

THE HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DINESH KUMAR PALIWAL

ON THE 15th OF MARCH, 2022

CRIMINAL APPEAL No. 2769 OF 1998

Between

**SIROMAN SINGH, AGED ABOUT 26
YEARS, SON OF SARU KACHHI, R/O
VILLAGE SAMTHARI, P.S.
CHIRGAON, DISTRICT JHANSI.**

..... APPELLANT

(BY SHRI V.K. KUSHWAHA – ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
(THROUGH P.S. ORCHHA, DISTRICT
TIKAMGARH) (M.P.).**

..... RESPONDENT

(BY SHRI RAJEEV PANDEY – PANEL LAWYER)

*This appeal coming on for **Final Hearing** this day, the Court
passed the following*

J U D G M E N T

This criminal appeal under Section 374(2) of Cr.P.C. is preferred by the accused/appellant being aggrieved by the judgment dated 18.11.1998 passed by Second Additional Sessions Judge, Tikamgarh, in S.T. No. 123/1997 (State of MP Vs. Siromansingh). By the impugned judgment, the trial Judge convicted the appellant for commission of offence under Section 307 of IPC and sentenced to undergo R.I. for seven years with fine of Rs. 200/-, in default of payment of fine he shall further undergo simple imprisonment for one month.

2. The prosecution case in brief is that on 25.06.1997, Ram Payari aged about 22 years wife of appellant/ accused Siroman Kushwaha, R/o Village Simtari Kachhi Mohalla, Police Station- Bhandar, District-Gwalior lodged an FIR in Police Station-Orchha stating that Siroman Kushwaha is her husband, today he brought her to Orchha for Darshan of Raja Ram temple. Between 11 A.M. to 12 O'clock of day, her husband took her at a secluded place near monuments situated on bank of Betwa River. He tried to press her neck by tying towel and hit a stone on her forehead. She sustained injuries on her left eyebrow and forehead. Blood is oozing from her forehead and nose. She tried to scream but became unconscious. Her husband Siroman Singh with an intention to kill her has caused injuries to her and has fled away by leaving her. At around 4:00 p.m. after regaining consciousness, when she was sitting on the stairs of monuments, other persons saw her and informed the police. FIR (Ex. P-3) was registered at FIR No. 79/1997 of Police Station Orchha for commission of offence under Section 307 of IPC by Police Inspector J.P. Uike (PW-4). She was sent for medical examination to Medical College Jhansi. Dr. Prem Bihari Manocha (PW-5) examined her and found two lacerated wounds on her forehead, one contusion over nose

and one over lips and prepared MLC report Ex. P-13. After investigation, Police Orchha filed charge sheet against accused Siroman Singh before the Magistrate First Class, Orchha. Learned JMFC in its turn committed case to the Court of Session, which was transferred to Second Additional Session Judge, Tikamgarh for trial.

3. Appellant/accused abjured his guilt and claimed to be tried.

4. In order to bring home the charge against the appellant, the prosecution has examined five witnesses and proved documents Ex. P-1 to P-13 on record. The appellant/accused examined two witnesses in his defence.

5. The learned trial Court after considering the oral and documentary evidence on record convicted the appellant Siroman Singh for commission of offence under Section 307 of IPC and sentenced him as stated herein above.

6. Learned counsel for the appellant has assailed the impugned judgment and has urged that prosecution has utterly failed to prove the charges for commission of offence under section 307 of IPC against the appellant/accused as neither injured Ram Payari was examined nor any other eye witness was

examined before trial court in support of the prosecution case. The learned trial Judge erroneously treating the FIR (Ex.P-3) and police statement (Ex. P-9) recorded under Section 161 of Cr.P.C. as dying declaration, has convicted and sentenced the appellant/accused. It is a case of no evidence. The findings recorded by the learned trial Judge in impugned judgment treating FIR (Ex.P-3) and Police Statement (Ex.P-9) as dying declaration are against the settled proposition of law. In want of substantive evidence, findings of conviction as recorded by learned trial Judge is not only erroneous but also bad in law. Learned counsel has therefore, prayed that impugned judgment of conviction and sentence be set-aside and appeal be allowed.

7. On the other hand, learned Panel Lawyer for the State has supported the findings recorded by the trial Court and has submitted that conviction recorded by learned trial Judge are in accordance with law. There is no merit in the appeal; He has prayed that this appeal being without merit be dismissed.

8. I have considered the arguments advanced by learned counsel for the parties and perused the trial court record and impugned judgment.

9. The crucial questions for determination before me, are;

- (i) Whether the contents of F.I.R. (Ex.P-3) and the Statement (Ex.P-9) recorded under Section 161 Cr.P.C. in a case where deceased has died of natural death, can be treated as a dying declaration under Section 32 of the Indian Evidence Act?
- (ii) Whether the statement (Ex.P-9) recorded under Section 161 Cr.P.C. in absence of the evidence of that person is admissible under Section 33 of the Evidence Act and can be looked into for judging the veracity of the prosecution case or not?

10. In this case, there is no evidence on record that Rampyari died because of the injuries caused by the accused. J.P. Uike (PW-4) Police Inspector in para 2 of his deposition has deposed that injured Rampyari died on 07.09.1998, report whereof is Ex.P-12. In this case incident took-place on 25.06.1997. Ex.P-12 is a summon issued to Rampyari Bai by court for tendering evidence and it has been received unserved with a report that Rampyari Bai died on 07.09.1998 due to Diarrhea and factum of her death is recorded in birth and death register.

11. On a perusal of Ex.P-12 and report on it and the evidence of J.P. Uike (PW-4), it is apparent that Rampyari who lodged the First Information Report (Ex.P-3) and her statement (Ex.P-9) recorded under Section 161 Cr.P.C. by J.P. Uike (PW-4), has died of natural death and not because of the injuries on her person alleged to be caused by the appellant/accused Siroman Singh. The F.I.R. (Ex.P-3) recorded under section 154 of Cr.P.C. and the Statement (Ex.P-9) recorded under Section 161 Cr.P.C. are not by itself a substantive piece of evidence and the statement made there in cannot be considered as evidence, unless it falls within the preview of Section 32 of the Evidence Act. It is apparent that Rampyari Bai did not died because of the injuries caused by the appellant/accused. Hence, Section 32 of the Evidence Act was not applicable.

12. In this case, Rampyari Bai due to her death during the course of trial, could not be examined before the trial Court. F.I.R. (Ex.P-3) recorded as per provisions under Section 154 of Cr.P.C. and the statement (Ex.P-9) recorded under Section 161 Cr.P.C. respectively have been exhibited in his evidence by Inspector J.P. Uike (PW-4). In such circumstances contents of the F.I.R. (Ex.P-3) and statement (Ex.P-9) recorded under Section 161 Cr.P.C. can not

be looked into because the appellant/accused had no opportunity to cross examined this witness.

13. In this case, prosecution has examined as many as five witnesses. Witness Swamiprasad Vishwakarma (PW-1) has been declared hostile. He has deposed that one year ago at around 04:00 p.m. his duty was at Betwa Cottage. He was told by one labour that perhaps one woman has fallen from the stairs and is calling police, at this he had informed the police on telephone. Swamiprasad (PW-1) has not supported prosecution story.

14. Lalaram (PW-2) is the father of the deceased Rampyari. He is not an eyewitness of the incident. He has deposed that Siroman is his son-in-law. Last year, his son-in-law Siroman Singh fetched her daughter from home and after two months of fetching of Rampyari by Siroman he through the newspaper came to know that Siroman attempted to kill his daughter, at this when he went Medical College Jhansi, Rampyari had informed him that Siroman took her to Orchha for Darshan and after Darshan he took her at secluded place, tied her neck from a towel and hit a stone on her forehead. Her daughter had sustained injuries over her head and eyes.

15. In his cross examination, Lalaram (PW-2) has stated that he had reached Medical College, Jhansi after three days of incident and when he reached there, her daughter was conscious. As far as the truthfulness of the evidence of Lalaram (PW-2) is concerned, his evidence does not inspire confidence as in his examination-in-chief he has deposed that he came to know about the incident after two months of Rampyari going alongwith Siroman Singh. As per the contents of the F.I.R. (Ex.P-3) Siroman had brought Rampyari Bai same day from her father's village. There exist material contradictions in the evidence of Lalaram (PW-2), about the day and time as to when her daughter was brought by appellant/accused Siroman Singh for Orchha Darshan. Thus, the evidence of Lalaram (PW-2) being unbelievable is not worth reliance.

16. On 25.06.1997, Inspector J.P. Uike (PW-4) was posted as Police Inspector in P.S. Orchha. According to him, he had recorded the F.I.R. (Ex P-3) and it bears his signature on 'A' to 'A' part of it and thumb impression of Rampyari Bai is on 'B' to 'B' part of it. He had recorded the statement (Ex.P-9) of Rampyari Bai under Section 161 of Cr.P.C. In his evidence, J.P. Uike (PW-4)

has not proved the contents of F.I.R (Ex.P-3) and statement (Ex.P-9).

17. Admittedly, Rampyari Bai has died after one year and three months of the incident due to Diarrhea and not due to the injuries sustained in the incident dated 25.06.1997. As far as statement recorded under Section 161 of the Cr.P.C. is concerned, that empowers the Police Officer conducting investigation of the case to examine orally any person supposed to be acquainted with the facts and circumstances of the case. The Police Officer may reduce into writing any statement made to him during course of such examination. Section 162 of Cr.P.C. explains the purpose for which such statement could be used. Section 162 of Cr.P.C. imposes a bar from the use of any statement made by any person to a Police Officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradictory witnesses in the manner provided in Section 145 of the Indian Evidence Act. Any part of such statement may be used in re-examination of witnesses for the purpose of explaining any matter referred to in cross-examination. Section 145 of the Evidence Act provides that the witness may be cross-examined as to previous

statement made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, that if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. This is the limited use to which statement recorded under Section 161 Cr.P.C. can be used. The statement recorded by the police in the course of investigation or confronted to the witness to impeach the credibility of the witness. If the witness had given contradictory statement, that is a ground to raise suspicion against the credibility of the witness. The statements recorded under Section 161 Cr.P.C. could be used to show that the witness had given different versions - one before the police during the course of investigation and another before the court and it could be argued that his evidence before the court cannot be believed. But, under no circumstances, the statement given by the witness to the Police during investigation could be used as a substantive evidence. Reliance can be placed upon the judgment passed in the case of *Hazari Lal Vs. State (Delhi Administration)* reported in (1980)2 SCC 390, *Baldev Singh Vs.*

State of Punjab reported in (1990) 4 SCC 692 and *Tajhsildar Sing Vs. State of U.P.* reported in AIR 1959 SC 1012.

18. In the case of *Ram Swaroop & Ors. Vs. State of Rajasthan* reported in AIR 2004 SC 2943, Hon'ble the Supreme Court has held that “a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness”.

19. In paragraph 12 of the impugned judgment, learned Additional Sessions Judge has mentioned that the deceased has died after three months of the incident. This fact recorded by the learned Additional Sessions Judge is clearly against the report endorsed on Ex.P-12 proved by Inspector J.P. Uike (PW-4). It is settled position of law that F.I.R. is not a substantive piece of evidence and prosecution cannot based its case solely on F.I.R. It can, however, only viewed as previous statement for the purpose of either corroborating by its maker or for contradicting him.

20. As already discussed that Rampyari Bai has died of Diarrhea after one year and three months after the incident, therefore, F.I.R. (Ex.P-3) could not be treated as dying declaration. Section 32(1) of the Evidence Act renders a statement relevant

which was made by a person who is died in cases in which the cause of that person's death comes into question, but its admissibility depends upon one of the two conditions; either such statements should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his/her death. In other words, in order to make the statement of a dead persons admissible under Section 32 of the Evidence Act, the statement must be as to cause of his/her death or as to any of the circumstances of the transaction which resulted in his/her death. In case in hand, Rampyari Bai has died a natural death, therefore, the F.I.R. (Ex.P-3) and the statement (Ex.P-9) recorded under Section 161 Cr.P.C. cannot be treated as dying declaration or relevant under Section 33 of the Evidence Act.

21. In the case of *Kailash & Others etc. Vs. State of M.P. (2007)Cri.LJ 1329* where the maker of the F.I.R. was not examined in the court because of her death, the Division Bench of this Court expressed the view that contents of the F.I.R./ cannot be looked into, because the appellants had no opportunity to cross-examine, this witness and observed as under:

“11. In case of Randhir Singh v. State of M.P. (1979-II M.P. Weekly Note No. 82 Page 113), the learned single Judge of this High Court had an occasion to

consider the question of use of FIR in absence of examination of its author in the Court and held as under:-

“The question is how far the aforesaid reasoning is justified either on facts or in law. It is an admitted fact that the deceased did not die because of the injuries received by him in this incident. Accordingly, the statement made by him in the First Information Report (Ex. P/26) cannot be said to be a statement of a deceased person either as to the cause of his death or as to any of the circumstances resulting in his death. When this report was not admissible as the statement of a deceased under Section 32 of the Evidence Act the learned trial Judge could not rely upon it as a substantive piece of evidence, or for corroborating the evidence given by the other prosecution witnesses in the trial Court, the reason being that the deceased Raghunath was not available to the accused for cross examination and, if that statement in the First Information Report was not admissible under Section 32 or any other section of the Evidence Act, then the same could not be used against the accused for any purpose whatsoever.

The learned trial Judge also erred in treating this statement in the First Information Report (Ex. P/26) as substantive evidence. As First Information Report can be used either to corroborate or contradict the maker of it, in case he is examined. If the maker of the report is not available for examination and

the party against whom the report is to be used as evidence has no opportunity to cross examine him, then the same cannot be used for any purpose much less for the purpose of treating it either as substantive or as corroborative evidence.”

12. In the case of ***Kishanchand v. State of Rajasthan ((1982) 3 SCC 466 : AIR 1982 SC 1511 : (1983 Cri LJ 1) Para 11)*** the Supreme Court has considered the question of evidentiary value of the FIR when its author/complainant died before commencement of the trial and held as under :-

“It was next contended that once Rajendra Dutt is not available for evidence there is no evidence as to the demand of bribe on Nov. 20, 1974, and it is not open to the court to spell out the demand from the contents of Ex. P/12. It is undoubtedly true that the FIR lodged by him on Nov. 22, 1974, cannot be used as substantive evidence nor the contents of the report can be said to furnish testimony against the appellant. Such an FIR would not be covered by any of the clauses of Ss. 32 and 33 of the Evidence Act and would not be admissible as substantive evidence. The question still remains whether there is any evidence of demand of bribe on Nov. 20, 1974, in this case. A fact may be proved either by direct testimony or by circumstantial evidence.”

13. The Supreme Court in the case of ***Harkiratsingh (1997 Cri LJ 3954)*** in para 4 has reiterated the law and held that (Para 3):-

“In our considered view, the High Court was not justified in treating the statement allegedly made by Khairati Lal during inquest proceedings as substantive evidence in view of the embargo of Section 162 Cr.P.C. Equally unjustified was the High Court's reliance upon the comments of the FIR lodged by Walaiti Ram who, as stated earlier, could not be examined during the trial as he had died in the meantime. The contents of the FIR could have been used for the purpose of corroborating or contradicting Walaiti Ram if he had been examined but under no circumstances as a substantive piece of evidence.”

22. In this case there is absolute lack of substantive evidence, in support of the prosecution story that appellant/accused Siroman Singh ever attempted to kill his wife Rampyari Bai by tying towel in her neck and hitting stone on her head and causing injuries on her person. In this case no eyewitness has been produced by the prosecution and admittedly complainant Rampyari Bai has died of natural death. Learned trial Court fell in error in treating the FIR (Ex. P-3) and the statement (Ex.P-9) recorded under Section 161 Cr.P.C. as dying declaration and substantive evidence and treating them as dying declaration. Learned trial Court used F.I.R. (Ex.P-3) as dying declaration but

overlooked the fact that Rampyari Bai has not died due to the injuries sustained in the incident and has died due to Diarrhea. Thus, there was no substantive evidence on the record. Therefore, it is manifestly explicit that the learned trial Court fell in error in treating the F.I.R. (Ex.P-3) and the statement (Ex.P-9) as dying declaration and substantive piece of evidence.

23. In this case there can be no conviction, if injured had turned hostile and denies in the evidence before the Court F.I.R (Ex.P-3) and Statement (Ex.P-9) stating that no such incident was caused with her by her accused-husband. There cannot obviously conviction in such a case for the simple reason that there is no substantive evidence in support of the alleged fact that accused had hit his wife.

24. For the reasons mentioned herein above, I am of the view that, in this case, there is an absolute lack of substantive evidence in support of the prosecution story that appellant/accused had attempted to kill her wife by tying towel in her neck and by hitting a stone on her forehead. In absence of substantive evidence the truth of the prosecution story become doubtful. In such circumstances, the impugned judgment passed by learned trial

Court does not deserve to be maintained and appellant/accused deserve to be acquitted.

25. For the forgoing reasons and legal and factual discussions, the present appeal is allowed. The conviction and sentence of the appellant Siroman Singh is set-aside. He is acquitted of the offence under Section 307 of IPC The amount of fine, if already deposited by him, shall be refunded to the appellant/accused. His bail bonds shall stands discharged.

26. A copy of this judgment alongwith the record of the trail Court, be sent to the trial Court immediately.

(Dinesh Kumar Paliwal)
Judge