

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

&

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

ON THE OF APRIL 25th, 2022

CRIMINAL APPEAL No. 891 of 2011

Between:-

**BASANT S/O YASHWANTRAO KALA ,
AGED ABOUT 50 YEARS,
OCCUPATION: KATLARI 104,
MALHARGANJ,INDORE (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI A.S. RATHORE, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH GOVT.
THROUGH POLICE STATION SARAFI,
INDORE (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI MUKESH KUMAWAT, GOVT. ADVOCATE)

Reserved on	: 28/03/2022
Whether approved for AFR	: Yes
Law Laid down	: Statement made by the deceased contemporaneously with the act or immediately thereafter is admissible as dying declaration u/S 32 of the Evidence Act as well as u/S 6 of Evidence Act as Rule of <i>res gestae</i> will apply in the instant case.
Relevant Paragraph(s)	: Para 14
Judgment(s) relied	:<i>Sukhar Vs. State of Uttar Pradesh [(1999)9 SCC 507]</i>

J U D G M E N T
(Delivered on .04.2022)

Satyendra Kumar Singh, J.,

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973(2 of 1974) [in short Cr.P.C.] against the judgment dated 28.06.2011 passed by the Court of 3rd Additional Sessions Judge, Indore in S.T.No.1042/2009, whereby the appellant has been convicted under Section 302 of Indian Penal Code, 1860 (in short IPC) and under Sec 25(1)(1-B) of Arms Act and sentenced to undergo life imprisonment with fine of Rs. 1,000/- and 1 year R.I. with fine of Rs. 500/- with default stipulation.

2. Prosecution story in brief is as follows:

(i) About fifteen years ago complainant Saroj Kashyap's husband deceased Surendra Kashyap purchased a *hath thela* placed near Mahalaxmi Temple, opposite to Rajwada Indore from the appellant Basant Kala for an amount of Rs. 40,000/- and ran a shop of bangles therein. Appellant occasionally used to take an amount of Rs. 1,000/- as rent from the deceased and when the deceased denied to give the rent amount, appellant got angry and was having animosity with him. On 29.06.2009, at about 8:30 p.m. when deceased was going towards Rajwada Gate, appellant came there from

opposite direction and with an intent to commit his murder inflicted two knife blows on his chest, due to which he sustained grievous injuries and cried for help saying “ *mujhe Basant Kale ne chaku mara hai*”. Complainant – Saroj, her nephew Mahendra and neighbour Shopkeeper Ravi ran towards deceased to see the incident, soon whereafter, appellant ran away from the spot.

(ii) Complainant - Saroj , Mahendra and Ravi immediately took the deceased to Arpan Hospital and thereafter to M.Y. Hospital Indore in an Auto rickshaw where at about 9:07 p.m. he was declared dead. On the same day, at about 9:17 p.m. on the basis of telephonic information received from M.Y. Hospital, HC Shivram Singh registered the *merg intimation* report (Ex. P-4) at Police Station, Sarafa, Indore. Inspector G.S. Chadhar rushed to M.Y. Hospital and at about 9:10 p.m. recorded *dehati nalishi* (Ex. P-3) on the basis of statement of complainant - Saroj. On the same day, he inspected the place of incident and prepared spot map (Ex. P-8), seized plain and blood soaked soil from the place of incident, as per seizure memo (Ex.P-9) and recorded statements of the complainant as well as witnesses Mahendra, Ishant, Ravi and Karan Singh.

(iii) On the next day i.e. on 30.06.2009, ASI Gajanand went to M.Y. Hospital Indore, called the witnesses issuing *safina form* (Ex.P-5) and prepared *naksha panchayatnama*(Ex. P-6) of deceased's body and vide

letter (Ex. P-23) sent the same for post-mortem examination. On the same day, at about 12:16 p.m. Dr. N.M. Unda conducted post-mortem examination of the body of the deceased and found following injuries on his body:

(a) Stab injury present on the left side of chest, 14.0 cm above and 1.0 medial to left nipple just below the clavicle mid point, 2.2. x 1.50 cm deep to the thoracic cavity. Obliquely placed cut mark present in the underneath vascular. Structure thoracic cavity and lung tissue upper lobe left side cut marks in lung tissue 2x1 cm deep, total depth. 12.0 cm, direction of wound is meteropostuing shift downwards. One end of the wound is narrow clean cut and other end is slightly broad and lacerated.

(b) Stab wound present on the left side of chest wall just over the nipple and are of a slightly obliquely placed. Size of the wound is 2.5 x 1.50 cm, deep to the lung border and heart. Cut mark size on lung tissue and heart are 1.0 cm through and through the heart wall and its width is 0.5 cm in the bone. Total depth is measured in the heart cavity to extend 12.0 cm. One end of the wound is slightly broad and lacerated, left margin clean cut and narrow.

Dr. N.M. Unda prepared post-mortem report (Ex. P-23 and P-24) and opined that deceased died due to shock and hemorrhage as a result of stab injuries to the chest. Both the injuries were caused by hard, sharp and penetrating object and are sufficient to cause his death in ordinary course of nature and his death was homicidal in nature.

(iv) On 29.06.2009, Inspector G.S. Chadhar arrested the appellant as per arrest memo (Ex. P-10), seized his blood stained shirt as per seizure memo (Ex. P-11), recorded his memorandum statement (Ex. P-12) and on his instance, seized the weapon - knife used in the crime from his possession as per seizure memo (Ex. P-13). He vide letter dated 28.08.2009 (Ex.P-15) sent the seized article for chemical examination to FSL, Rau, Indore and after completion of investigation, filed the chargesheet before the Court of Additional Chief Judicial Magistrate, Indore, who committed the same to the Court of Sessions Judge, Indore.

4. Learned trial Court considering the material *prima-facie* available on record, framed the charges u/S 302 of IPC and Section 25 of Arms Act against the appellant, who abjured his guilt and prayed for trial. In his statement recorded u/S 313 of Cr.P.C., the appellant pleaded his false implication in the matter.

5. Learned Trial Court after appreciating the oral as well as documentary evidence available on record, recorded the findings that

prosecution proved his case beyond reasonable doubt against the appellant for the offence punishable u/S 302 of IPC and Sec 25(1)(1-B) of Arms Act. Therefore, vide judgment dated 28.06.2011 convicted him u/S 302 of IPC and sentenced him as mentioned in para 1 of this judgment. Being aggrieved with the said judgment of conviction and order of sentence, appellant has preferred this appeal for setting aside the impugned judgment and discharging him from the charges framed against him.

6. Learned counsel for the appellant submits that statements of deceased's wife – complainant Saroj, son – Ishant, nephew – Mahendra and neighbour Shopkeeper – Ravi are inconsistent on the point of place of incident, series of occurrence and on other material issues which make their presence doubtful on the spot at the time of incident. Complainant – Saroj specifically deposed that incident occurred opposite to Rajwada premises which is far off from complainant's shop and it was not possible for her as well as other witnesses to witness the incident from there. Ravi admitted in his cross-examination that he did not see the appellant assaulting deceased. Ocular evidence and medical evidence are also inconsistent. Contradictions and omissions in the statement of prosecution witnesses on material issues have not been properly considered. Hence, learned trial Court has committed a legal error while appreciating the evidence available on record. Thus, by setting aside the impugned

judgment of conviction and order of sentence, appellant may be acquitted of the charges alleged against him.

7. Per contra, learned counsel for the respondent/State while supporting the impugned judgment of conviction and order of sentence submits that judgment passed by the trial Court is based on proper appreciation of evidence and material available on record and the same is well reasoned establishing guilt of appellant beyond reasonable doubt. Therefore, by affirming the impugned judgment of conviction and order of sentence, the appeal filed by the appellant may be dismissed.

8. Heard learned counsel for the parties at considerable length and perused the record in depth.

9. Present case is based on direct as well as on circumstantial evidence. Prosecution has examined deceased's wife complainant - Saroj Kashyap (PW-6), son Ishant (PW-8), nephew(PW-10) and neighbour shop keeper - Ravi (PW-7) as eye-witnesses of the incident. Complainant Saroj Kashyap(PW-6), Ishant (PW-8) and Mahendra (PW-10) deposed that deceased purchased a *hath thela* placed near Mahalaxmi Mandir, opposite to Rajwada Indore from the appellant for an amount of Rs. 40,000/- where he ran a bangles shop. Saroj Kashyap (PW-6) and Mahendra (PW-10) deposed that appellant even after sale of the said *hath thela* occasionally used to demand and take an amount of Rs. 1,000/- as rent from the

deceased and when deceased denied to pay the rent, appellant got angry and started having animosity with the deceased. Appellant has challenged the aforesaid fact that the deceased purchased the said *hath thela* from him and during cross-examination of both the above witnesses, it has specifically been suggested on behalf of him that deceased took the said *hath thela* only on rent from the appellant, therefore, this fact appears undisputed that the deceased took aforesaid *hath thela* from the appellant and there were differences between them about the ownership of the said *thela* and also about the payment of rent of the same.

10. Complainant Saroj (PW-6), Ravi (PW-7), Ishant(PW-8) and Mahendra (PW-10), all have deposed that at the time of incident, they were present near the place of incident. Saroj (PW-6) deposed that at that time, she was present on her bangles shop which was about 15 ft away from the place of incident. Ravi (PW-7) deposed that at that time, he was present on his shoes shop placed on the footpath near complainant's bangles shop(*hath thela*). Ishant (PW-8) and Mahendra (PW-10) deposed that at the time of incident, they were also present at the complainant's shop. Appellant has challenged the presence of these two witnesses Ishant and Mahendra on the spot at the time of incident as they are chance witnesses. Complainant Saroj (PW-6) and Ravi (PW-7) although deposed that Ishant and Mahendra were present on the complainant's shop at the time of

incident, but both in their cross-examination have specifically stated that after the incident, complainant and Ravi took the deceased to hospital. Ravi (PW-7) in para 6 of his cross-examination stated that after the incident, he took the deceased to hospital then deceased's nephew Mahendra (PW-10) also came to the hospital, where he narrated the incident to him. Complainant Saroj (PW-6) in *dehati nalishi*(Ex. P-3) no where mentioned about the presence of Ishant (PW-8) at the time of incident, therefore, presence of both the above two witnesses i.e. Ishant and Mahendra near the place of occurrence at the time of incident appears to be doubtful. But so far as the presence of the complainant Saroj and Ravi at that time at their respective shops is concerned, this is not disputed that their shops were situated near Rajwada, and at the time of incident i.e. at about 8:30 p.m., it was quite natural that they were present on their respective shops. Moreso, appellant has not challenged their presence in their respective shops at the time of incident, therefore it is established that both of them were very well present at their respective shops at the time of incident.

11. Both the above witnesses have supported the prosecution case. Complainant Saroj (PW-6) deposed that on the date of incident at about 8-8:30 p.m., when her husband deceased Surendra Kashyap was going towards Rajwada Gate, appellant came there and inflicted knife blows on his chest. She further deposed that when her husband screamed, she ran

towards him to see the incident and took him to hospital. Ravi (PW-7) deposed that on the date of incident, at about 8-8:30 p.m., when he was at his shoes shop, which is placed on the footpath near complainant's shop, he saw the deceased running towards his shop in injured condition, screaming '*Basant Kale ne muje chaku mar diya hai*'. He in para 7 of his cross-examination specifically deposed that he saw the deceased first at the time of incident. He in para 12 of his cross examination further deposed that he did not see the appellant assaulting deceased by knife, but deceased told him that appellant had assaulted him with knife.

12. Statements of both the above witnesses are inconsistent on the point whether at the time of incident, deceased was going towards Rajwada Gate and fell down there as per statement of complainant – Saroj or coming from Rajwada Gate side towards Ravi's shop and fell down near his shop as per statement of Ravi. Complainant Saroj(PW-6) in para 6 & 7 has admitted that at the time of incident Ravi was present at his shop and he took the deceased to hospital in an auto rickshaw and she followed him and went to the hospital in another auto rickshaw. She in the same para on being asked whether Ravi informed her about the incident, answered that '*mujhe bhi samne se dikh raha tha*'. From all these facts, it is clearly established that both the above witnesses were although present at their respective shops situated near the place of incident and after hearing deceased's screams,

they rushed to the place of incident, but they themselves did not see the appellant assaulting the deceased with knife.

13. Ravi (PW-7) appears to be an independent witness who fairly admitted in his cross-examination that he did not see the appellant assaulting the deceased with knife, but he specifically deposed that at the time of incident, he heard the deceased's screams saying “*mujhe Basant Kale ne chaku mara hai*”. He further deposed that when he was taking the deceased towards hospital, deceased told him that appellant had inflicted knife blows to him. His above statement finds support from the statement of complainant – Saroj (PW-6) as well as *dehati nalishi* (Ex. P-3) lodged by her just after the incident. Complainant Saroj (PW-6) deposed that when she heard deceased's screaming at the time of incident, she ran towards him. Inspector G.S. Chadhar deposed that after the incident when he reached to M.Y. Hospital then at about 21:10 p.m, he recorded *dehati nalishi*(Ex.P-3) on the basis of complainant's statement wherein she stated that at the time of incident, she heard her husband's screams saying “*mujhe Basant Kale ne chaku mara hai*”. During cross-examination of the aforesaid witnesses it has nowhere suggested on behalf of the appellant that there was any prior enmity or animosity of the appellant with the witness Ravi, whose statements are supported by the statement of complainant as well as *dehati nalishi* (Ex.P-3) lodged by her. Therefore, there is no reason to

disbelieve the statement made by him about the incident.

14. Aforesaid statements of Ravi as well as Saroj are although hearsay, but the same were made contemporaneously with the acts or immediately thereafter, therefore the same are very well admissible in the evidence as per the provisions of Section 6 of the Evidence Act. In this regard, observations made by Hon'ble Apex Court in the judgment rendered in the case of *Sukhar Vs. State of Uttar Pradesh [(1999)9 SCC 507]* can profitably be relied upon. Relevant paragraphs are reproduced below for convenience and ready reference:

8. This Court in *Gentela Vijayavardhan Rao and Another V. State of A.P.* 1996 (6) SCC 241 considering the law embodied in Section 6 of the Evidence Act held thus: The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*.

9. In another recent judgment of this Court in *Rattan Singh V. State of H.P.* 1997 (4) SCC 161, this Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus: . The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration A to Section 6 makes it clear. It reads thus:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(emphasis supplied) Here the act of the assailant intruding into the courtyard during dead of the night, victims identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act.

10. Applying the ratio of the aforesaid two cases to the evidence of PW 2, we have no hesitation to come to the conclusion that his statement indicating that the injured told him that his nephew has fired at him, would become admissible under Section 6 of the Evidence Act. We are, therefore, unable to accept the first submission of Ms Goswami, learned counsel appearing for the appellant.

15. In view of the aforesaid discussion, there is no doubt that statements of complainant – Saroj (PW-6) and Ravi (PW-7) are relevant and admissible. As Dr. N.M. Unda(PW-12) specifically stated and reported in his post mortem report (Ex. P-23) that deceased's death was due to shock and hemorrhage as a result of stab injuries on the chest within 24 hours from the time of post-mortem examination and his death was homicidal in nature and appellant has not challenged aforesaid facts, therefore, statement made by the deceased at the time of incident and also when he was on his way to hospital to witness – Ravi (PW-7) will be treated as his oral dying declaration. Hence, the same is also admissible under Section 32 of the Evidence Act.

16. Inspector G.S. Chadhar(PW-9) deposed that on 30.06.2009 i.e. on

the next day of incident, he interrogated appellant in Police Station Sarafa and seized his blood stained shirt as per seizure memo (Ex. P-11), recorded his memorandum statement (Ex. P-12) and thereafter on his instance, seized blood stained knife (Article 'C') from a room of his house which was in his exclusive possession as per seizure memo (Ex. P-13). Seizure witnesses Mahendra (PW-10) and Karan(PW-11) have supported the aforesaid statement and deposed that on the next day of incident, police interrogated appellant and seized his blood stained shirt in front of them. They further deposed that on the same day, appellant's memorandum statement(Ex. P-12) was recorded wherein he stated about the knife and thereafter on his instance, a blood stained knife was seized from a room of his house as per seizure memo (Ex. P-13). Appellant has challenged their statements, but nothing material has come in their cross-examination on the basis of which seizure of shirt and knife from his possession can be doubted or disbelieved. As per FSL report(Ex.P-25), human blood was found on both the articles which corroborates the prosecution story that injuries found on the chest of the deceased were caused by the appellant with the seized knife (Article 'C').

17. Learned counsel for the appellant has argued that as incident took place all of a sudden and only two injuries were found on the body of the deceased, therefore it cannot be inferred that the said injuries were inflicted

or caused with an intent to commit murder of the deceased. Hence, act alleged to be committed by the appellant at the most comes under Section 304(Part 2) of IPC and not u/S 302 of IPC. In this regard, learned counsel for the appellant has pressed into service decision of Apex Court rendered in the case of *Atul Thakur Vs. State of Himachal Pradesh & Others [(2018) 2 SCC 496]* and judgment passed on 10.08.2021 by Division Bench of this Court in the case of *Irfan Vs. State of M.P. Through P.S. Khajrana Indore* in Cr.A. No.201/2009 in support of his above submission.

18. In both the above matters, sudden fight took place between the deceased and accused persons, while in the present case, it has no where suggested on behalf of the appellant that incident took place all of a sudden. It has already been found proved that prior enmity or animosity was going on between the appellant and deceased on account of payment of rent of *hath thela* said to be purchased by the deceased from the appellant. It has also been found proved that appellant inflicted two knife blows on the vital part i.e.chest of the deceased, which in itself shows his intention that the same were inflicted with an intent to commit murder of the deceased. Thus, facts of the case in hand are different from the fact of the cases relied upon(supra) by the learned counsel for appellant and thus are of no assistance.

19. In these circumstances, learned trial Court has not committed any error in holding the appellant guilty for the offences punishable under Section 302 of IPC as well as under Section 25 of Arms Act.

20. Hence, we found no fault in the impugned judgment of conviction and order of sentence passed by learned trial Court. There is no merit in the appeal, the appeal thus is liable to be dismissed.

21. In view of aforesaid discussions, the impugned judgment of conviction and order of sentence passed by learned trial Court is hereby affirmed.

22. Accordingly, this appeal filed on behalf of the appellant is hereby dismissed.



(Subodh Abhyankar)
Judge
25-04-2022

(Satyendra Kumar Singh)
Judge
25-04-2022