

(2013) 04 CHH CK 0003
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 434 of 1997

Mahettar Kunwar and Another	Vs	APPELLANT
State of Madhya Pradesh (Now Chhattisgarh)		RESPONDENT

Date of Decision : 17-04-2013

Acts Referred:

Citation : (2013) 2 CGBCLJ 572 : (2013) 3 CGLJ 269 : (2013) CriLJ 4688

Hon'ble Judges : Sunil Kumar Sinha, J; Rangnath Chandrakar, J

Bench : Division Bench

Advocate : Amit Tiwari, for the Appellant; Rajendra Tripathi, Panel Lawyer, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—This appeal is directed against the judgment dated 1st of February, 1997, passed in Sessions Trial No. 225/96 by the Additional Sessions Judge, Baloda Bazar, District Raipur. By the impugned judgment, the 2 accused persons namely - Mahettar (A-1) and Bundkunwar (A-2) were convicted under Sections 302/34, IPC and sentenced to undergo imprisonment for life and to pay fine of Rs. 1000/- with default sentenced of R.I. for 6 months. The facts, briefly stated, are as under:--

1.1. Deceased - Chainmati was aged about 70 years. The case of the prosecution is that on a land dispute, she was assaulted by the appellants by lathi etc. at about 21.20 hrs. on 18-1-1996. The incident was witnessed by Hemlal (PW-5). Hemlal (PW-5) went to Dilip (PW-1, son of the deceased) and informed about the incident. Dilip (PW-1) and Terasram (PW-4) reached to the place of occurrence and saw the deceased in injured condition. According to them, the deceased made oral dying declaration before them saying that she was assaulted by Mahettar (A-1) and Bundkunwar (A-2). Thereafter, the deceased died. Dilip (PW-1) lodged First Information Report (FIR Ex. P/1). Both the accused were named in the FIR. The Investigating Officer reached to the place of occurrence, gave notice (Ex. P/2) to the Panchas and prepared inquest (Ex. P/3) on the dead-

body of the deceased. The dead-body was sent for postmortem. The postmortem examination was conducted by Dr. C.S. Patel (PW-10). He noticed following injuries on the dead-body of the deceased:

- i. Incised wound of 1 3/4 x 1/2 c.m. on the right portion of skull.
- ii. Incised wound of 1.5 x 1/2 c.m. on the lower portion of right cheek;
- iii. Incised wound of 1.5 x 1/2 c.m. on the left forearm;
- iv. Incised wound of 1.5 x ? x ? c.m. on the left forearm;
- v. Incised wound of 1 1/4 x 1/2 x 1/2 c.m. on the right leg;
- vi. Contusion over the left forearm. It was appearing that the bones had fractured;
- vii. 2 abrasions on the right forearm;
- viii. Contusion on the right thigh;
- ix. 3 abrasions on the middle of the right forearm; and
- x. 2 abrasions with swelling of 4 x 2 c.m. on the lower portion of left forearm.

All the injuries were ante-mortem and were grievous injuries. There were fractures over both the bones of right forearm and there was also a fracture on the right femur bone.

The Autopsy Surgeon opined that the cause of death was shock and haemorrhage on account of the above injuries and the death was homicidal in nature. The post-mortem report is Ex. P/16.

1.2. The case of the prosecution was based on eye-witness account of Hemlal (PW-5) and oral dying declaration made before Dilip (PW-1) and Terasram (PW-4).

1.3. The learned Sessions Judge relied on the testimonies of these witnesses and held that it was proved that the appellants had assaulted the deceased by lathi and Kudali, therefore, they were liable for punishment under Sections 302/34, IPC. The appellants, thus, were convicted and sentenced as above. Hence, this appeal.

2. Appellant No. 1 - Mahettar (A-1) has died during the pendency of this appeal and his name has been deleted from the cause title of memo of appeal and the appeal filed on behalf of appellant No. 1 - Mahettar (A-1) has abated.

3. Mr. Amit Tiwari, learned counsel appearing on behalf of the appellant, has argued that the solitary eye-witness namely - Hemlal (PW-5) has not stated anything against appellant No. 2 - Bundkunwar (A-2); the oral dying declaration made before Dilip (PW-1) and Terasram (PW-4), appears to be shaky as according to Autopsy Surgeon, Dr. C.S. Patel (PW-10), the deceased being a lady,

aged about 70 years would not have survived for more than 10-15 minutes and would not have stated the story to these witnesses.

4. On the other hand, Mr. Rajendra Tripathi, learned Panel Lawyer appearing on behalf of the State, has opposed these arguments and supported the judgment passed by the Sessions Court.

5. We have heard counsel for the parties.

6. Hemlal (PW-5) was aged about 10 years on the date of recording of his evidence on 17-9-1996. He deposed that on the fateful day, deceased - Chainmati was going ahead him to the Badi (place of occurrence). He saw that in Badi, she was assaulted by Mahettar (A-1). He added that Mahettar (A-1) had given blows on different parts of her body. He was going to the Talkies just behind Chainmati (deceased), but after seeing the incident, he went to inform Dilip (PW-1) and narrated that his mother was lying in pool of blood.

Thereafter, Dilip (P.W. 1) went towards the Badi. He had also informed the incident to his father. In his entire evidence, he did not make any allegation against appellant No. 2-Bundkunwar (A-2). According to him, the deceased was assaulted by Mahettar (A-1) alone. Therefore, nothing was proved against appellant-Bundkunwar (A-2) on the eye-witness account of Hemlal (P.W. 5).

7. Now we shall consider the evidence of oral dying declaration.

8. In Arun Bhanudas Pawar Vs. State of Maharashtra, the Supreme Court held that "The oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination". We have no doubt that the dying declaration can well be the basis of conviction if it inspires the full confidence of the Court. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the declaration and that it was not the result of tutoring, prompting or imagination. However, where the dying declaration is suspicious and there is no other evidence on record, it would be difficult to the Court to record conviction on the solitary evidence of such dying declaration.

9. In the instant case, it has not been disputed that Hemlal (P.W. 5) was just behind the deceased while she was going to the Badi to collect wood. Hemlal (P.W. 5) had seen the entire incident. He deposed in clear words that the deceased was assaulted by Mahettar (A-1). He did not make any allegation against the present appellant (A-2). Even he also did not mention that any other person than Mahettar (A-1) was involved in assaulting the deceased. Hemlal (P.W. 5) is the person, who had informed Dilip (P.W. 1) about the above incident. He was neither declared hostile nor there is any other infirmity in his evidence.

10. Dr. C.S. Patel (P.W. 10), who conducted autopsy, admitted in para 4 of his cross-examination that on account of old age and weakness, the deceased might have become unconscious within 10-15 minutes. It does not come on record as to how much time was consumed by Hemlal (P.W. 5) for informing Dilip (P.W. 1)

and how much time Dilip (P.W. 1) had consumed for reaching to the Badi. Thus, there is a possibility that if Dilip (P.W. 1) would have reached to the place of occurrence after 10-15 minutes of the incident, the deceased may not have in conscious condition to make the above oral dying declaration. Therefore, the oral dying declaration becomes shadowed.

11. If we appreciate the evidence of oral dying declaration in light of the evidence of Hemlal (P.W. 5), who had seen the entire incident, and had not seen appellant No. 2(A-2) assaulting the deceased, the alleged oral dying declaration itself becomes unreliable. We are of the view that in the above facts and circumstances of the case, the learned Sessions Judge was not justified in resting the conviction of appellant No. 2. Bundkunwar (A-2) on the solitary evidence of the alleged dying declaration made before Dilip (P.W. 1) and Terasram (P.W. 4).

12. For the above reasons, we are unable to sustain the conviction of appellant No. 2-Bundkunwar (A-2) on the above set of evidence. In the result, the appeal is allowed. The conviction and sentences awarded to appellant No. 2-Bundkunwar (A-2) u/s 302/34, IPC are set aside. She is acquitted of the charges framed against her. Appellant No. 2-Bundkunwar (A-2) is on bail. Her bail bond shall continue for a period of 6 months in view of Section 437A, Cr.P.C.