A.F.R.

11.5.12

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(50)

HIGH COURT OF CHHATTISGARH, BILASPUR

CORAM: Hon'ble Shri Sunil Kumar Sinha &
Hon'ble Shri Radhe Shyam Sharma, J J.

Criminal Appeal No. 800 of 2006

Suresh Kumar Patel & Another

Vs.

State of Chhattisgarh

JUDGMENT

For consideration

Sd/-
Sunil Kumar Sinha
Judge

HON'BLE SHRI JUSTICE RADHE SHYAM SHARMA

I agree

Sd/-
R.S. Sharma
Judge

Post for Judgment : 11/05/2012

Sd/-
Sunil Kumar Sinha
Judge

A.F.R.

11.5.12

(51)

HIGH COURT OF CHHATTISGARH, BILASPUR

CORAM: **Hon'ble Shri Sunil Kumar Sinha &**
Hon'ble Shri Radhe Shyam Sharma, J J.

Criminal Appeal No. 800 of 2006

APPELLANTS

1 Suresh Kumar Patel son of Brihaspati, aged about 30 years, resident of Korai, P.S. Parasgaon, District Bastar

2 Anand Kumar Patel, son of Sukmanram, aged about 22 years, resident of Korai, P.S. Parasgaon, District Bastar

Versus

RESPONDENT

State of Chhattisgarh,
Through the Police Station Parasgaon,
District Bastar

(Criminal Appeal under Section 374 (2) of The Code of Criminal Procedure, 1973)

Appearance:

Mr. B.P. Sharma, Advocate for the appellants.
Mr. N.K. Mehta, Panel Lawyer for the State.

JUDGMENT
(11.05.2012)

Following judgment of the Court was delivered by **Sunil Kumar Sinha, J.**

(1) This appeal is directed against the judgment dated 12th of September, 2006 passed in Session Trial No. 386/2005 by the Session Judge, Bastar at Jagdalpur (C.G.). By the impugned judgment, the appellants have been convicted u/ss 302/34 and 341 IPC and sentenced to undergo imprisonment for life and R.I. for 6 months with a direction to run the sentences concurrently.

(2) The facts, briefly stated, are as under:-

Deceased- Sukduram was aged about 55 years. The case of the prosecution is that on 14.6.2005 at about 9.30 a.m., Sukduram was brought to police station Farasgaon, where he lodged the First Information Report (F.I.R. – Ex.-P/10) making allegations that on 13.6.2005 at about 9.00 p.m., the appellants met him on the way, when he was returning from the house of one Bhagdeo Pujari, and assaulted him by a knife. When the assault was being made, he cried taking the name of his daughter Savita (PW-1). When the appellants saw that his daughter is coming, they fled from the place of occurrence. His son- Sriram (PW-2) and wife- Maharin Bai (PW-3) also came there. They took him to his house and thereafter, he has come to lodge the report. On the above report an offence u/ss 307/34 & 341 IPC was registered and the deceased was sent for medical examination. The deceased was examined by a local Doctor and thereafter he was referred to Maharani Hospital, Jagdalpur. A surgery was performed for the injuries sustained over the abdomen by the deceased. However, the deceased succumbed to the injuries while his treatment at 12.45 Noon on 15.6.2005. Then the offence was converted u/s 302/34 IPC. The dead body was sent for post-mortem. The post-mortem examination was conducted by Dr. R.B.P. Gupta (PW-5). He noticed following injuries on the dead body of the deceased:-

(i) Dressed wound 2 x 1 c.m. on the lateral aspect of the neck;

(ii) Stitched and dressed wound 2 x 1 c.m. on the left lower portion of chest;

(ii) Stitched wound having 2 stitches on the left hand; &

(iv) One dressed laparotomy over the abdominal region having 12 stitches; after opening the stitches injuries were seen over dom of left diaphragm, mesentery & jejunum. Black coloured substance was present in abdominal cavity.

According to the Autopsy Surgeon, the cause of death was shock and septicemia on account of injuries to the stomach and chest.

(3) The case of the prosecution was mainly based on F.I.R. (Ex.-P/10) made by the deceased which was taken as dying declaration; oral dying declaration made by the deceased before Savita (PW-1 – daughter of the deceased), Sriram (PW-2 – son of the deceased) and Maharin Bai (PW-3 – wife of the deceased); and the circumstance that the appellants were seen at the place of occurrence when the deceased was crying for help.

(4) The learned Session Judge relied on the testimonies of the above witnesses and held that the witnesses had seen the appellants at the place of occurrence when the deceased was crying for help; the deceased made oral dying declaration before them; thereafter the deceased himself went to the police station and lodged the F.I.R. (Ex.-P/10) which was a written dying declaration, therefore, the appellants were liable for punishment under the aforementioned Sections of IPC.

(5) Mr. B.P. Sharma, learned counsel appearing on behalf of the appellants, has firstly argued that it was not proved that the deceased had lodged the report, therefore, finding relating to written dying declaration (F.I.R. lodged by the deceased) was erroneous. For the principles, he cited the decision of ***Sham Shankar Kankaria –Vs- State of Maharashtra, (2006) 13 SCC 165***.

(6) We have no doubt about the principles relating to the dying declaration. However we reiterate the same on the above judgment of the Supreme Court. The Supreme Court, while considering the evidentiary value of the dying declaration, held that the dying declarations are based on the *Maxims "nemo moriturus praesumitur mentire"* means a man will not meet his maker with a lie in his mouth. The eight clauses of Section

32 are exceptions to the general rule against hearsay evidence. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eyewitness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

(7) In ***Munnu Raja and another –Vs- The State of Madhya Pradesh, AIR 1976 SC 2199*** the Supreme Court 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. Therefore, first information report, lodged by the deceased was rightly treated as a dying declaration and there can be hardly any dispute regarding it. Mr. Sharma has also not disputed the above legal position. However he has argued that it was not proved beyond all reasonable doubt that the deceased himself lodged the above report, therefore, the above report (F.I.R.) could not have been

treated as a dying declaration. If we look into the F.I.R. (Ex.-P/10), it is in format (Form No. 1). It bears a thumb impression at the place where thumb impression or the signature of the maker is to be taken. There is no mention that whose thumb impression was there in the F.I.R. as nothing has been written on or near the thumb impression. Sub-Inspector- Arvind Dwivedi (PW-8) is the police officer who recorded the F.I.R. (Ex.-P/10). He has proved his signature over the F.I.R. (Ex.-P/10). He admitted in Para-8 of his cross-examination that by mistake it was not endorsed in the F.I.R. that whose thumb impression was taken by him. However he asserted that the thumb impression of the deceased was taken. Deceased- Sukduram was Patel of the village. A defence witness- Bhanu (DW-1) has been examined. Bhanu (DW-1) deposed that deceased Sukduram used to put his signature on the documents. For example he produced a copy of *Rin-Pustika* (Ex.-D/5) in which signature of village Patel is required and deceased- Sukduram has put his signature over the said document. In cross-examination, he denied that occasionally Sukduram used to put his thumb impression. Ex.-D/5 is an old document. There is no reason to disbelieve the same. Normally if a person used to put his signature over the documents in all transactions, he would not go, in normal human conduct, to put his thumb impression instead of his signature unless compelling circumstance so requires. If deceased- Sukduram was in a position to lodge a report after going to the police station and he lodged the report in clear words, as it appears from the face of the report, why he will not put his signature on the report and would put his thumb impression, which is also not identified by the scribe of the F.I.R. Had there been a case in which the maker of the F.I.R.

would have sustained injuries over his hand or finger and on account of those injuries, he was not in a position to put his signature, then of course, such conduct would have been appreciated. But present is not a case like that. Therefore, the contents of the F.I.R. appear to be suspicious.

(8) Savita (PW-1) is daughter of the deceased. She admitted in her cross-examination that on the next morning she had also accompanied the deceased to the police station on a Jeep. They were accompanied by Amarnath (PW-4), Bhagchand and Mahara. They had taken the deceased to Farasgaon Hospital. She admitted in clear words that Bhagchand, Amarnath (PW-4) and Mahara had gone inside the police station to lodge the F.I.R.. Not only this she admitted that Mahara , who is her uncle, had lodged the F.I.R. We have no reason to disbelieve the above evidence of Savita (PW-1). In this context Sub-Inspector Arvind Dwivedi (PW-8), in Para-8 of his cross-examination, has very much emphasized that the report of Sukduram (F.I.R. – Ex.-P/10) was recorded inside the police station which would mean in the room of the police station. In appreciation of evidence of above witnesses together with the aforesaid deformities regarding taking of signature/thumb impression in the F.I.R., we are of the view that it was not proved beyond reasonable doubt that in fact, the deceased lodged the above F.I.R. (Ex.-P/10) in the police station and he in fact gave the above declaration (which has been treated as dying declaration) before the police. Therefore, the dying declaration (F.I.R. – Ex.-P/10) was not proved to be given by the deceased and we hold it accordingly.

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(9) Mr. Sharma has next contended that the copy of the F.I.R. was not sent to the *Ilaqa* Magistrate. He has cited the decision of ***Shivlal and Another –Vs- State of Chhattisgarh, (2011) 9 SCC 561***. In the above judgment, relying various earlier decisions, the Supreme Court observed in Paras - 18, 19 & 20 as follows:-

> "**18.** This Court in ***Bhajan Singh –Vs- State of Haryana, (2011) 7 SCC 421*** has elaborately dealt with the issue of sending the copy of the FIR to the Ilaqa Magistrate with delay and after placing reliance upon a large number of judgments including ***Shiv Ram –Vs- State of U.P., (1998) 1 SCC 149*** and ***Arun Kumar Sharma –Vs- State of Bihar, (2010) 1 SCC 108***, came to the conclusion that CrPC provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not ante-timed or ante-dated. The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159 CrPC, if so required. The object of the statutory provision is to keep the Magistrate informed of the investigation so as to enable him to control the investigation and, if necessary, to give appropriate direction. However, it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or the investigation is not fair and forthright. In a given case, there may be an explanation for delay. An unexplained inordinate delay in sending the copy of the FIR to the Ilaqa Magistrate may affect the prosecution case adversely. However, such an adverse inference may be drawn on the basis of attending circumstances involved in a case.
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> **19.** In the instant case, copy of the FIR was not sent to the Magistrate at all as required under Section 157 (1) CrPC. In such a case, in the absence of any explanation furnished by the prosecution to that effect, would definitely cast a shadow on the case of the prosecution. This Court dealt with the issue in ***State of M.P. –Vs- Kalyan Singh, (2011) 9 SCC 569***, wherein this Court was informed by the Standing Counsel that in Madhya Pradesh, police is not required to send to the copy of the FIR to the Ilaqa Magistrate, but it is required to be sent to the District Magistrate. It was so required by the provisions contained in Regulation 710 of the Madhya Pradesh Police Regulations. This Court held that Regulation 710 cannot override the statutory requirements under Section 157 (1) CrPC which provide for sending the copy of the FIR to the Ilaqa Magistrate.

> **20.** The instant appeal has come from Chhattisgarh which has been carved out from the State of Madhya Pradesh. The learned Standing Counsel for the State is not in a position to throw any light on this issue at all. Thus, in such a fact situation, we can simply hold that in spite of the fact that any lapses on the part of the IO, would not confer any benefit on the accused, the case of the prosecution may be seen with certain suspicion when examined with other contemporaneous circumstances involved in the case."

(10) In the instant case the factual position does not disclose that the F.I.R. was not at all sent to the *Ilaqa* Magistrate. The F.I.R. (Ex.-P/10) contains endorsement at the appropriate place that it was sent to Judicial Magistrate First Class, Kondagaon having jurisdiction over the area concerned. Though this argument has been advanced, but there is no foundation for such argument. On perusal of the evidence of Sub-Inspector – Arvind Dwivedi (PW-8), we find that not a single question has been asked from this witness regarding the above endorsement made in the F.I.R. or regarding the contention that the F.I.R. was not sent to the *Ilaqa* Magistrate. Therefore, we do not find present to be a case in which there was non-compliance of provisions of Section 157 of the Code of Criminal Procedure. Moreover, in light of our finding regarding the dying declaration, in which we have held that no such dying declaration was made by the deceased which is contained in the F.I.R., the above argument does not assume much importance.

(11) Mr. Sharma has next contended that Savita (PW-1), Sriram (PW-2) and Maharin Bai (PW-3) were not reliable witnesses and the deceased had not made oral dying declaration before them.

(12) Savita (PW-1) is daughter of the deceased. She deposed that in the fateful night at about 7-8.00 p.m. her father (deceased) had gone to

the house of Bhagdeo. After sometime she heard the cries of her father. She immediately rushed towards the place of occurrence and saw that her father was lying on the way and the appellants were standing there. When she cried, the appellants ran away. The appellants left the knife at the place of occurrence. Her brother Sriram (PW-2) and mother Maharin Bai (PW-3) also reached to the place of occurrence. Her father was conscious. He told them that the appellants have assaulted him by knife. She very specifically deposed that when her father (deceased) was telling the above fact, her brother Sriram (PW-2) and mother Maharin Bai (PW-3) were also present there.

(13) Sriram (PW-2) is son of the deceased. He is younger to Savita (PW-1). He also deposed in similar fashion. He deposed that in the fateful night when they heard the cries of their father, and reached to the place of occurrence, he saw that the appellants were returning away. He had seen the injuries over neck, chest and abdomen of his father. His father (deceased) was lying on the way. His father told him that the appellants had assaulted him by knife. He deposed that they had repeatedly asked to his father, who clearly told them taking the names of the appellants that they had assaulted him.

(14) Maharin Bai (PW-3) is wife of the deceased. She had also seen the appellants at the place of occurrence. She also deposed that her husband (deceased) made oral dying declaration before them that he was assaulted by the appellants.

(15) The incident took place in a small village, where almost everyone was known to each other. The evidence of above 3 witnesses, appears to

be natural. If any person of a family receives such injuries, in normal human conduct the first reaction of the members of the family would be to know as to how such injuries were received. If the victim would be in a position to disclose the facts about the injuries, he would definitely disclose it to his family members and unless it is shown that either the victim was not in a position to disclose all this or there was no situation that the witnesses would have met the victim just after the incident, such evidence would hardly be discarded.

(16) In the instant case, the deceased was immediately rescued by the above 3 witnesses who were none else but his children and wife. They immediately rushed to the place of occurrence and met with the deceased where the deceased made oral dying declaration before them. Mr. Sharma has argued much about credibility of these witnesses. After going through the contents of the entire evidence of these witnesses, we are of the view that the learned Session Judge was right in relying on the testimonies of these witnesses and holding that the deceased made oral dying declaration before them just after the incident. Therefore, involvement of the appellants was proved on the evidence of oral dying declaration of the deceased, which he made before the above witnesses.

(17) Now we shall examine as to which offence the appellants committed while causing the above injuries.

(18) Dr. R.B.P. Gupta (PW-5) noticed that out of 4 injuries, injury no. (i) and (iii) were superficial injuries. Injury no. (ii) which was on the left portion of the chest was also of 2 x 1 c.m. and there is no mention in the report as to what was the depth of this injury and which internal organ

was damaged by it. Laparotomy was done for injury no. (iv) and it appears that there were injuries over diaphragm, mesentery and jejunum. The Autopsy Surgeon has not deposed that either of the injuries were sufficient to cause death in ordinary course of nature. On the contrary, he deposed that the cause of death was shock and septicemia on account of injuries to the abdomen and chest. The case of the prosecution is that both the appellant inflicted injuries to the deceased and single knife was used by them. According to the case of the prosecution, when the deceased was coming from the house of Bhagdeo, the appellants also accompanied him, because all were known to each other, and the incident took place on the way. Out of 2 vital blows if we attribute one to each appellant, it would not be a case in which the appellants delivered successive blows to the deceased. There was sufficient time and opportunity to the appellants to give repeated blows. It is not the case of the prosecution that the appellants wanted to deliver other blow and that they were prevented from doing so by any person. So there is reasonable ground to believe that after giving above blows, the appellant had stopped and not acted cruelly. It was a case in which a surgery was performed in the abdominal region and the Doctor performing surgery was not examined by the prosecution. Even the Doctor who examined the deceased when he was alive, was also not examined and the M.L.C. report of the deceased was not proved. We are of the view that in the above facts and circumstances of the case, the appellants were not having intention to commit murder of the deceased or to cause particular injuries (as stated above) to the above internal organs of the deceased. However knowledge can well be attributed to the appellants that their

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such act of causing such bodily injuries was likely to cause death of the deceased, and thus, they were liable for punishment u/s 304 Part II IPC.

(19) For the foregoing reasons, the appeal is partly allowed. The conviction and sentences awarded to the appellants u/ss 302/34 IPC are set-aside. Instead thereof, they are convicted u/ss 304 Part II/34 IPC and sentenced to undergo R.I. for 7 years. The conviction and sentences awarded to them u/s 341 IPC are maintained. The direction to run the sentences concurrently is also maintained.

(20) It is stated that the appellants are in jail since 16.6.2005. They shall be entitled to set-off the period already undergone.

Sd/-
Sunil Kumar Sinha
Judge

Sd/-
R.S. Sharma
Judge

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