

(1)

High Court of Madhya Pradesh: Bench at Indore

Case Number	Criminal Appeal No.949/2012
Parties Name	Pappu @ Dayaram Vs. State of M.P.
Date of Judgment	03/06/2021
Bench	<u>Division Bench:</u> Justice Sujoy Paul Justice Rohit Arya
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	Shri. Tarun Kushwaha, learned counsel for appellant. Ms.Archana Kher, learned Dy.A.G. for respondent/State.
Law laid down	<p>*Section 32 of Indian Evidence Act – Dying Declaration-The conviction can be based solely on the basis of an oral dying declaration provided such declaration is free from any doubt and its correctness and genuineness is out of question.</p> <p>*Multiple Dying Declarations- If there are more than one dying declaration, Court needs to examine qualitative worth of each declaration and not number of declarations.</p> <p>The dying declaration must be examined with utmost care and caution because the maker of such declaration cannot be put to cross-examination.</p> <p>*Inconsistencies in two Dying Declarations – In the first declaration, deceased did not take anybody's name and stated that two unknown persons assaulted and thrown him in the well whereas in the second declaration, he took the name of appellant and three unknown persons for committing said act. This is material inconsistency and contradiction between two dying declarations which causes serious dent on the story of prosecution.</p> <p>*Appreciation of Evidence- It was the</p>

(2)

	<p>minimum expectation from the Court below to assign reasons if one dying declaration is found to be trustworthy and another is discarded. Adequate and justifiable reasons should have been given for accepting one declaration and discarding another which exercise is totally missing.</p> <p>*Effect of not declaring the PW.1 as hostile- Dhansingh (PW.1) is an independent witness before whom first dying declaration was given. He was not declared as hostile. There was no reason to disbelieve his statement.</p> <p>*Last Seen Theory – It is not prudent to base the conviction solely on last seen theory. There must be something more establishing connectivity between commission of crime and the accused.</p> <p>*Benefit of Doubt- The impugned judgment is based on second dying declaration and last seen theory. The second dying declaration was found to be not trustworthy and last seen evidence was also a weak piece of evidence. Thus, appellant is given the benefit of doubt and impugned judgment is set aside.</p>
Significant paragraph numbers	12,13,15,16,18,20,21,22,23,24

J U D G M E N T

(Delivered on 03rd June, 2021)

Sujoy Paul, J.:

This Criminal filed u/S.374 of Cr.P.C assails the judgment of 1st Additional Sessions Judge (Fast Track Court), Narsingharh, District Rajgarh in Sessions Trial No.223/2011, dated 26/07/2012 whereby the appellant was held guilty for the offence u/S.302 of the IPC and sentenced to undergo life imprisonment with fine of Rs.5000/- and in default of payment of fine he shall further undergo six month's RI.

[2] Draped in brevity, the case of the prosecution is that the appellant has assaulted and thrown deceased Bhupendra in a well

(3)

between 26/4/2011 and 27/4/2011. Bhupendra was found alive by the villagers at Sonkatch (Narsingharh). The intimation was given to Kesri (PW.2), real brother of deceased Bhupendra. In turn, Dhansingh (PW.1), an independent witness and Kesri (PW.2) reached to the place of incident and found that villagers are trying to rescue Bhupendra who is found injured inside the well. In turn, Bhupendra was taken out of the well. Bhupendra died after some time. As per prosecution story, Kesri (PW.2) took him in injured condition to hospital in a Jeep. While travelling between the place of incident and hospital, Bhupendra informed Kesri (PW.2) that he was assaulted by Pappu @ Dayaram (appellant) and three other persons. He further stated that Pappu who is brother-in-law of deceased assaulted him but three other persons who accompanied Pappu were not known to him.

[3] Before the Court below 15 prosecution witnesses entered the witness box and deposed their statements. The appellant abjured his guilt. Nobody entered the witness box on behalf of the accused.

[4] The Court below has considered the statement of wife of deceased Pragbai (PW.3) and Devchand (PW.10) wherein they stated that Bhupendra was taken by Pappu in his motor cycle on 26/4/2011 on the pretext that they have to distribute marriage card of appellant's brother. Thereafter Bhupendra could be traced only on 28/4/2011 and he died on the same day. These two witnesses were introduced by prosecution in order to show that the deceased was last seen with Pappu by the said witnesses.

(4)

[5] Dr.Sandeep Narayani (PW.13) deposed his statement on the basis of postmortem report and stated that 18 injuries were found on the person of Bhupendra (which are mentioned in para 20 of the impugned judgment). PW.13 further stated that reason of death is head injury and failure of respiratory system and other complications. This witness proved his communication with concern police station Ex.P/17 which was duly signed by him.

[6] The Court below treated the statement of Kesri (PW.2) as oral dying declaration. On the basis of last seen evidence and aforesaid dying declaration, the court below opined that prosecution has proved its case beyond reasonable doubt and resultantly convicted and sentenced the appellant for committing offence u/S.302 of IPC.

[7] Shri Tarun Kushwaha, learned counsel for appellant urged that Dhansingh (PW.1) is an independent witness who categorically deposed that when he along with other persons reached to the place of occurrence i.e. the well in Sonkatch, he found that Bhupendra is lying inside the well. With the help of villagers, Bhupendra was taken out of the well. By this time, real brother of Bhupendra, Kesri (PW.2) also reached to the place of incident. Bhupendra informed Dhansingh (PW.1) that two unknown persons of Beenaganj had thrown him in the well. This intimation was given by Bhupendra to Dhansingh (PW.1) only. By taking this Court to the cross examination, learned counsel for appellant submits that PW.1 clearly stated that only two unknown persons have thrown him in the well. The reliance is placed on the

(5)

statement of Kesri (PW.2) to contend that this witness who is real brother of deceased narrates a different story. This witness deposed that when he carried injured Bhupendra in a Jeep to the hospital, he asked him as to who assaulted him. In turn, Bhupendra informed him that his brother-in-law (appellant) along with three unknown persons assaulted him and thrown him in the well. Before reaching hospital, Bhupendra died. He further deposed that Bhupendra was taken by the appellant on 26/4/2011 from his house. The contention of learned counsel for appellant is that both the dying declarations are not in tune with one another. It was not proper on the part of court below to totally ignore the first dying declaration given to PW.1 and solely rely on the second dying declaration given to the relative (PW.2). By placing reliance on *(1999) 8 SCC 458 (Heikrujam Chaoba Singh Vs. State of Manipur)* and *2016 Cr.L.J. 2939 (Rambraksh alias Jalim v. State of Chhattisgarh)*, it is urged that there are serious inconsistencies in both the dying declarations. The court below has committed an error in passing the impugned judgment on the basis of 'last seen' and second dying declaration alone. It is further urged that 'merg' intimation (Ex.P.22) which is recorded on the basis of information given by Kesri (PW.2), clearly shows that Bhupendra died because he fell down in the well. It is not mentioned that anybody either assaulted or thrown the deceased in the well. For the same purpose, reliance is placed on the communication (Ex.P.17) of Dr. Narayani (PW.13) to concerned police station wherein the same

(6)

reason of death is mentioned by the treating doctor. On the strength of these documents, Shri Kushwaha submits that had it been a case of assault and throwing the deceased in the well by the present appellant, Kesri would have informed this reason while recording of 'merg' intimation. Thus, dying declaration allegedly given by Bhupendra to Kesri (PW.2) is not corroborated by any material whatsoever and it is not worthy of credence.

The learned counsel for the appellant further contends that Dhansingh (PW.1) before whom oral dying declaration was given by deceased was not declared as a hostile witness. Thus, his statement could not have been discarded and disbelieved. When there are multiple dying declarations, the dying declaration which is in favour of the accused should be relied upon. The reliance is placed on **(1999) 8 SCC 458 (Heikrujam Chaoba Singh Vs. State of Manipur)**, **1992 SC 223 (Kamla vs. State of Punjab)**, **2014 SCC OnLine MP 8652 (Guddi Bai vs. State of MP)** and **2011(1) MPHT 50 Jugal @ Shabbir Khan**. Attention of this Court is also drawn on the statement of Dr. Sandeep Narayani (PW.13), who conducted the postmortem and deposed that the injuries found on the person of deceased could have been caused because of falling in the well. Statement of RP Pathak (PW.15), Investigation Officer is relied upon to contend that this witness clearly stated that Kesri (PW.2) did not inform him about any oral dying declaration being given to him by deceased Bhupendra. In absence of any motive and previous animosity between appellant and

(7)

deceased, who are close relatives, the appellant could not have been held guilty for committing murder.

[8] Criticizing the impugned judgment on the basis of last seen theory, learned counsel for appellant submits that as per wife of deceased Pranbai (PW.3) and Devchand (PW.10), the deceased was taken for distributing marriage invitation card by appellant on 26.4.2011. Thereafter there exists no evidence to show that he remained with the appellant for next two days. In absence of any corroboration, the last seen theory is not sufficient to hold the appellant as guilty. Further more, as per statement of Dhansingh (PW.1) and Kesri (PW.2) more than one person were involved in the offence. Police has not made any effort to investigate the matter regarding involvement of other persons. In absence of any corroboration and in view of time gap between the date Bhupendra was allegedly taken by appellant and the date when he was found, last seen theory cannot be the sole basis to convict the appellant. In support of aforesaid submissions, the appellant has also filed the written submissions.

[9] Sounding a *contra* note, Ms.Archana Kher, learned Dy.A.G supported the impugned judgment. She submits that although there was no eye witness to the incident, the case of prosecution was based on last seen theory and the dying declaration of Bhupendra given to Kesri (PW.2). The Court below has not committed any error in appreciating the evidence and has rightly passed the impugned

(8)

judgment.

[10] Parties confined their arguments to the extent indicated above.

[11] We have bestowed our anxious consideration on rival contentions and perused the record.

ORAL DYING DECLARATION:

[12] As noticed above, the impugned judgment of conviction is based on the oral dying declaration of Bhupendra given to Keshri (PW.2) and last seen evidence based on deposition of wife of deceased Pragbai (PW.3) and Devchand (PW.10). This is trite that conviction can be recorded solely on the basis of a dying declaration or even on the basis of an oral dying declaration. However, such dying declaration should be free from any doubt and must pass scrutiny of reliability. [See: *Heikrujam Chaoba Singh Vs. State of Manipur* (supra)]. It is equally settled that it is qualitative worth of a declaration and not plurality of declaration which matters. [See: *(2004) 13 SCC 314 (State of Maharashtra vs. Sanjay D. Rajhans)*]

[13] In the instant case, as per prosecution story, there are two oral dying declarations given by Bhupendra to Dhansingh (PW.1) and Kesri (PW.2). In the first dying declaration, the deceased did not take the name of appellant or anybody else. He categorically stated that he was assaulted and thrown in the well by two unknown persons. Pertinently, this independent prosecution witness was not declared hostile by the prosecution. In a case of this nature where there are multiple dying declarations, the trial Court was under an obligation to

(9)

examine each one with accuracy and precision. Adequate reasons were required to be given if any dying declaration is given preference over the other. Putting it differently, if second dying declaration was relied upon and believed, adequate reasons ought to have been assigned as to why first one could not inspire confidence and worthy of credence. The Court below has miserably failed to undertake aforesaid exercise and mechanically relied upon the second dying declaration.

[14] The dying declaration is required to be examined very carefully, because the maker of the statement is not alive and cannot be put to cross-examination. In this backdrop, the dying declaration must be examined with utmost care and caution. [See: *Kamla vs. State of Punjab* (supra)].

[15] If both the dying declarations are examined in juxta position, it will be clear that there are glaring inconsistencies and contradictions. In the first dying declaration, nobody's name was taken and number of persons, who were involved in commission of crime were stated to be two, whereas in the second dying declaration, the name of appellant was taken with three more unknown persons who were accompanying the present appellant. This, in our view shows serious inconsistency and contradiction in the dying declaration which makes the second dying declaration as doubtful. In the case of *Kamla and Heikrujam Chaoba Singh* (supra), the Apex Court interfered with the impugned judgment because of inconsistencies in the dying

(10)

declarations. Same is the view taken by Division Bench of this Court in the case of *Guddi Bai (supra)*. Another Division Bench in *Jugal @ Shabbir Khan (supra)* opined that if there are more dying declarations than one and on the material points they are contradictory to each other, certainly, the benefit will go to the accused and authenticity could not be attributed to the said dying declarations. It was further held that no reliance can be placed upon such dying declarations to hold the appellant as guilty.

[16] Thus, in our view, the Court below has erred in recording conviction on the basis of second dying declaration. The first dying declaration was given to Dhansingh. The prosecution did not declare PW.1 as a hostile witness. This is settled law that if a witness is not declared hostile by the prosecution, the benefit of such evidence should go to the accused and not to the prosecution. (*See (2005) 5 SCC 272 Raja Ram Vs. State of Rajasthan*). This principle was followed in *AIR 2013 SC 2519 Safi Mohd. Vs. State of Rajasthan*. A division bench of this Court in *2009(2) MPHT 313 (State of M.P. Vs. Munshilal)* followed the *ratio decidendi* of *Raja Ram (supra)* and opined that the prosecution is bound by the statement of a prosecution witness who was not declared as hostile. For this reason, the statement of PW.1 and first dying declaration was worthy of credence and could not have been ignored and discarded. More so when admittedly Dhansingh (PW.1) was an independent witness whereas Kesri (PW.2) was real brother of deceased.

(11)

[17] Apart from this, while recording 'murg' intimation, Kesri (PW.2) did not inform the hospital authorities regarding any assault or the incident of throwing the deceased in the well by anybody. Indeed, he informed that Bhupendra fell into the well. This Court in **2013 SCC Online MP 2491 (Karan Vs. State of M.P.)** opined that in the *murg* intimation the star prosecution witness mentioned that the offence was committed by "one person", without disclosing his name whereas in his later deposition, he took the name of said person by stating that said person was known to him. Since name of that person was not taken in the *murg* intimation, the statement of said witness was found to be not trustworthy.

[18] In the case of **Ramsai and others Vs. State of MP (AIR 1994 SC 464)**, the trial court relied only on evidence of one prosecution witness namely PW.29 and discarded the other statements. Interestingly, in the said case, PW.29 did not inform anybody about the alleged oral dying declaration and it is only on that day he disclosed it to the police inspector. Since no explanation was given as to why he has not informed anybody earlier, the Court disbelieved his statement. It was poignantly held that the dying declaration is no doubt an important piece of evidence, but it should be free from all infirmities. In cases of inconsistencies and contradictions in dying declarations there must be some corroboration. The Apex Court opined that it will be highly unsafe to base the conviction on the basis of oral dying declaration in view of aforesaid infirmity.

(12)

[19] Apart from the above, RP Pathak (PW.15), I.O. in his cross-examination clearly admitted that Kesri (PW.2) did not inform him about any oral dying declaration during investigation. No other prosecution witness supported the statement of Kesri (PW.2) regarding second dying declaration. Thus, for the cumulative reasons mentioned herein-above, the second dying declaration could not have been relied upon by the Court below to convict the appellant.

LAST SEEN THEORY:

[20] Another reason for convicting the appellant is based on “last seen theory”. As noticed above, as per deposition of wife of deceased Pragbai (PW.3) and Devchand (PW.10), appellant took the deceased with him on 26/4/2011 and he was found injured in a well on 28/4/2011. There is no iota of material/evidence to show what happened during these two days.

[21] The Apex Court in the case of *Rambraksh @ Jalim* (supra) clearly held that to record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused. In this case also, the independent prosecution witnesses did not support the prosecution story, and, therefore, the judgment of conviction was turned down.

[22] In *Nizam Vs. State of Rajasthan (2016) 1 SCC 550*, it was ruled that it is not prudent to base the conviction solely on “last seen theory”. The said theory should be applied taking into consideration

(13)

the case of prosecution in the entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. Similarly in *Kanhaiyalal Vs. State of Rajasthan (2014) 4 SCC 715*, it was held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. In *Ramreddy Rajesh Khanna Reddy (2006) 10 SCC 172* which was followed in *State of Goa Vs. Sanjay Thakran (2007) 3 SCC 755*, it was poignantly held that even in the cases where time gap between the point of time when the accused and deceased were last seen alive and when the deceased was found dead is too small, the possibility of other person committing the offence cannot be ruled out.

[23] In view of the principles laid down by Supreme Court in the aforesaid judgments, there is no cavil of doubt that last seen evidence in the present case is a weak piece of evidence and on the basis of this theory alone conviction cannot be affirmed. More so when the second dying declaration given to Kesri (PW.2) does not inspire confidence and there exists serious inconsistencies in two dying declarations.

[24] In view of foregoing analysis, we are unable to countenance the impugned judgment. In our view, the prosecution could not establish its case beyond reasonable doubt and Court below has clearly erred in recording conviction on the basis of last seen theory and second dying declaration. In our view, it is a fit case of giving benefit of doubt to

(14)

the appellant. Resultantly, impugned judgment passed in Sessions Trial No.223/2011 is set aside. If appellant's presence in the custody is not required for any other offence, he be released forthwith.

[25] The appeal is **allowed**.

(Sujoy Paul)
Judge

(Rohit Arya)
Judge

vm/soumya

