

(2010) 02 RAJ CK 0002
In the Rajasthan High Court
Case No : Criminal Appeal No. 1257 of 2003

Nand Singh and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 341

Citation : (2011) 1 RLW 302

Hon'ble Judges : Gopal Krishan Vyas, J;Arvind Mohanlal Kapadia, J

Bench : Division Bench

Advocate : Ashok Upadhyay, Shravan Ojha and K.L. Thakur, for the Appellant;
K.R. Bishnoi, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Gopal Krishan Vyas, J.—By way of filing this criminal appeal, the appellants are challenging the impugned judgment dated 14th October, 2003 passed by the Additional Sessions Judge (Fast Track), Bhilwara in Sessions Case No. 30/2001, whereby, the learned trial Court convicted all the accused-appellants for committing offence under Sections 147, 364/149 and 302/149 IPC and passed sentence of life imprisonment for offence u/s 302/149 IPC alongwith fine of Rs. 2,000/- to each accused-appellants and in default of payment of fine each accused-appellants to further undergo three months rigorous imprisonment and for offence u/s 364/149- ten years rigorous imprisonment alongwith fine of Rs. 1000/- to each accused-appellants and in default of payment of fine each accused-appellants to further undergo one month's rigorous imprisonment and for offence u/s 147 IPC-two years rigorous imprisonment. According to the brief facts of the case, an FIR was registered at Police Station Kotadi, District Bhilwara against all the five accused-appellants on the basis of statement (Parcha Bayan Exhibit P/7) of deceased Hamatu Singh on 17th November, 1997. The statement of deceased Hamatu Singh was recorded by the SHO, Police Station Kotadi at 9.25 p.m. on 17.11.1997 at Mahatma Gandhi Hospital, Bhilwara, in which, it was

deposed by the deceased Hamatu Singh that on 17th November, 1997 at about 7:00 PM when he was coming to his house from his well along with his son Bheru Singh and nephew Gopal Singh, all of sudden near the well of village, accused-appellants Nand Singh, Hem Singh, Rajender Singh, Sampat Singh and their father Dabi Singh restrained his way and assaulted him by lathies. Thereafter, Hem Singh and Rajender Singh lifted him and brought to the house of Nand Singh and after closing the door of the house, all the accused-appellants assaulted him. Nand Singh was having sword in his hand and tried to cut his nose. Due to severe beating by lathies, he received grievous injuries upon head and both the legs. It is further stated that there is previous enmity between him and all the accused-persons with regard to agricultural land, therefore, accused-appellants kidnapped him and assaulted him seriously.

2. As per prosecution story, the S.H.O. Police Station Kotadi went on the spot alongwith Lal Singh, Sawar Mal, Geesa Lal and Kailash Chandra constables by government vehicle upon the information received at Police Station, Kotadi at about 7:00 PM on 17th November, 1997 on telephone by unknown person. After reaching on spot deceased Hamatu Singh was found in critical condition, therefore, he was taken to the Mahatma Gandhi Hospital, Bhilwara in the government jeep and got admitted in the hospital at 9:15 PM. In the hospital, statement (Exhibit P/7) of the deceased Hamatu Singh was recorded by the SHO. In the back side of the statement (Ex. P/7) of deceased Hamatu Singh, it was written at about 9.30 p.m. that now Hamatu Singh has died, therefore, for registration of the case, the said statement (Ex. P/7) was forwarded to Police Station, Kotadi through Constable Sawar Mal (PW. 5) at 9:50 p.m. and constable Sawar Mal (PW. 5) submitted the said statement of deceased Hamatu Singh in the police station, upon which FIR was registered at Police Station, Kotadi under Sections 147, 148, 149, 341, 364, 342 and 302 IPC.

3. After death of deceased Hamatu Singh, his body was sent for postmortem. The postmortem was conducted by the medical jurist on 18th November, 1997, which is Exhibit P/33. Upon completion of all the formalities, the investigating officer proceeded to investigate the matter and after completion of investigation filed challan against all the five accused persons in the Court of Judicial Magistrate, Kotadi from where the case was committed to the Court of District & Sessions Judge, Bhilwara and thereafter, the case was transferred to the Court of Additional Sessions Judge No. 2, Bhilwara and from where the case was further transferred to the Court of Additional Sessions Judge (Fast Track), Bhilwara under the order of District & Sessions Judge, Bhilwara on 11th June, 2001 where the trial took place.

4. In the trial to prove the prosecution case, statements of nineteen prosecution witnesses were recorded and thereafter statements of accused appellants u/s 313 Cr.P.C. were also recorded by the trial Court. After recording statements u/s 313 Cr.P.C., an opportunity to lead evidence in defence was also provided to the accused-appellants, but no oral evidence was produced by the accused-

appellants in their defence.

5. The learned trial Court after hearing both the parties finally decided the case vide impugned judgment dated 14th October, 2003 whereby the aforesaid punishment was imposed against all the accused-appellants. The said judgment is under challenge in this appeal.

6. Learned counsel of the appellants vehemently argued that the finding of learned trial Court with regard to acceptance of dying declaration is totally erroneous and contrary to basic principle of criminal jurisprudence because prosecution has not proved so called dying declaration (Ex. P/7) beyond reasonable doubt. The dying declaration of deceased Hamatu Singh Ex. P/7 was recorded by SHO Police Station Kotadi and just after recording his statement, deceased Hamatu Singh died at about 9.30 p.m. and before recording statement of deceased, certificate of doctor was also taken at about 9.25 p.m. Meaning thereby, as per prosecution story, just after recording the statement by SHO, Police Station Kotadi, the deceased Hamatu Singh died. But this fact is not corroborated by postmortem report (Ex. P/33) and statement of Dr. Yashpal Singh - PW. 17 because in the postmortem report, the time of death is shown as 10.00 p.m. and Dr. Yashpal Singh - PW. 17 deposed in his statement before the Court that deceased Hamatu Singh died at 10.00 p.m. whereas case was registered under Sections 147, 149, 341, 364, 342 and 302 IPC at about 9.30 p.m. on the basis of fact that just after recording statement of deceased at about 9.25 p.m. deceased died in front of S.H.O. Police Station, Kotadi, and in the back of Parcha Bayan (Ex. P/7), the proceedings with regard to death of Hamatu Singh were drawn by SHO, Police Station, Kotadi at about 9.30 p.m. for registering the case under Sections 147, 149, 341, 364, 342 and 302 IPC and the said statement was sent to the Police Station Kotadi from Mahatma Gandhi Hospital Bhilwara at about 9.50 p.m. through Constable Sanwar Mal PW. 5, therefore, it is argued that on the basis of above facts there is serious doubt about recording the statement of deceased Hamatu Singh by SHO, Police Station, Kotadi at about 9.25 p.m. The above facts clearly reveal that prosecution has concocted a false story and on the basis of such type of fabricated story, the learned trial Court has wrongly arrived at with the finding that the accused appellants have committed offence u/s 302 IPC. It is also argued that as per statement of two witnesses whose names are mentioned in the statement of deceased Ex. P/7 namely Bheru Singh PW. 6 - son of deceased and Gopal Singh PW. 9 - nephew of deceased who were said to be present at the time occurrence took place, it emerges that their testimony is not trustworthy because according to statement of Bheru Singh PW. 6 - son of deceased Hamatu Singh, he has run away from the place of occurrence when accused party came on the spot and he came back when police came on spot. Further, it is stated by him that he does not know who has killed his father because his father was not assaulted in front of him. For the purpose of discrediting the statement of this witness, it is argued that no prudent son will run away to leave his father when such type of incident took place, therefore, on the basis of version given by Bheru Singh PW. 6 in his statement, it is obvious

that this witness was not present and planted by the prosecution to prove the false and concocted prosecution story, therefore, accused-appellants have wrongly been held guilty on the basis of such type of statement given by PW. 6 Bheru Singh.

7. Similarly, while inviting the attention towards the statement of PW. 9 Gopal Singh - nephew of deceased Hamatu Singh, it is submitted that he has also deposed in his statement that he left the place of occurrence when his uncle was taken away by the accused appellants and he went to the house with Bheru Singh and sit outside the house. It is submitted that this witness is also planted by the prosecution to prove the prosecution story but both PW. 6 Bheru Singh and PW. 9 Gopal Singh cannot be termed as eye witnesses of the occurrence nor any allegation has been made in their statement that they saw the incident. Therefore, the prosecution has failed to prove the story which is mentioned in the dying declaration under the thumb impression of deceased Hamatu Singh. While assailing the validity of dying declaration Ex. P/7, it is submitted by learned counsel for the appellant that so called dying declaration recorded by SHO, Police Station Kotadi in the Hospital was not in consonance with Rule 6-22 of the Rajasthan Police Rules, 1965 in which procedure has been laid down in Chapter VI of the Rules of 1965 for recording dying declaration, which is not followed in this case. Therefore, legality of the said dying declaration is to be seen whether it is in consonance with the procedure laid down in the Rajasthan Police Rules, 1965. In Rule 6-22 of the Rules of 1965, it is specifically provided that dying declaration shall whenever possible be recorded by a Magistrate and the person making declaration shall, if possible be examined by a medical officer with a view to ascertain that he sufficiently is in position of his reason to make a lucid statement. If no Magistrate can be obtained, the declaration, when, a gazetted police officer is not present, be recorded in presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case. Here in this case, the time of death itself is in dispute, so also, as per learned counsel for the appellants the certificate upon the statement of deceased Hamatu Singh Ex. P/7 given by the doctor is also doubtful because it appears from the original document that writing of doctor appears to be made after writing the statement of deceased Hamatu Singh and thereafter thumb impression of the deceased was obtained. It is further argued by learned counsel for the accused-appellants that while relying upon dying declaration, the learned trial Court was required to keep in mind that the prosecution story may not only be true that it must be true and between may be true and must be true, there is a large gap which is to be proved by the prosecution agency by adducing unimpeachable and reliable evidence. Upon perusal of Ex. P/7 itself, it emerges that the said dying declaration is a fabricated document prepared by the SHO himself. In this view of the matter, the finding of learned trial Court with regard to acceptance of dying declaration Ex. P/7 of deceased Hamatu Singh deserves to be quashed.

8. In this case, as per learned counsel for the appellants the so called eye

witnesses Kalu Lal PW. 13 and Kailash Singh turned hostile and not supporting the prosecution case but learned trial Court has relied upon the testimony of PW. 6 Bheru Singh and PW. 9 Gopal Singh, son and nephew of deceased Hamatu Singh though in the finding it is stated that they are not eye witnesses but their testimony can be accepted for the purpose of lifting deceased Hamatu Singh and taking him in the house of accused-appellants Nand Singh and Devi Singh. This finding is also not based upon sound reasons because except police party, no prosecution witness was present when injured Hamatu Singh was found in injured condition.

9. As per learned counsel for the appellants, no FIR was registered prior to recording statement of deceased Ex. P/7 in the Hospital. Meaning thereby for the purpose of concocting the prosecution story the so called dying declaration was prepared under the thumb impression of deceased in which false and fabricated story was framed with connivance of complainant party with the allegation that accused appellants lifted deceased Hamatu Singh from the way to the house of accused-appellants Nand Singh and Devi Singh. For this purpose, learned counsel for the appellants has invited our attention towards the site plan Ex. P/5 which was prepared on 18.11.1997 at about 1.15 p.m. in front of two witnesses namely PW. 4 Sanvat Singh and PW. 3 Amar Singh. While inviting attention towards statement, it is contended that both these witnesses PW. 3 Amar Singh and PW. 4 Sanvat Singh are not proving the fact of preparation of site plan Ex. P/5 in their presence. In this view of the matter, when place of occurrence is not proved by the prosecution by leading cogent evidence then it is obvious that a gross error has been committed by learned trial Court while accepting the testimony of PW. 6 Bheru Singh and PW. 9 Gopal Singh for the purpose of place of occurrence.

10. it is admitted case of the prosecution that no blood was found upon the weapons including the sword which is said to be recovered from accused Nand Singh and Lathi which is recovered from other accused but while accepting above fact the learned trial Court has erroneously gave finding that recovery of these weapons itself is corroborative evidence for convicting the accused appellant. Learned trial Court has wrongly arrived at with the finding that deceased Hamatu Singh died due to injury caused by sword or lathies by the accused appellants.

11. It is further argued by learned counsel for the accused appellants that there is no evidence on record to prove that there was any enmity in between the accused party and complainant party and in absence of such evidence, it cannot be said that prosecution has proved any motive behind the alleged offence. Learned counsel for the appellants vehemently argued that the prosecution has failed to prove its case beyond reasonable doubt because the fact of dying declaration and motive has not been proved by the prosecution by leading cogent and trustworthy evidence, therefore, the conviction which is solely based upon the dying declaration, which is seriously in dispute, deserves to be quashed because the prosecution case is far away from the truth.

12. In nut shall as per learned counsel for the accused appellants, the dying

declaration is not proved, there is no eye witness of the incident nor the prosecution has proved the place of occurrence by leading cogent evidence and further no blood was found upon the recovered weapons then how the accused appellants can be held guilty, therefore, the finding arrived at by learned trial Court deserves to be quashed and the accused-appellants are entitled to be acquitted from the charges levelled against them.

13. Learned counsel for the accused-appellants has invited our attention towards the following judgments for the purpose of disbelieving the dying declaration as well as discrepancies with regard to timing of lodging FIR and delay in registering the case:

(1) 2009 (3) Cr.C.C. 178 (SC) (Om Prakash vs. State of U.P.) (for the purpose of discrepancies as regards timing of lodging FIR).

(2) Raju @ Rajkumar Vs. State of Rajasthan (for the purpose of disbelieving the dying declaration).

(3) Shiv Narayan and Others Vs. State of Rajasthan, (with regard to recording dying declaration of deceased by Police Official without following procedure).

(4) Shankarlal Vs. State of Rajasthan, (Delay in filing FIR is fatal).

14. While inviting attention towards the above judgments, it is submitted that as per verdict of Hon''ble Supreme Court and Division Bench of this Court enumerated in the above cited judgments, it is abundantly clear that prosecution has not proved its case and accused appellants have been convicted wrongly while relying upon the so called dying declaration, which is seriously disputed document of the prosecution. In this view of the matter, the accused-appellants are entitled to be acquitted from the charges levelled against them.

15. Per contra, learned Public Prosecutor vehemently argued that the prosecution has proved its case beyond reasonable doubt by leading cogent and reliable evidence before the Court. It is contended by learned Public Prosecutor that SHO, Police Station, Kotadi recorded the dying declaration after taking certificate from the Doctor at about 9.30 p.m. and just after recording the dying declaration (parcha bayan Ex. P/7), the injured Hamatu Singh died in the Hospital. Therefore, at 9.30 p.m. FIR was ordered to be registered and for the purpose of registering the FIR at Police Station, Kotadi, one Sanwarmal, Constable was sent to the Police Station Kotadi at about 9.50 p.m. upon which FIR was registered and later on evidence was collected against the accused appellants.

16. In the trial, in all, statement of 19 prosecution witnesses were recorded and all the prosecution witnesses supported the prosecution story that the accused appellants have committed offence under Sections 147, 149, 341, 364, 342 and 302 IPC. The testimony of prosecution witnesses were rightly considered by trial Court and trial Court gave its finding that dying declaration Ex. P/7 recorded by SHO Police Station, Kotadi is reliable document and learned trial Court accepted the testimony of dying declaration and found that prosecution has proved its

case and produced cogent evidence to prove the allegations levelled by deceased Hamatu Singh in his dying declaration. Therefore, the finding arrived at by learned trial Court does not require any interference in this case.

17. Learned Public Prosecutor vehemently argued that although two eye witnesses namely PW. 13 Kalulal and PW. 15 Kailash Singh declared hostile before the Court but upon information received by Police Station, Kotadi, the police party reached at the place of incident and thereafter took the body of injured Hamatu Singh to Mahatana Gandhi Hospital, Bhilwara and the hospital after recording his statement Ex. P/7 by SHO, PW. 19 Hinglaj Dan, injured Hamatu Singh died, therefore, FIR under Sections 147, 149, 341, 364, 342 and 302 IPC was registered and learned trial Court rightly believed the testimony of Investigating officer PW. 19 Hinglaj Dan. In this view of the matter, the finding arrived at by trial Court with regard to holding accused appellants guilty for the charges levelled against them does not require any interference by this Court because it is based upon well appreciation of evidence in which there is no error, therefore, this appeal deserves to be dismissed.

18. We have considered the arguments advanced by learned counsel for the parties as well as evidence on record, so also, the finding arrived at by learned trial Court.

19. In our opinion, following questions are involved in this appeal for assessing the Finding of learned trial Court upon which the accused appellants were convicted by trial Court, which are as follows:

(1) Whether prosecution has proved that there was motive behind the commission of offence by the accused-appellants.

(2) Whether so called dying declaration of deceased Hamatu Singh Ex. P/7 recorded by SHO, Police Station, Kotadi in Mahatma Gandhi Hospital, Bhilwara, is a reliable document.

(3) Whether the evidence of recovery of weapons is trustworthy and conviction can be passed upon the said recovery of weapons.

(4) Whether any trustworthy evidence is on record to prove the incident in the house of accused appellants.

(1) Whether prosecution has proved that there was motive behind the commission of offence by the accused-appellants: Upon perusal of entire record of the case, it is revealed that no direct and transparent evidence has been produced on record by the prosecution to prove the "motive" except the reason of dispute of land mentioned in dying declaration of deceased Hamatu Singh Ex. P/7. It is true that in the parcha bayan of deceased Hamatu Singh Ex. P/7, recorded by SHO, Police Station Kotadi in Mahatma Gandhi Hospital, Bhilwara, it is mentioned that . Likewise, PW. 6 Bheru Singh-son of deceased Hamatu Singh stated in his statement that . Further, Ranjeet Singh PW. 7, another son of deceased Hamatu Singh has stated in his statement that . But to prove the

above fact, no documentary evidence or any other independent witness has been produced before the Court and bald allegation of land dispute has been levelled to prove the fact of "motive" without any corroborative and independent evidence. It is also very important to mention here that dying declaration Ex. P/7 itself is in question because it was recorded by SHO, Police Station, Kotadi at about 9.15 p.m., thereafter certificate of the doctor was obtained and as per prosecution, just after recording the said statement, Hamatu Singh died, therefore, the case under Sections 147, 149, 341, 364, 342 and 302 IPC. was registered but in the prosecution report, time of death has been shown as 10.00 p.m. Meaning thereby, the statement of deceased Ex. P/7 itself is in dispute, therefore, it can be said that without any cogent evidence and reliable evidence prosecution has tried to make out a case that there was a motive for committing offence under 302 IPC. In the statement of Investigating Officer also, it emerges that no investigation was made by him to ascertain what was the motive behind assaulting and committing murder of deceased Hamatu Singh by accused appellants. If the Investigating Officer has not made any efforts to prove the fact that there was any motive then how it can be said that prosecution has proved its case that there was motive behind committing murder of deceased Hamatu Singh. In this view of the matter when there is no material on record to show except bald assertion of three interested witnesses including deceased then, it cannot be said that prosecution has proved its case that there was "motive" for committing offence by accused appellants. Hinglaj Dan PW. 19 Investigating Officer has not said a single word whether in his investigation, he found that there was motive behind commission of offence of murder by accused appellants. In this view of the matter, when prosecution has not proved the motive before the Court by leading trustworthy and reliable evidence either oral or documentary then it is obvious that in absence any motive no finding with regard to holding accused appellants for committing offence under Sections 147, 149, 341, 364, 342 and 302 IPC can be arrived at and in absence of any main ingredients of murder which is motive, no conviction under Sections 147, 149, 341, 364, 342 and 302 IPC can be made.

(2) Whether so called dying declaration of deceased Hamatu Singh Ex. P/7 recorded by SHO, Police Station, Kotadi in Mahatma Gandhi Hospital, Bhilwara, is a reliable document: In this case admittedly an information was received by SHO Police Station, Kotadi at about 7 p.m. on 17.11.1997 and on the basis of information so received by him he went to the place of occurrence and from where he took injured Hamatu Singh to Mahatma Gandhi Hospital, Bhilwara. As per prosecution story along with SHO, other members of police party went on the spot. In the police party, Constables Lal Singh, Sanwar Lal, Ghisa Lal and Kailash Chandra also accompanied with SHO and went to the place of occurrence and as per investigation officer PW. 19 Hinglaj Dan when he reached village pithas first of all, he met with Bheru Singh and Gopal Singh and after taking them with him he went to the house of Devi Singh and Nand Singh, from where he took Hamatu Singh in injured condition to Mahatma Gandhi Hospital, Bhilwara where he was

admitted and SHO recorded his statement (Ex. P/7) at about 9.15 p.m. in the hospital.

20. First of all for assessing the truth of recording the statement of Hamatu Singh is required to be seen. Admittedly, as per Investigating Officer he reached in the Hospital along with injured Hamatu Singh at 9.15 p.m. and recorded the statement of deceased Hamatu Singh (Ex. P/7) at 9.15 p.m., when he was alive but it is strange that in the back side of Ex. P/7 there is assertion that during the intervening period deceased died, therefore, offence u/s 302 IPC is made out and this assertion was made at 9.30 p.m. Meaning thereby, as per prosecution evidence in between 9.15 p.m. to 9.30 p.m. the so called statement of deceased was recorded by SHO under the thumb impression of Hamatu Singh and thereafter at 9.50 p.m. the said parcha bayan was sent through Constable Sanwarmal to the Police Station Kotadi. As per prosecution, Hamatu Singh was alive at 9.25 p.m. on 17.11.1997 and at that time Doctor gave certificate that he is in position to give statement but it is very strange that as per time mentioned by the SHO, Police Station Kotadi, those statements were written by him at 9.15 p.m. before taking certificate from Doctor but in the proceedings for registering the case under Sections 147, 149, 341, 364, 342 and 302 IPC, it was mentioned that just now deceased Hamatu Singh has died but in the postmortem report Ex. P/33, time of death is shown as 10.00 p.m. In this view of the discussion, it is transparently clear that the fact of recording the statement of deceased upon which FIR was registered has not been proved by the prosecution by leading cogent evidence. More so, it appears that statement of deceased Hamatu Singh Ex. P/7 was recorded under his thumb impression by the SHO, Police Station Kotadi and before that no case was registered though occurrence took place at 7.00 p.m. and case was registered at police station on the basis of Ex. P/7 at about 11.00 p.m. on 17.11.1997. Therefore, the finding arrived at by learned trial Court with regard to accepting dying declaration recorded by SHO, Police Station, Kotadi at 9.15 p.m. without taking any certificate from doctor as credible evidence is totally baseless and based upon Wrong appreciation of evidence because certificate of fitness was obtained from the doctor at 9.25 p.m. after writing statement of deceased.

21. The Hon''ble Apex Court in case of Munnu Raja and Another Vs. The State of Madhya Pradesh, has held that "Investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of an investigation ought not to be encouraged."

22. Further, the Hon''ble Apex Court in case of Smt. Laxmi Vs. Om Prakash and Others, has held in paras 29 and 30 as follows:

"Nemo Moriturus praesumitur mentire - no one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth" - is the philosophy in law underlying admittance in evidence of dying declaration.

A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is as if the maker of the dying declaration was present in the court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances. If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming a safe basis for conviction. (para 29).

One of the important tests of the reliability of the dying declaration is a finding arrived at by the courts as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it. (para 29).

A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by an investigating officer has been discouraged and the Supreme Court has urged the investigating officers to avail the services of a Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer. (para 30).

23. In the aforesaid cases, the Hon''ble Supreme Court has held that the court should discourage the tendency of recording dying declaration by investigating officers. The facts of this case speaks volume that the dying declaration Ex. P/7

recorded by SHO police station Kotadi has not been proved by the prosecution beyond reasonable doubt.

(3) Whether the evidence of recovery of weapons is trustworthy and conviction can be passed upon the said recovery of weapons: For proving the recovery, the statement of PW. 1 Narayan Singh was recorded but he turned hospital before the Court. Similarly, PW. 2 Khuma motbir of recovery of lathi is not supporting the prosecution story. He clearly stated in his statement that he gave his thumb impression as per the instructions of police officials and no recovery was made in front of him and lathis were shown to him by the police officials. Other witnesses of recovery PW. 3 Amar Singh and PW. 4 Sanwat Singh are witnesses of recovery of cloths of deceased and not the weapons, therefore, they are not relevant for the purpose of recovery of weapons from the accused appellants.

24. It is also one of the important fact that as per the finding of learned trial Court, no blood was found upon any of weapons recovered from the accused appellants and recoveries are not proved by the prosecution witnesses and as per the finding given by learned trial Court, the trial Court accepted that no blood was found upon weapons so recovered from accused appellants. Therefore, the evidence is not accepted but it can be treated to be a corroborative evidence of prosecution case. But such type of finding cannot connect the accused appellants with the crime because no blood was found upon the so called recovered weapons. In this view of the matter, learned trial Court himself has arrived at with the finding that recovery of weapon sword from Nand Singh and lathi from other accused is not connecting the accused appellants with the crime but these recoveries are sufficient to prove the case. In our opinion, such type of finding is baseless and have no foundation to stand before the eye of law.

(4) Whether any trustworthy evidence is on record to prove the incident in the house of accused appellants: With regard to above point, our adjudication is that there is no eye witness in this case with regard to proving the fact that occurrence took place in the house of accused appellants. Admittedly, both son and nephew of deceased went away from the place of occurrence as per their own testimony. Therefore, it cannot be said that they proved the place of occurrence. Likewise, soon after the occurrence memo of inspection of site Sanwant Singh and PW. 3 Amar Singh. It is very strange that in the statement of PW. 3 Amar Singh, he has not proved the document Ex. P/5 and PW/4 Sanwat Singh has also not proved the said document and it appears that for connecting the accused appellants with the crime, a concocted story was fabricated while recording the so called dying declaration parcha bayan Ex. P/7 in which a story was formulated by the prosecution that occurrence took place in the house of accused-appellants. But to prove this fact, no cogent evidence has been recorded by the trial Court except the statement of investigating officer. As per the prosecution case, first of all, two persons were there on spot namely PW. 6 Bheru Singh son of deceased and PW. 9 Gopal Singh nephew of deceased. PW. 6 Bheru Singh stated in his statement that accused appellants took his father in their

house and closed the doors. PW. 9 Gopal Singh stated same thing in his statement. Both are son and nephew of deceased Hamatu Singh but as per statement of PW. 10 Lal Singh, it is stated by him that Hamatu Singh was alive in injured condition outside the house of Nand Singh and PW. 19 Hinglajdan, SHO, Police Station, Kotadi stated in his statement that injured was lying outside the house of Nand Singh and Devi Singh in injured condition. It is very strange that along with police party in all four persons reached at the place of occurrence namely Lal Singh, Sanwar Lal, Ghisa Lal and Kailash Chandra.

25. PW. 19 Hinglaj Dan Singh, SHO., Police Station, Kotadi stated in his statement that PW-9 Gopal Singh stated in his statement that PW-5 Sanwar Lal stated in his statement that PW-6 Bheru Singh stated in his statement that

PW 10 Lal Singh stated in his statement that

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26. Upon perusal of statement of all above witnesses, it emerges that all the witnesses gave their different version with regard to place of occurrence and now perusal of statement of PW. 3 Amar Singh and PW. 4 Sanwat Singh - motbirs of preparation of site plan, it will reveal that both these prosecution witnesses are not corroborating the preparation of Ex. P/5. In this view of the matter, it is not safe to arrive at with the finding that injured Hamatu Singh was taken away inside the house of accused appellants. The testimony of these prosecution witnesses is not accepted on other facts also that none of the witnesses stated in clear words with regard to weapons which is said to be lying with the accused appellants. Eye witnesses namely PW. 6 Bheru Singh and PW. 9 Gopal Singh stated in their statement that Nand Singh was armed with gun but there is no injury upon the body of deceased caused by gun and as per the prosecution story, pistol was recovered from accused Nand Singh and no injury of pistol was found upon the body of deceased, therefore, whole story of prosecution is concocted one and not supported by cogent evidence. It is also material fact of the case that no blood was found upon any of the recovered weapons. In this view of the matter, whole case of the prosecution appears to be based upon concocted story while relying upon the called dying declaration Ex. P/7, which is not proved by the prosecution by leading cogent evidence.

27. Upon close scanning of the evidence on record, it emerges that main bone of the case which is dying declaration has not been proved, so also, the prosecution has failed to establish any case against the accused-appellants. As per the basic concept of criminal law, if sole basis of conviction is dying declaration then courts are under obligation to keep in mind that prosecution story may not be true but it must be true and in between "may be true" or "must be true", there is a large gap which is to be travelled by the prosecution agency by adducing unimpeachable and reliable evidence. But in this case, the investigating officer who has recorded the statement of deceased Hamatu Singh has mentioned the time of recording of statement as 9.15 p.m. Upon the said document, he has

obtained the certificate of doctor and doctor gave time of issuing certificate as 9.25 p.m. and in the back side of dying declaration, the SHO observed in the proceedings that during the intervening period, deceased has died at 9.30 p.m., therefore, it is observed by him that offence u/s 302 IPC is also made out. But this fact is seriously disputed because in the postmortem report, the time of death has been shown as 10.00 p.m. and in the statement of Doctor PW. 17 Yashpal Singh, he has categorically stated that Hamatu Singh died at 10.00 p.m. Meaning thereby, all the proceedings undertaken by the SHO in recording statement of deceased are seriously disputed and not corroborated by any other independent evidence, so also, not corroborated by doctor whose certificate for the purpose of recording dying declaration was obtained. Therefore, in this case, prosecution has not proved its case beyond reasonable doubt. More so, the basic document which is FIR itself is in dispute, which was registered on the basis of so called statement recorded by SHO under the thumb impression of deceased Hamatu Singh.

28. In this view of the matter, there is no material on record to prove the prosecution case. Therefore the finding arrived at by trial Court deserves to be set aside. Hence, the impugned judgment dated 14th October, 2003 delivered by trial Court does not stand in the eye of law for the purpose of conviction and sentence against the accused appellants. On the basis of above discussions, this appeal is allowed and the impugned judgment dated 14th October, 2003 passed by Addl. Sessions Judge (Fast Track), Bhilwara is hereby quashed and set aside and accused-appellants are hereby acquitted from the charges levelled against them. All the accused appellants except Nand Singh are on bail, therefore, their bail bonds are hereby cancelled and sureties are discharged. Accused appellant Nand Singh is in jail. He shall be released forthwith if not required in any other case.