers. It was not soiled, crumpled or bear blood stains which would be expected if it was in fact recorded at the spot. No steps were taken to apprehend the accused immediately which would create doubt as to Durga giving out names of accused in Ex. P/64-A. For all these reasons, Shri J. P. Gupta urged that the dying declaration recorded by Investigating Officer did not inspire confidence and pass the test of (truth and reliability. He urged for an acquittal. In his submissions, Shri J. P. Gupta referred to a number of decisions which would be referred to at appropriate place.

On behalf of the State, Shri S. S. Samvatsar learned Government Advocate strongly defended the impugned judgment.

Durga in injured condition was examined on 22-6-1984 by Dr. D. K. Gupta and he (Durga) breathed his last in the presence of the witness. Later the witness had conducted post mortem examination on Durga's dead body and as per post mortem examination report, Ex. P/60 found as many as 29 injuries all contusions, lacerations and one abrasion of varying sizes on all over the body. Some of the injuries had fractures also. Extensive reproduction of the injuries appears unnecessary. In opinion of Dr. Gupta the injuries on Durga were caused by hard and blunt weapons and were ante mortem and of within 18 hours" duration. In his opinion, injuries were sufficient in the ordinary course of nature to cause death. Besides the opinion of Gupta, Shri J. P. Gupta learned counsel for the accused/appellants also did not dispute homicidal death of Durga. Therefore, there can be no doubt that Durga died violent or homicidal death.

Learned Additional Sessions Judge had discussed main prosecution evidence in para 24 onwards of his judgment. It is seen that Virendra Kumar (PW 1), Ambaram (PW 4), Ramchandra (PW 5), Hira (PW 6), Ganeshram Joshi (PW 7), Mansingh (PW 19) and Gabba (PW 20) were declared hostile by the prosecution and cross-examined. In their cross-examination also nothing emerged to advance the prosecution case. He disbelieved Gendibai (PW 22) w/o Durga, in view of contradiction with her case-diary-statement, Ex. D/I, whereas against her deposition in the Court she had omitted to name any of the accused. Mangilal (PW 25) was disbelieved because of delay in recording his statement. He based conviction of the accused on Ex. P/64-A.

It is now to be seen whether all or any of the accused can be convicted for murder and rioting under sections 302/149 and 148, Indian Penal Code or any other offence on the strength of Ex. P/64-A.

Shri Gupta's argument that DEHATINALISI, Ex. P/64-A recorded by Nathu Singh (PW 29) on information given by deceased Durga in injured condition, could not be treated as first-information-report and reliance for this purpose on Baiju alias Bharosa Vs. State of Madhya Pradesh, may first be disposed of. It is seen that precedent does not relate to a case of dying declaration. In that case Jairam (PW 4) and several other villagers had seen dead bodies of Smt. Bhagwanti and Rambakas the two deceased in the case on morning of January 21, 1975 and Jairam had gone and lodged a report at Police Station, Premnagar which was written down by head constable Jaggnath and was marked Ex. P/38. This Ex. P/38 was not in the paperbook and was later retrieved by Shri I. N. Shroff, counsel for the respondent/State of Madhya Pradesh. It is in this context that observation that DEHATINALISI Ex. P/32 dated January 21, 1975 and Ex. P/32-A dated January 26, 1975 (written after FIR Ex. P/38, dated January 21, 1975) could not be read as FIR and were left out of consideration, came to be made. Besides not much turns on this argument in this case because even if Ex. P/64-A be not FIR within the meaning of section 154, Criminal Procedure Code it would not cease to be a dying declaration within the meaning of clause (1).of section 32 of the Indian Evidence Act, 1872 and statement made by any person to a Police Officer in the course of investigation and in view of the exception contained in sub-section 2 of section 162 of the Code of Criminal Procedure, 1973 the prohibition as to its use contained in sub-section (1) *ibid* would not apply to the same. The decision in the case would ultimately depend on truth and reliability of Ex. P/64-A as dying declaration of deceased Durga, which would have to be judged in the light of well established principles.

In a long line of decisions the Supreme Court has enunciated the law relating to dying declaration. Ratan Lal's of Evidence, 17th Edition revised by Justice M. Hidayatullah, former Chief Justice of India and V. R. Manohar based on Khushal Rao Vs. The State of Bombay, and later decisions summarises the law as follows:-

"That it could not be laid down as an absolute rule of law or even as a rule of prudence which has ripened into a rule of law, that a dying declaration cannot

form the sole basis of conviction unless it is corroborated.

Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made. It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence.

A dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence.

A dying declaration recorded by a competent Magistrate in a proper manner in the form of questions and answers and in the words of the maker as far as practicable stands on a much higher footing than a dying declaration which depends on oral testimony which may suffer from all the infirmities of human memory and character.

In order to test reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, e.g. whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time of making the statement; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

Mansingh (PW 19) and Gobba (PW 20) are brothers. of deceased Durga and accompanied him during return from Police Station, Manasa to village Malkheda, when near the well of Bhuwan Mali the incident in question took place. These two witnesses were declared hostile by the prosecution and cross-examined with reference to their earlier case-diary-statements, Exs. P/54 and P/55. It is well settled that declaring a witness hostile has not effect of washing away his entire evidence and acceptable portions can be acted upon. Both the witnesses stated that it was dark at the time of incident and they could not indentify any of the assailants. Gabba also stated that at the time a storm was rising. Prosecution has not elicited any contradiction from the two witnesses about light or darkness at the time. The two witnesses being brOrs. of the deceased it is not expected that they would support the accused. While during their examination in Court, they were declared hostile, there was no question of hostility of these witnesses when they lodged information, Ex. P/44 at Police Station. This Ex. P/44 did not give out name of any of the accused. All that it stated is that Durga was surrounded by the villagers who were indulging in MARPIT. This omission in the information about the names of any of the accused would support the version of these two witnesses that due to darkness they could not identify any of the assailants.

Above finds support also from the statement of Gendibai (PW 22) wd/o deceased Durga cited as an eye witness by the prosecution but disbelieved by the

Additional Sessions Judge, who in cross-examination para 6 says that time of the incident was night and it had become very much dark "RAT KO ROTI KA TIME HO GAY A THA, KHOOB ANDHERA HO GAY A THA"; further, in para 7 of cross-examination she states that when she ran away from the village, electric lights had been switched on and storm was setting in. Dewa (PW 24) father of the deceased cited by the prosecution as an eye-witness has not been declared hostile. About time of incident he states that it was evening time and darkness was slightly setting in. Except attributing two stone blows to accused Mangilal on himself he generally stated that whole village including all the accused had collected. According to him he could not see weapons in the hands of any one. He did not name any of the accused except accused Mangilal. Against positive statement of Gendibai (PW 21) that electric lights had been switched on (in para 4 of cross-examination), the witness is not sure whether at the time of incident electric lights had been switched on. Even according to DEHATINALISI, Ex. P/64-A, the time of incident was 7.30 i.e. darkness must have set in.

The evidence discussed above would make it doubtful whether at the time of incident there was sufficient light for deceased Durga to have identified all the assailants and their weapons properly.

According to Mansingh (PW 19) deceased Durga was not fully conscious and he did not tell any thing (para 1 of his examination-in-chief and paras 4 and 6 of his cross-examination). According to Gabba (PW 20) Durga was lying unconscious and did not properly respond to his enquiries. (Para 1 of his deposition). Further, according to him on Nathu Singh's speaking to Durga, he did not respond to the same and only made groaning sound "HUM HAN KARTA THA." As already stated, these two witnesses are brOrs. of the deceased and were declared hostile by the prosecution. Dewa (PW 24) father of the deceased has not been declared hostile by the prosecution. After the incident he met Durga in injured condition at the house of Sarpanch of Hat Pipalya when Durga was brought in tractor. According to Dewa, Durga told him that he was beaten and his legs were broken, all the villagers hit him with sticks of the cart and axes. He also says that Durga did not tell him names of the assailants (para 2 of his statement).

The learned Additional Sessions Judge in para 27 of the judgment refers to the evidence of Dewa (PW 24). Beyond describing his relationship with deceased and stating that the testimony of this witness also does not support the prosecution case he has not considered anywhere in the judgment the effect of the statement of this witness on truth and reliability of dying declaration, Ex. P/64-A. As already stated, the witness was not declared hostile by the prosecution and as held in Sukhram Vs. State of M.P., and Mohanlal Gangaram Gehani Vs. State of Maharashtra, the evidence of Dewa (PW 24), who was not declared hostile by the prosecution would have to be taken as" a part of the prosecution version. The evidence would show that the dying declaration attributed to the deceased was not consistent. When an opportunity presented itself to him, he did not name the assailants before his father Dewa (PW 24).

Nathusingh (PW 29) the Investigating Officer of the case is not conversant with instructions contained in Madhya Pradesh Police Regulations as to recording dying declaration (para 23 of his deposition). The S.D.O.(P.) who is a gazetted officer accompanied the witness from Police Station, Manasa to the place of incident. From the relevant paras of the deposition of this witness, Nathusingh (paras 2 and 23) it does not clearly appear that the S.D.O.(P.) was present at the time, when Nathu Singh recorded Ex. P/64-A. The S.D.O.(P.), whose name cannot be ascertained from the record, is not cited as one among the 39 witnesses cited by the prosecution nor examined in Court. In this state of evidence, it would appear that when actually Ex. P/64-A was recorded by Nathu Singh, the S.D.O.(P.) was not present, though he may have been present in the village. Para 742 of the Madhya Pradesh Police Regulations, clauses (c), sub-para (2) has inter alia following instructions on the point-

742(c)(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."

In view of the finding above, as to presence of S.D.O.(P.), his not being cited or examined as witness presence of two or more credible witnesses unconnected with Police Department was necessary. Now there are no such witnesses. Learned Additional Sessions Judge in para 32 of the judgment referred to presence of Virendra Kumar (PW 1) and Baljit Singh (PW 3) to place reliance on the statement of Nathu Singh as to recording Ex. P/64-A. Virendra Kumar (PW 1) was declared hostile by the prosecution. In examination-in-chief para 1, he stated that Durga was lying unconscious and Thanedar had done some writing (LIKHAPADI), after 2-3 sentences, he stated that in his presence. Thanedar did nothing and he does not know as to what he did. The version of this witness cannot support Nathusingh (PW 29) on the point of his recording dying declaration, Ex. P/64A of Durga. Baljit Singh (PW 3) was police constable attached to Mansa Police Station. According to him, Durga was in unconscious state and was speaking, after two sentences, he added that on Nathusingh's questioning him Durga told the names etc. ..(NAM VAGARE BATAYA....). The witness is employed in Police Department and cannot be a credible witness unconnected with Police Department within a meaning of sub-para (2) of the clause (c) of para 742 of the Madhya Pradesh Police Regulations reproduced above.

In Balak Ram Vs. State of U.P., where inter alia the Investigating Officer had recorded dying declaration in violation of rule 115 of the U.P. Police Regulations and had not obtained the signature of two respectable witnesses on the same. The Supreme Court disbelieved the dying declaration. In that case the signature or mark of the declarant at the foot of the declaration had not been obtained. In the present case, Nathusingh (PW 29) in para 25 of his cross-examination admits

that dying declaration does not recite that the declarant admitted it to be correct. All this taken along with other features discussed in the case would make the dying declaration doubtful.

According to Ex. P/64-A Durga named all the accused and then goes on to say that all the accused with common object "SAB NE EKMAT HOKAR" hit him. At one place after the words "EKMAT HOKAR" he says to cause his death "JAN SE MARNE KO MARA HAI". Now, the use of words "EKMAT HOKAR" meaning common object at two places by Durga creates suspicion. Whether in reality, it uses the words used by Durga or the words are an invention on the part of Nathu Singh so as to invoke sections 141, 147, 148 and 149 and fasten liability on accused and that of unlawful assembly? This is not to say that villagers, in any case, cannot use the words "EKMAT HOKAR" but taken along with other circumstance pointed in the case, the probability of the Investigating Officer himself having introduced these words in Ex. P/64-A, cannot be ruled out.

According to Dr. D. K. Gupta (PW. 27) deceased Durga had as many as 29 injuries - all contusions, lacerations and one abrasion. Of the injuries Nos. 21 and 24 besides Ors. had fractures of bones of both the legs and bone pieces were coming out, blood vessels were also crushed. In cross-examination para 11, he opined that from the injuries on the legs there would be immediate excessive haemorrhage. He also opined that from haemorrhage or fear or cumulative effect of the injuries shock could result and in his opinion shock must have resulted immediately. He also stated that in state of excessive shock, a man cannot speak. In para 139 he opined that looking to injuries on Durga, shock must have arisen immediately. Learned Additional Sessions Judge in para 34 of the judgment relying on Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore, and looking to the age of the deceased and the fact that there was no injury on the head, did not accept the opinion of Dr. Gupta on the point, when shock must have arisen and ability of Durga to speak. Para 12 of the decision in Somappa's case (supra) shows that opinion of doctor, who examined deceased Sasangauda in injured condition (PW 32) was at variance with the opinion of Dr. Madan Appa (P.W. 18), who conducted post mortem on his dead body. Besides there were eye witnesses in the case. It is in this background that the Hon'ble Supreme Court observed that:-

"The opinion of doctor that looking to the injuries he was of the view that the shock would have been instantaneous cannot be conclusive on a question of the ability of the deceased to talk."

Unlike the precedent in the present case, there is no trustworthy evidence showing that the deceased was capable of talking or that he in fact, talked. The evidence as pointed above, on the other hand, points to his inability. Besides, para 5 of the judgment shows that of the eight eye witnesses P.Ws. 4, 7, 11 and 14 intervening the accused in the case fled away. Injured Basangauda was questioned by the witnesses and on telephonic message PW 1 (PW 38) arrived at the scene. In the instant case, the Police arrived hours after the incident. In

this state of evidence and distinguishing features in the present and the precedent referred to by the Additional Sessions Judge in his judgment, the opinion of Dr. Gupta certainly imports an infirmity in the prosecution case on the point of Durga being able to narrate the incident and name all the eighteen accused to Nathu Singh (PW 29) in Ex. P/64-A.

The dying declaration, Ex. P/64-A names eighteen appellants as assailants of Durga but does not give the father's name or residential address. It is common knowledge that names like those of the accused of are common in villages and in absence of these particulars the credibility of the dying declaration would be considerably affected. *Gopalsingh and Another Vs. State of Madhya Pradesh and Another*, relied on). Besides, according to dying declaration Shyam and Radheshyam of the eighteen appellants were armed with axes. No injury with sharp edged, weapons has been found on the body of Durga. Ex. P/64-A only speaks of blows with sticks and stumps of wood and not with axes. This would show that at least, two, Shyam and Radheshyam did not assault deceased Durga, otherwise, there would have been incised wounds on the body. This is another infirmity in the dying declaration.

Besides, according to Dewa (P.W. 24) Durga while not naming any of the assailants stated that axe blows were also dealt to him. According to medical evidence there were no incised wounds on dead body. As against this Ex. P/64-A omits reference to axe blows. This discrepancy in the two versions is suggestive of deliberate omission of axe blows in Ex. P/64-A to bring it in accord with injuries which an experienced Police Officer like Nathu Singh could have easily noticed.

The learned Additional Sessions Judge in relying on Ex. P/64-A was influenced by presence of signature of Durga on it. For the purpose he drew support from evidence of Chandra Shekhar Sarvate (D. W. 1). Now Virendra Kumar (P.W. 1) declared hostile by prosecution and P. C. Baljit Singh (P.W. 3) do not say that Durga had put his signature. The burden to prove the case lay on the prosecution and use of Chandra Shekhar Sarvate's opinion for holding that signature was that of Durga in our view was not justified. In the light of foregoing facts we are not prepared to accept the solitary statement on behalf of prosecution of Nathusingh (P.W. 29) as to signature on Ex. P/64-A being that of deceased Durga. Assuming that signature on Ex. P/64-A that of deceased Durga, in view of the infirmities discussed above, this fact alone would not advance the prosecution case.

The only evidence against the accused is dying declaration recorded by Investigating Officer, Nathusingh (P.W. 29). In the light of probabilities, discrepancies, facts and circumstances of the case and having regard to observations of the Supreme Court in *Balak Ram Vs. State of U.P.*, , *Munnu Raja and Another Vs. The State of Madhya Pradesh*, and. *Daljitsingh v. State of Punjab* AIR 1979 SC 1173 and considering that investigating officers are keenly interested in achieving the fruits of their efforts, it would not be prudent to base

the conviction on declaration in Ex. P/64-A made to Investigating Officer Nathusingh (P.W. 29).

In view of our finding above, it would appear not necessary to deal with other grounds urged by Shri Gupta. However, they are briefly referred to. Shri Gupta based on case-diary-statements of Mansingh (P.W. 19) and Gabba (P.W. 20) submitted that as against their statements in court not identifying any of the accused, their case-diary-statements implicated all the eighteen accused by name, which must have been an invention or interpolation on the part of the Investigating Officers and therefore, it be held that the Investigating Officer introduced the names in dying declaration of Durga, Ex. P/64-A. This argument is mentioned only to be rejected. No decision has been cited where such a use of case-diary-statements of the witness may have ever been made. Besides, such a use of the case-diary-statement would offend the prohibition as to use of such statement contained in sub-section 1 of section 162 of the Code of Criminal Procedure, which permits the use of the statement only for contradiction by prosecution and the defence in the manner set out in the proviso thereto.

Relying on certain observation in para 23 in Mohanlal Gangaram Gehani Vs. State of Maharashtra, Shri Gupta urged that no steps were taken by Nathu Singh to have accused persons apprehended and no explanation was given for the same, which would make the dying declaration, Ex. P/64-A suspicious. The incident took place in the night on 21-6-1984 and Nathu Singh had reached the place of incident at about 11.00 in the night. It is observed that except for accused Raj Bahadur and Radheshyam, who were arrested on 25-6-1984 all other accused were arrested on 22-6-1984. In the precedent in question there was two days" delay in apprehending the accused, whereas in the present case, there would appear no such delay. This argument is of no avail.

As to argument that the dying declaration is not recorded in the fom of question and answer and reliance for this purpose on State (Delhi Administration) Vs. Laxman Kumar and Others, it is observed that amongst Ors. this was one of the reasons in the case, why the Supreme Court ignored the dying declaration recorded in the case. There were, however, eye witnesses also. The observations must be read in the context of the case.

From the above discussion, it appears doubtful that in darkness, deceased Durga could have identified the assailants. It is also doubtful if he could have made dying declaration Ex. P/64-A attributed to him. When later opportunity presented to him his oral dying declaration to his father Dewa (P.W. 24) was not consistent with Ex. P/64-A. The medical and other oral evidence also discussed above, make it doubtful whether he was in a fit condition to make dying declaration, Ex. P/64-A recorded by the Investigating Officer is the only evidence against the accused. It does not inspire confidence, and it would not be prudent to base conviction of eighteen or any of accused solely on it.

As a result, convictions and sentences imposed against the appellants are set

aside and they are acquitted of the charges of which they have been convicted. They are on bail, their bail bonds are discharged. Appeal allowed.