

(2018) 07 CHH CK 0283

In the Chhattisgarh High Court

Case No : Criminal Appeal (CRA) No. 39 Of 2015

Vidyadhar Manjhi And Ors

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 25-07-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313
Indian Penal Code, 1860 — Section 34, 294, 302, 324, 506
Evidence Act, 1872 — Section 32, 32(1)

Citation : (2018) 07 CHH CK 0283

Hon'ble Judges : Pritinker Diwaker, J;Gautam Choradiya, J

Bench : Division Bench

Advocate : Dharendra Prasad Mishra, Ravindra Agrawal

Final Decision : Dismissed

Judgement

P. Diwaker, J

1. This appeal arises out of the judgment of conviction and order of sentence dated 2.12.2013 passed by the learned 1st Additional Sessions Judge, Raigarh in S.T. No.154/12 convicting the accused/appellants under Section 302/34 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to RI for life and fine of Rs.5,000/-, in default to undergo additional RI for 1 year.

2. The prosecution story, in brief, is that Dhansingh Manjhi (deceased) was having illicit relation with Manmoti, wife of accused/appellant No.1. It is stated that on the date of incident i.e. 16.7.2012 at about 5 pm, when the deceased and said Manmoti were going together towards the village pond, they were seen by accused persons, after seeing them the accused persons chased them and caused injuries to the deceased by club and axe. Seeing the assaults, Manmoti fled from the spot. On coming to know about the incident, Bundrawati (PW-1), mother of deceased, Nandlal (PW-4) and other villagers reached the spot before whom the deceased made oral dying declaration stating that the accused person had assaulted him. Immediately thereafter the deceased was taken to

Community Health Centre, Gharghoda for treatment where his MLC was done by the doctor (PW_8) vide Ex.P-10A. However, looking to the critical condition of the deceased, he was referred to KG Government Hospital, Raigarh and on reaching the hospital, the doctor declared him brought dead. Meanwhile, on the basis of report of the deceased, FIR (Ex.P-8) was registered on 16.7.2012 at 10.30 p.m. against the appellants under Section 324, 294, 506II, 34 of IPC. Diary statement (unexhibited) of deceased Dhansingh was also recorded on 16.7.2012 itself. After the death of the deceased, un-numbered merg (Ex.P-7) was recorded on 17.7.2012, whereas numbered merg was recorded on 18.7.2012 vide Ex.P-8. Inquest (Ex.P-27) was prepared over the body of deceased on 17.7.2012 in which it has been recorded that PW-1 has informed the police that her son was killed by accused persons. Body was sent for post-mortem examination which was conducted by Dr. R.N. Mandavi (PW-3) and he noticed following injuries on the body of deceased;- ? Incised wound of 3x 0.5x0.5cm at the middle of parietal bone. ? Contusion over right shoulder of 3x1cm in size ? Contusion over right buttock of 3.5 x 1 cm in size ? Contusion over umbilical of 4x1 cm in size.

? Fracture in tibia & fibula bone of right leg.

He opined that cause of death was haemorrhagic shock and the death was homicidal in nature. On the basis of memorandum statement (Ex.P-14) of accused/appellant No.1, one axe was seized vide seizure memo Ex.P-16. Based on the memorandum statement (Ex.P-15) of accused/appellant No.2, one club was seized vide seizure memo Ex.P-17. Statements of witnesses were recorded in the course of investigation.

3. After investigation, charge sheet against the accused/appellants was filed under Section 302/34, 294, 506 Part II of IPC followed by framing of charges by the Court below under those sections. The prosecution in order to bring home the charges levelled against the accused persons examined 12 witnesses in all. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.

4. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment convicted & sentenced the accused/appellants in the manner as described above.

5. Learned counsel for the accused/appellants submit that;-

? infact there was no reliable evidence before the trial Court, placing reliance on which a judgment of conviction could have been passed, except the oral dying declaration of deceased allegedly made before PW-1 & PW-4, but the evidence as to the mental and physical condition of the deceased at the time of making the statement was far from satisfactory. In view of the nature of injuries sustained by the deceased, he must have lost his consciousness before making any such declaration. Therefore, it was not safe to base conviction on the evidence of PW-1 & PW-4 who had not witnessed the incident but only spoke about the oral dying declaration having been made by deceased to them when the latter

enquired from the deceased immediately after the incident. ? in absence of report of FSL or Serologist confirming presence of human blood and its group, recovery of club at the instance of appellants is not sufficient.

6. On the other hand, learned counsel appearing for the State has supported the impugned judgment. He submits that in the oral dying declaration the deceased has specifically stated that appellants had assaulted him. This dying declaration was made by the deceased to PW-1 & PW-4 immediately after the assault and therefore the trial Court was justified in accepting the evidence of these witnesses on this point. Therefore, the findings of conviction recorded by the trial Court are sustainable in law.

7. We have heard learned counsel for the parties and perused the impugned judgment and record of the trial Court.

8. PW-1 Bundrawati, mother of deceased, has stated that on the fateful day at about 4 in the evening, her aunt came and informed that her son (deceased) is lying near the pond and perhaps someone had killed him. She rushed to the pond and on reaching there, she found her son lying beside the pond. Injuries were present on his head & left leg and blood was coming out from his head. On being asked as to what had happened, he told that accused Indal and Vidhya have assaulted him by club & axe. She went back to her home, narrated the incident to Ram Manjhi, Nandlal & others and thereafter all of them again came to the spot and brought her son back home. After arranging vehicle from Gharghoda Hospital, they took the deceased to Gharghoda Hospital where the doctor advised to take him to District Hospital and accordingly they took him to the government hospital where the doctor declared him dead. In the cross-examination this witness has denied the suggestion that the deceased had not disclosed the incident to her.

9. Ram Manjhi (PW-2) did not support the prosecution case and turned hostile.

10. Dr. R.N. Mandavi (PW-3) is the person who conducted post-mortem examination over the body of deceased and noticed the injuries as described above. He has opined that cause of death of deceased was haemorrhagic shock due to excessive bleeding from the head injury and the death was homicidal in nature.

11. Nandlal Manjhi (PW-4) has stated that on coming to know from Bundrawati, mother of deceased, that somebody had assaulted her son and he is lying near the pond, he along with Ram Manjhi had gone near the pond and saw that deceased was lying near the hedge beside the pond. They brought him back to home and on being asked, the deceased disclosed that the appellants are responsible to cause injuries to him by axe.

12. Kanhaiyalal Rathiya (PW-5) is the Patwari who prepared the spot map vide Ex.P-4. Suresh Kumar Panda (PW-6) is the police person who assisted in the investigation.

13. Dilip Behra (PW-7) is the Constable who recorded FIR (Ex.P-8). According to this witness, after recording the statement of deceased Dhansingh, he had registered the crime against the accused persons and thereafter the injured was sent to the Community Health Centre, Gharghoda for examination.

14. Dr. V.K. Lakda (PW-8) is the doctor who medically examined deceased Dhansingh and noticed three incised wounds and one contusion on the body of deceased. He has referred the deceased to District Hospital for further treatment. The axe & club seized from the possession of accused persons were sent to this witness for examination and after examination, he gave report Ex.P-12 and opined that it was possible to cause injuries with the axe & club which were found on the body of deceased.

15. Bheema Shrivastava (PW-9) is the witness of memorandums (Ex.P-14 & P-15), seizure memos Ex.P-13, P-6, P-17 and arrest memos Ex.P-18 & P-19. However, he did not support the prosecution case and turned hostile.

16. Dharam Singh (PW-10) did not support the prosecution case and turned hostile.

17. Keshav Narayan (PW-11) is the investigating officer who has duly supported the prosecution case. Ramesh Kumar Behra (PW-12) is the police person who did part of the investigation.

18. There is no eye-witness of the occurrence and conviction of present accused/appellant is based on oral dying declaration made by the deceased firstly before Bundrawati (PW-1), mother of deceased, & Nandlal (PW-4) and thereafter at the time of lodging FIR. Therefore, we have to consider as to whether the oral dying declaration made by the deceased is sufficient to connect the accused/appellants with the offence?

19. The Hon'ble Supreme Court in catena of judgements has held that the statement written or oral of the relevant fact as to the cause of death and as to the nature and circumstances of transactions, which resulted in the death, in cases in which the cause of that person's death comes into question, is admissible under Section 32 of the Evidence Act. Where oral dying declaration suffers from no infirmity and suffers from no embellishment or distortion it is sufficient to sustain the conviction without insisting on corroboration. It is also true that it is not a statement on oath and its truth cannot be contested by cross-examination and, therefore, the courts are required to apply strictest scrutiny.

20. In the case in hand, after the incident the deceased was taken to the police station where report (Ex.P-8) was registered at the instance of deceased in which he disclosed the names of accused/appellants to be his assailants. Dilip Behra (PW-7), who recorded FIR and also statement of deceased (not exhibited), has stated that the deceased disclosed the names of appellants as his assailants. In this cross-examination, this witness denied the suggestion that the deceased was not in a position to give his statement. There is nothing on record to show that

the deceased was unconscious or remained unconscious till his death. Even, after lodging of the report, when the deceased was medically examined, the doctor has also not stated that the deceased was not in a position to speak or talk. Thus, this report (Ex.P-8) is fully covered by the provisions of Section 32 (1) of the Evidence Act, which reads as under:-

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.-- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) when it relates to cause of death.--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

21. In *Munna Raja & another v. State of Madhya Pradesh* reported in 1976 CrL. L.J. 1718 it has been held that where after making the statement before the police, the victim succumbs to his injuries the statement can be treated as a dying declaration and is admissible under Section 32 (1) of the Evidence Act. It is also settled position that F.I.R. could be treated as an oral dying declaration of the deceased because it was on his information about the incident.

22. In view of the above, the statement made by the deceased in FIR (Ex.P-8) is relating to his cause of death, therefore, admissible in evidence under Section 32 (1) of the Evidence Act.

23. According to PW-1, on coming to know that her son (deceased) is lying injured near the pond, she rushed there and when she asked from her son as to what had happened, he replied that he was assaulted by accused Indal & Vidya by axe & club. She returned to her home and came back again on the spot along with Nandlal (PW-4) & other villagers and on being asked by Nandlal (PW-4), the deceased disclosed that the appellants are responsible to cause injuries to him by axe. According to Nandlal (PW-4), on reaching the spot they found the deceased lying at the bank of pond near the hedge. They brought him home and on being asked, he disclosed that he was assaulted by accused persons with axe. Wordings of the oral dying declaration of the deceased given by both these witnesses is almost the same. These witnesses have been subjected to cross-examination by the defence counsel, but we do not find any material substance in their cross-examination which would discredit the case of the prosecution regarding the oral dying declaration. Thus, we are of the view that version of the

incident given by the deceased in FIR (Ex.P-8) finds support from the statements of PW-1 & PW-4.

24. As the oral dying declaration of the deceased, which relate to the facts leading to his death, has been corroborated by the testimonies of Bundrawati (PW-1) & Nandlal (PW-4), whose presence on the spot was natural and probable, we find no reason to disbelieve the oral dying declaration, which is admissible in evidence under Section 32 of the Evidence Act. Hence, such oral dying declaration can safely be made basis for conviction of accused/appellant, therefore, the trial Court has rightly found the accused/appellants guilty of the offence under Section 302/34 of IPC and the said findings cannot be said to be perverse or contrary to the evidence on record.

25. In the result, we do not find any merit in the appeal and it is accordingly dismissed confirming the conviction and sentence recorded against the accused/appellant by the trial Court. Since the accused/appellant is already in custody, no direction regarding his surrender etc. is needed.