

# SUPREME COURT OF INDIA

Bhupan

Vs.

State of Madhya Pradesh

Crl.A.No.495 of 2000

(N. Santosh Hegde and Doraiswamy Raju JJ.)

04.02.2002

## JUDGMENT

### **N. Santosh Hegde, J.**

1. The appellant herein and five others were sent for trial before the First Additional Sessions Judge, Sagar (M.P.) in Sessions trial No. 159 of 1984 on a charge under Section 302 IPC and in the alternate under Section 302 read with Section 149 IPC for having caused the death of one Shamim on 10th of March, 1984 around 9.45 p.m. The learned Sessions Judge while acquitting five of the accused persons convicted the appellant herein of an offence under Section 302 and sentenced to undergo R.I. for life. The appellant preferred an appeal before the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 225 of 1988. The said appeal came to be dismissed by the judgment of the High Court dated 9th of March, 1999. Being aggrieved by the said judgment and conviction, the appellant has preferred this appeal.

2. The appellant is represented by Shri Anip Sachthey, learned Advocate of this Court who is appointed as an Amicus Curiae and the respondent by Ms. Geetanjali Mohan.

3. The prosecution case, in brief, is that on 10th of March, 1984, at about 9.30 p.m., the appellant along with six other persons caused as many as 23 injuries on Shamim, consequent to which he died. The prosecution in support of its case has examined PW-6 Ballu, as eye-witness to the incident, PW-2 Bhai Abdul Rashid who having come to know of the incident lodged a complaint as per Ex.P2. PW-3 Dr. Choubey and PW-8 Deputy Collector - M.P. Shrivastav, who recorded the dying declaration of the deceased as per Ex.P.5 among other evidence.

4. The trial court after considering the material on record refused to place any reliance on most part of the prosecution evidence. However, it came to the conclusion that the prosecution has established the involvement of the appellant herein in the death of the deceased Shamim, primarily relying upon the dying declaration (Ex.P.5) and convicted the appellant, as stated above.

5. The High Court, in appeal, also refused to place any reliance on the evidence of the so called eye witnesses as well as PW 4 who lodged the complaint, but accepted the dying declaration of the deceased made to PW-3 (Doctor) and PW-8 (Deputy Collector) before whom the said declaration was made, as also recovery of a sword at the instance of the appellants, hence, dismissed, his appeal.

6. In this appeal, Shri Anip Sachthey, learned Amicus Curiae appearing for the appellants contended that the courts below have seriously erred in placing reliance on the dying declaration so as to base a conviction on the appellants while they chose not to rely upon the oral evidence produced by the prosecution. He also pointed out when the prosecution case almost in its entirety was found to be unacceptable in regard to other accused persons including Ramji Bhura, who was named in the dying declaration, they could not have placed reliance on the same to base a conviction on the appellants. He also contended that the recovery of the sword purportedly to be at the instance of the appellants is a make-believe story and identity of the appellants not having been established beyond doubt by the prosecution, he is entitled for at least benefit of doubt. Ms. Geetanjali Mohan, learned counsel appearing for the State of M.P., however, contended that, so far as the appellants are concerned, even if the oral evidence adduced on behalf of the prosecution is not acceptable, the dying declaration being unexceptionable, which named the appellants specifically cannot be rejected so as to give benefit to the appellants.

7. Having heard the learned counsel for the parties, we notice that what is left of the prosecution case against the appellants is only the dying declaration of deceased Shamim. Learned counsel for the appellants attacked the said dying declaration by pointing out to the evidence of the Doctor to show that the deceased could not have been in a fit condition to make the said dying declaration because even according to medical evidence there was hardly any pulse to show that the deceased was in a fit condition to make the dying declaration. He also contended that the circumstances in which the dying declaration came into existence were highly suspicious, hence, no conviction could have been based on this document.

8. We notice that the only ground on which the conviction is based is on the dying declaration and the recovery of the sword. Having read the evidence of PW-3 (Doctor) and PW-8 (Deputy Collector), we are convinced that the dying declaration (Ex.P5) was recorded at that point of time when the deceased was in a condition to make the said dying declaration and the same is not, in any manner, tainted by any suspicious circumstances. However, the question still remains whether this dying declaration does, in any manner, implicate the accused so as to base a conviction of having caused the murder of the declarant? For this purpose, we think it appropriate that the dying declaration in its entirety be extracted for further consideration which is as follows:

"I have been assaulted by Bappan, Ramji Bhura. 4-5 persons were with them. Assaulted about 1-1/2-2 hours back. Rs. 100 was demanded from me and on refusal Bappan slapped me. I ran. Then from behind I was assaulted by sword and `farsi`

because of which I started bleeding. Thereafter, Police came and they took me in the vehicle. Bappan is Thakur, Ramji Bhura is Yadav. Where they reside, I do not know."

9. It is to be noticed that in this dying declaration, the deceased has stated that he was assaulted by Bappan, Ramji Bhura and 4-5 other persons. So far as the appellant is concerned, the overt act attributed to him is confined to the act of slapping him only. The declarant then says that when he started running then he was attacked from behind with sword and farsi. He does not state or indicate which of the accused persons, as a matter of fact, attacked him, in that manner which resulted in his death. From the nature and number of injuries suffered by the deceased, it is clear it could have been caused not by a single person but by a group of persons and in such a swift manner when he was admittedly on the run the deceased had no occasion to notice which assailant caused the injuries particularly the total injuries to him. The courts below have chosen to discard this evidence, so far as it pertains to the other accused persons including Ramji Bhura whose name is specifically mentioned in the dying declaration. That being the case, it is rather difficult to accept this dying declaration as the sole basis to come to the conclusion that it has implicated the appellant of having caused the injuries leading to his death. That apart, in the dying declaration, it is shown that the appellant's caste is 'Thakur', whereas during the course of trial it has come in evidence that the appellant is, as a matter of fact, a Yadav which is seen from certain court records maintained in some earlier proceedings. The courts below have rather brushed aside this factor which, in our opinion, is a material fact necessary to prove the identification of the person named in the dying declaration. If, as a matter of fact, the deceased knew the appellant then he would not have committed the mistake of mentioning wrong caste which throws an element of doubt about his knowledge as to the possibility of the deceased having identified the appellant. In this regard, learned counsel for the appellant placed reliance on the judgment of this Court in the case of *Bhopa Prasad v. State of Maharashtra*<sup>1</sup>, wherein in a similar case of identification by a region from where the accused came, this court held that the difference pointed out as to the description of the assailant was a material difference casting doubt on the identification of the assailant. Therefore, we are of the considered opinion that it is not safe to rely on this dying declaration to base a conviction, if this piece of evidence is eschewed from consideration, then the mere fact of the prosecution having recovered a sword at the instance of the appellant, on facts and circumstances of this case, would not permit us to base a conviction under Section 302 IPC in the background of the fact that almost all other evidences produced by the prosecution are disbelieved by the courts below.

10. For the reasons stated above, we consider it unsafe to rely upon the prosecution evidence to base a conviction on the appellant for having committed the murder of Shamim, and giving the benefit of doubt, we allow this appeal and set aside the judgments of the courts below and acquit the appellant of the charges framed against him. The appellant, who is stated to be in custody, shall be released forthwith, if not required in any other case.

11. We record our appreciation for the assistance rendered by Shri Anip Sachthey as an Amicus Curiae in this case. The appeal is allowed accordingly. Appeal allowed.

<sup>1</sup>1998(9) SCC 353