SUPREME COURT OF INDIA

Sri Bhagwan

Vs.

State of U.P.

Crl.A.No.1709 of 2009

(Swatanter Kumar and Fakkir Mohamed Ibrahim Kalifulla JJ.)

06.12.2012

JUDGMENT

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. This appeal by the sole accused is directed against the judgment of the Division Bench of the High Court of Allahabad dated 28.11.2008 passed in Criminal Appeal No.2520 of 1982 by which the High Court confirmed the conviction and sentence of life imposed on the appellant for the offence under Section 302, Indian Penal Code (IPC) by the Sessions Judge Agra in ST 457 of 1981 in the judgment and order dated 06.09.1982.

2. Shorn of unnecessary details, the case of the prosecution was that on 26.05.1980 at 10.45 p.m. on hearing the cries of the deceased Yogender Nath Bhargava, Gurvanta Singh (PW-1) and Lalji Prasad-first informant (PW- 3) rushed to the place of occurrence which was Dayalbagh bus stand where they witnessed the action of the accused in pouring acid on the body of the deceased. It was also stated that while committing the said offence, the accused was heard saying "I will pay your Rs.1,300/- today". It was the further case of the prosecution that on seeing the witnesses, the accused attempted to escape from the spot. However, he was caught by the persons who were present at the spot.

3. Both the deceased and the accused were stated to have been then brought to the police station by 11.10 p.m. where PW-3's report (Exhibit Ka-2) was lodged based

on which Exhibit Ka-3 FIR was prepared by H.M. Shivraj Singh (PW-6) wherein the crime under Section 326, IPC was registered in the General diary (Exhibit Ka-14). ASI Raghu Nath Singh (PW-4) recorded the statement of the deceased who was injured at that point of time under Section 161, Criminal Procedure Code (Cr.P.C). Thereafter the injured was stated to have been sent to the District Hospital where he was examined by Dr. S.P. Mishra (PW-5) at 11.45 p.m. and the injury report was marked as Exhibit Ka-17. The injured stated to have breathed his last at 9.40 p.m. on 27.5.1980 due to extensive burn injuries sustained by him. Dr. S.P. Mishra (PW-5) who conducted the post-mortem on the body of the deceased issued Exhibit Ka-15, the report. Thereafter, the crime was altered as one under Section 302, IPC. Raghu Nath Singh (PW-4) ASI inspected the place of occurrence, prepared a site plan (Exhibit Ka-5), collected materials such as acid bottle (Exhibit-1), Nausadar (Exhibit- 2), gloves (Exhibit-4), and bag (Exhibit-3) from the spot under memo (Exhibit Ka-17). The inquest memo was marked as (Exhibit Ka-6). Investigation was stated to have been subsequently taken over by S.H.O. Raj Pal Singh on 28.05.1980.

4. Charge-sheet was thereafter laid as Exhibit Ka-5. The articles recovered were sent for chemical examination and the chemical examination report was marked as Exhibit Ka-18. The trial Court, on consideration of the evidence placed before it, both oral and documentary and the material objects, found the appellant guilty of the offence under Section 302, IPC and imposed upon him the sentence for life. The appellant's appeal before the High Court having been dismissed, he has come forward with the present appeal before us.

5. Mr. M.P. Shoravala, learned counsel for the appellant in his submission contended that PWs-1 and 3 could not have witnessed the incident inasmuch as, in their version before the Court they stated that they only heard the deceased saying that the accused sprinkled acid on him. According to the learned counsel, since the deceased had severe burn injuries in his tongue, he was incapable of making any statement and, therefore, the alleged dying declaration in the form of Section 161 statement recorded by Raghu Nath Singh (PW-4) ASI cannot be true. Learned counsel contended that as per para 115 of Police Regulations, the 161 statement, if were to be treated as a dying declaration, the same should have been done in the presence of two respectable witnesses in which the signature or mark of the declarant and the witnesses at the foot of the declaration should have been obtained. Since the said requirement was not fulfilled, the said statement could not

have been relied upon by the trial Court as well as the High Court. It was then contended that absence of acid mark on the accused belied the case of the prosecution. It was also contended that the arrest of the accused was suppressed. According to the learned counsel for the appellant, PW-3 was a stock witness and, therefore, his version could not have been relied upon. He also contended that on 25.05.1980, the death ceremony of the appellant's father was held and, therefore, in that situation the appellant would not have been in a mood at all to commit a heinous crime of murder of the deceased. According to the learned counsel, if the deceased had suffered such extensive burn injuries due to acid attack, he would not have been in a position to make such a long statement as was recorded by PW-4. The learned counsel also argued that since in the site plan, no light post was marked and since the occurrence had taken place at 10.45 p.m., there would have been no scope at all for PWs-1 and 3 to have witnessed any incident as stated by them. Learned counsel contended that the so-called dying declaration recorded by PW-4 was not admissible in evidence. The learned counsel, therefore, contended that the evidence does not confirm the offence alleged against the appellant.

6. As against the above submissions, Mr. Ratnakar Dash, learned senior counsel submitted that the very fact that the FIR was lodged at 11.10 p.m. at the instance of PWs 1, 2 and 3 who brought accused as well as the deceased to the police station were all factors relevant to show that the case of the prosecution was truly projected before the Court. Learned senior counsel submitted that PWs-1 and 2 were guarding the area in the night and when they happened to hear the cries of the deceased to which they responded by rushing to the spot which was just 30 steps ahead of their way and with the aid of the street lights, they were able to witness the occurrence as narrated by PW-3 in his report pursuant to which the FIR came to be registered. Learned senior counsel also submitted that when the appellant attempted to escape from the spot, he was caught by the persons standing nearby and thereafter brought to the police station along with the deceased. Learned counsel contended that such natural course of events having been accepted by the Court with the aid of the evidence of the eye witnesses and the declaration made by the deceased who was in the injured state at that point of time before PW-4 and having regard to the exceptional circumstances stipulated under Section 161 (2) Cr.P.C., the said statement was validly relied upon as the dying declaration of the deceased himself falling under Section 32 (1) of the Evidence Act and, therefore, the reliance placed upon the said dying declaration of the deceased was unquestionable. The learned senior counsel submitted that PWs-1, 2 and 3 were all

strangers and they had no reason to implicate the accused to the offence. He also pointed out that PW-3 was working as a Peon in the District Court and his statement was fully reliable. According to the learned senior counsel, both the Courts accepted the version of PWs1 to 3 inasmuch as they had no axe to grind against the accused and they were also not related to the deceased in order to state that they were interested witnesses. Learned senior counsel relied upon the decision reported in Jai Prakash and Others v. State of Haryana - 1998 (7) SCC 284 in support of his submission.

7. Having heard learned counsel for the appellant as well as learned counsel for the respondent and having bestowed our serious consideration to the respective submissions and the materials placed on record and the impugned judgments, we find the substantial contention made on behalf of the appellant was that PW1 and 3 could not have witnessed the incident and that having regard to the nature of the injuries sustained by the deceased, he could not have made a statement under Section 161 Cr.P.C. It is the further contention that even if the statement can be said to have been made by the deceased, the same cannot be treated as a dying declaration for non-fulfillment of the statutory requirements and that the absence of the acid marks on the accused belied the case of the prosecution. One other submission made on behalf of the appellant which also requires to be considered is that PWs -1 and 3 were stock witnesses and, therefore, their version could not have been relied upon.

8. When we consider the said submission of the appellant in seriatim, in support of the submission that PWs1 and 3 were stock witnesses, the learned counsel relied upon the decisions reported inBabudas v. State of M.P. - 2003 (9) SCC 86, Baldev Singh v. State of Punjab - 2009 (6) SCC 564. At the very outset, it will have to be stated that except submitting that PWs-1 and 3 were stock witnesses, nothing more was pointed out by learned counsel to support the said contention. Further when we examine the deposition of the said witnesses it disclose that they were actually guarding the area as members of the residential colony. According to them, the place of occurrence, namely, the bus stand of Dayalbagh is at a distance of about 250 yards from their colony. They also stated that when they heard the pathetic cries of the deceased, they could notice the accused assaulting the deceased which they were able to see from the street light brightness and that when they rushed towards the deceased, the accused who was throwing acid on the deceased started fleeing and that as they shouted at him, the passersby caught hold of the accused

and that is how they were able to bring the deceased as well as the accused to the police station. Nothing was put in cross examination to state that these witnesses had either tendered evidence at the instance of the police in any other criminal case or even a suggestion that they were stock witnesses of the police. There is nothing on record to show that these witnesses had earlier deposed in any other criminal case in order to even remotely suggest that they were being used as stock witnesses by the police authorities.

9. Keeping the above factors in mind, when we examine the decision relied upon reported as Babudas (supra), this Court has noted that PW-17 in that case was a stock witness who was appearing as witness for recovery on behalf of the prosecution even as far back as in the year 1965 and that admittedly the prosecution was using him as a stock witness and it was in those circumstances that this Court held that there should be a cautious approach in relying upon the testimony of such a stock witness. In the decision reported in Baldev Singh (supra) it was noted that PW-22 in that case was examined by the police authorities in some other case and that a suggestion was put to him that he was a police tout. It was, therefore, held that his evidence cannot be relied upon.

10. In the light of the said peculiar facts involved in those two cases, we find no scope to apply those decisions to the facts of this case. It can be stated that as per the version of PWs-1 and 3 while they were guarding the area as responsible residents of a nearby colony they heard the cries of the deceased and they rushed to the place of occurrence to help the deceased when they were able to witness the act of the appellant in sprinkling acid on the deceased and the attempt of the appellant to flee from the scene of occurrence which was successfully thwarted by the witnesses along with others standing nearby. Their statement in narrating the incident in such a sequence was really convincing and that it was quite natural and acceptable in every respect without giving room for any doubt. Moreover, as rightly pointed out by learned counsel for the respondent, they were not interested in any manner in the deceased. They were total strangers and their presence as claimed by them was justified in every respect and, therefore, there was no room to doubt their version in having stated that it was the appellant who was responsible for causing acid injury on the deceased. The said submission of the learned counsel for the appellant, therefore, does not merit acceptance.

11. It was also submitted by learned counsel for the appellant that PWs1 and 3 could not have witnessed the incident inasmuch as they stated that they only heard the cries of the deceased about inflicting of the injury by pouring acid by the accused on him and did not see the act of pouring acid on the deceased by the appellant. Even here we find that the said statement made by PWs-1 and 3 does not in any way dilute their earlier statement that on hearing the cries of the deceased, they rushed to the place of occurrence when they noticed the accused attacking the deceased by sprinkling acid on him. After reaching the spot they also heard from the deceased that the accused sprinkled acid on him. The reference to such statement of the deceased by the witnesses only strengthened their earlier version of having seen the appellant throwing acid on the deceased. Therefore, the version of PWs1 and 3 about the statement of the deceased on this aspect in no way contradict their statement of having seen the appellant assaulting the deceased by sprinkling acid. The said submission also, therefore, does not merit any consideration.

12. The next submission of the learned counsel for the appellant was that since the deceased suffered acid injury in his tongue, he was incapable of making any statement and, therefore, the alleged statement under Section 161 Cr.P.C. stated to have been recorded by PW-4 cannot be true. In this context, it will be worthwhile to refer to the post-mortem report Exhibit Ka-13. The said report mentioned the ante-mortem injuries as under:-

> "superficial burn on whole face, neck, front of cheeks, abdomen, whole back of both bottocks, both upper extremities right front of hip, whole tongue, undersurface of cheeks and orphornex, leather marks appearance (illegible)"

13. While referring to the said report and the injuries, it is also necessary to refer to the evidence of the doctor who issued Ka-13, namely, Dr. S.P. Mishra (PW-5). In the chief examination, PW-5 stated that even after sustaining the above mentioned injuries, the injured could have lived in consciousness for half an hour to an hour. In the cross examination, though PW-5 stated that the deceased might have suffered grave and severe agonies, nothing was suggested to him that he was not in a position to speak or make any statement. In the injury report Exhibit Ka-17 also it is noted that superficial burn injuries were found among other parts of the body as well as in the tongue. It was also mentioned therein that the burnt areas where in multiple patches and it was mentioned that they were of leather appearance with a

distinct demarcation between burnt and normal skin. A conspectus consideration of the injury report (Exhibit Ka-17) with post-mortem report (Exhibit Ka-13) and the oral evidence of Dr. S.P. Mishra (PW-5) amply show that the deceased was fully conscious immediately after the attack on him and that such conscious position remained for at least half-an-hour to one hour. As per the evidence available on record, while the occurrence took place at 10.45 p.m. the deceased along with the accused were brought to the police station by 11.10 p.m. PW-4 the ASI who recorded the statement of the deceased made it clear that having regard to the condition of the deceased, he quickly recorded the statement within 10 minutes in order to send him to the hospital to get him treated. The above factors go to show that the statement as recorded by PW-4 of the deceased was true and, therefore, the submission that the deceased was not in a position to make the statement cannot be accepted. In fact PWs1 and 3 in one voice stated that they heard the cries of the deceased after the attack. If the deceased was in a position to make a long cry after the acid attack, it can be safely concluded that he would have definitely be in a condition to explain to the police officer the manner in which the occurrence took place. We, therefore, reject the said submission of the learned counsel for the appellant that the statement of the deceased as recorded by PW-4 was not true.

14. Once we steer clear of the said hurdle then the question arises as to whether the said statement can be accepted as a dying declaration as has been done by the trial Court and as approved by the Division Bench of the High Court. The trial Court while dealing with the contention made on behalf of the appellant for not to rely upon the 161 statement of the deceased as a dying declaration rejected the said argument in so many words:

> "30. Regarding the dying declaration of the deceased I have already mentioned that there are two sets of dying declaration, one which was made by the deceased before the witnesses immediately after the incident and the other recorded by the investigating officer at the police station u/s 161 Cr.P.C. The learned counsel for the defence criticised the dying declaration on the point that the investigating officer himself introduced certain facts in it while recording the statement u/s 161 Cr.P.C. by adding the names and the addresses of the assailant and the victim on the basis of the written report, Ex.Ka2 due to which he argued that the same was not at all reliable. In this regard I find that 1979 Cr.L.J 1031, Tihari Singh vs. State of Punjab, is contrary, in which it has been held that the Head Constable who recorded the

> dying declaration had stated in his evidence that he put the question to the deceased and recorded his answers. He also added that he recorded what the deceased stated "in his own way". It does not mean that he recorded something other than what the deceased stated. All that it meant was that the language was his, but the substance was that of the deceased. In the circumstances, no infirmity was attached to the dying declaration on that account. I also find that the dying declaration alleged to have been made by the deceased in presence of the witnesses, remains still unaffected by the argument of the defence counsel, and in any case, the presence of the witnesses of fact at the place of the incident immediately after its occurrence, can not be doubted for the reasons mentioned above."

15. The High Court also rejected the said submission for not relying upon the 161 statement which otherwise turned out to be the dying declaration of the deceased. Before us, for the first time it was contended on behalf of the appellant that the said statement cannot be accepted as a dying declaration for the reason that it was not attested by two respectable witnesses as is required in para 115 of the police regulations. The said paragraph 115 reads as under:

> "115.The officer investigating a case in which a person has been so seriously injured that he is likely to die before he can reach a dispensary where his dying declaration can be recorded should himself record the declaration at once in the presence of two respectable witnesses, obtaining the signature or mark of the declarant and witnesses at the foot of the declaration." [emphasis supplied]

16. A reading of the said paragraph appears to be a guideline issued to the investigating officers as to the precautions to be taken while recording a dying declaration. It was stated therein that such declaration can be recorded by the investigating officer himself in the presence of two respectable witnesses and obtain the signature or mark of the declarant and the witnesses at the foot of the declaration. In the first place, such a guideline in the form of police regulation can have no impact on any superior statutory prescription. Leaving aside such a proposition which does not require to be considered in this case, the said para 115 will apply only in a grave situation where the victim is seriously injured and it would be impossible compliance of Section 32 (1) of the Evidence Act in its full rigour. Such guidelines have been issued to insure that at least the basic

requirement of recording such a dying declaration in the presence of two respectable persons as witnesses while obtaining the signature or mark of the victim himself. It is relevant to note that the said paragraph 115 makes a specific reference to the recording of the dying declaration in which event alone such precautions have to be ensured by the investigating officers and not when Section 161 statement is recorded which does not require the signature of the author of the statement.

17. While keeping the above prescription in mind, when we test the submission of the learned counsel for the appellant in the case on hand at the time when 161 Cr.P.C. statement of the deceased was recorded, the offence registered was under Section 326, IPC having regard to the grievous injuries sustained by the victim. PW-4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW-4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under Section 161 Cr.P.C. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent counsel merits acceptance.

18. Mr. Ratnakar Dash, learned senior counsel made a specific reference to Section 162 (2) Cr.P.C. in support of his submission that the said section carves out an exception and credence that can be given to a 161 statement by leaving it like a declaration under Section 32(1) of the Evidence Act under certain exceptional circumstances. Section 162 (2) Cr.P.C. reads as under:

> "162. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

19. Under Section 32(1) of the Evidence Act it has been provided 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 cases 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."

20. Going by Section 32(1) Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the extraordinary credence attached to such statement fall under Section 32(1) of the India Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration.

21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon

the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected.

23. The other submission of learned counsel for the appellant was that the absence of the acid marks on the body of the accused belies the case of the prosecution. At the very outset, it will be relevant to note that the recovery memo Exhibit Ka-1 disclose recovery of gloves which were marked as exhibit 4 before the trial Court. The chemical report marked as Ka-18 discloses the rubber gloves apparently used by the appellant while carrying out the offence of pouring acid on the deceased. Exhibit Ka-18 discloses that the burnt pieces of rubber gloves had the content of acid on it. Therefore, when the appellant had taken every precaution to ensure that while throwing acid on the deceased, he was not injured in any manner, the absence of any such injury on him can have no effect in the case of the prosecution.

24. The other argument was that the appellant lost his father and that on the day of occurrence he attended the ceremony in memory of his father and that when he

was in such a distress situation, he would not have committed the offence of murder. We do not find any substance in the said feeble submission in order to deal with the same in very many details.

25. The other discrepancies pointed out such as the street light was not shown in the site plan and, therefore, PWs 1, 2 and 3 could not have witnessed the incident, that the gloves were not seized and that the appellant was a small grocery shop owner and there was previous criminal background and, therefore, the appellant could not indulge in such a crime to pour acid on the face of the deceased are all arguments of desperation. Further some such submissions are all trivial factors submitted before us which we find do not in any way affect the case of the prosecution which was fully established by legally acceptable evidence placed before the Courts below.

26. Reliance was placed upon Ravikumar alias Kutti Ravi v. State of T.N. - 2006 (9) SCC 240 for the proposition that fully supports the case of the prosecution wherein this Court held "once the Court is satisfied that the declaration is true and voluntary, it undoubtedly, can base its conviction on the dying declaration without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis unless it is corroborated. The rule requiring corroboration is merely the rule of prudence".

27. As in the case on hand we have found that the statement under Section 161 Cr.P.C. which was relied upon as dying declaration, fulfilled the requirement, every provision of the law and fact. We, therefore, find that the said judgment fully supports the case of the prosecution in affirming the conviction imposed on the appellant.

28. Reliance was placed upon the decision in Suresh Chaudhary v. State of Bihar - 2003 (4) SCC 128 for the proposition that though IO seized certain mattresses and durries from the place of the incident which were bloodstained, and the same were not sent to the chemical examiner and this failure added to the list of suspicions pointed out by the defence.

29. The relevant conclusion in para 12 of the said decision is to the following effect:

> "12……..Then again we notice, though PW 13, the IO stated in his evidence that he has seized certain mattresses and durries from the place of the incident which were bloodstained, the same were not sent to the Chemical Examiner for establishing the fact that these durries seized from the place of the incident were actually used by the victims which might have supported the prosecution case if the bloodstains were to be proved to be that of the victims. This failure also adds to the list of suspicions pointed out by the defence. All these omissions and contradictions also add to the list of doubtful circumstances pointed out by the defence in the prosecution case."
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> (Emphasis added)

30. In the said decision the version of the sole eye witness was not relied upon inasmuch as he was found to be an interested witness and the other evidence also did not support the case of the prosecution. There was also inordinate delay in sending report to the Magistrate under Section 157 (1) Cr.P.C. The failure on the part of the prosecution to recover the weapons was one other relevant factor which was referred to in order to set aside the conviction. Therefore, apart from not sending the recovered blood stained material for chemical examination, there were various other serious infirmities in that case which all put together persuaded this Court to interfere with the conviction. We, therefore, do not find any support from the said decision. Not sending of the clothes of the deceased for chemical examination is an isolated factor which should not cause any dent in the case of the prosecution when the case of the prosecution was otherwise established by abundant legal evidence. Therefore, the said decision also does not persuade us to interfere with the conviction and sentence imposed on the appellant.

31. Having regard to our above conclusion, we do not find any merit in the appeal. The appeal fails and the same is dismissed.