**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR**

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| **Case No.**<br>**Parties Name** | **CRA. No.4833/2018**<br>*Ramesh Kachhi*<br>*Vs.*<br>*State of Madhya Pradesh*<br>*&*<br>**CRA. No.3824/2018**<br>*Rupesh Kachhi & Others*<br>*Vs*<br>*State of Madhya Pradesh* |
| **Date of Judgment** | **12/09/19** |
| **Bench Constituted** | **Division Bench:**<br>**Justice Sujoy Paul &**<br>**Justice B.K.Shrivastava** |
| **Judgment delivered by** | **Justice Sujoy Paul** |
| **Whether approved for reporting** | **Yes** |
| **Name of counsels for parties** | **CRA. No.4833/2018**<br>**For Appellant**: Shri S.C. Datt, Senior Advocate with Shri Nishank Pal Verma, Advocate<br><br>**For respondent-State**: Shri Brindavan Tiwari, Government Advocate<br><br>**CRA. No.3824/2018**<br>**For Appellants**: Shri R.S. Shukla, Amicus Curiae<br><br>**For respondent-State**: Shri Brindavan Tiwari, Government Advocate |
| **Law laid down** | **Evidence of hostile witness** –<br><br>(i) The best check on the veracity of a witness is the test of normal human behaviour. If the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. Such statements are held to be untrustworthy if measured by applying any yardstick. ***Rathinam vs. State of Tamil Nadu, 2011 (11) SCC 140,*** *relied on* |

(ii) If the maker of complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness (in absence of any plausible and tenable reasons pointed out on record) was held to be doubtful and testimoney of investigating officer who had sincerely and honestly conducted the investigation of the case was held to be acceptable. ***Mahesh vs. State of Maharashtra, (2008) 13 SCC 271,*** *relied on*

**Effect of belated recording of statements U/s 161 Cr.P.C. –**

(i) The story of prosecution cannot be discarded because of negligence of prosecution alone, otherwise, the faith and confidence of people would be shaken not only in the law enforcing agency but also in the administration of justice. (See: **Rambihari Yadav vs. State of Bihar, 1998 (4) SCC 517**).

(ii) If evidence led by prosecution is worthy of credence, any point that investigation was faulty or statements were belatedly recorded under Section 161 Cr.P.C. pales into insignificance. (See**: Dhanaj Singh v. State of Punjab 2004 (3) SCC 654**).

**Oral dying declaration given to parents –**

As there is no rule of thumb that the evidence of related witness must be discarded solely on the ground that he is a relative of the deceased, hence, the oral dying declaration given to deceased victim's brother held to be acceptable. (**2015 (4) SCC 749** ***Vijay Pal v. State (Govt. of NCT of Delhi*** *relied on)*

There is no scintilla of doubt that there is no absolute rule of law that dying declaration cannot form sole basis of conviction.

**Meaning of plea of alibi** – The latin word alibi means "elsewhere". In order to establish that appellant was far away from place of

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| | occurence and it is extremely inprobable that he would have participated in the crime, he has to establish it with absolute certainity by excluding the possibility of his presence at the place of occurence. If evidence adduced by accused is of such a quality and is of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurence took place, the accused undoubtedly is entitled to the benefit of doubt. (See: **1997 (1) SCC 283** ***Binay Kumar Singh vs. State of Bihar*** **and 2015 (4) SCC 749** ***Vijay Pal v. State (Govt. of NCT of Delhi )).***<br><br>*7.* **Alteration of conviction/sentence –**<br><br>No injury is found on the vital part of the body of deceased. There is nothing to establish that appellants intended to cause the deliberate murder of deceased. There is no legal evidence in this case that the appellants intended to cause the murder of the deceased. However, appellants have caused multiple injuries on various parts of body of deceased. Deceased died because of cumulative effect of such injuries. Appellants undoubtedly had the knowledge that cumulative effect of the injuries would result in the death of the deceased. Also there are evidence on record which shows that all the appellants have acted together and assaulted the deceased with the knowledge that the injuries caused by them were likely to cause his death. |
| **Significant paragraph numbers** | **23, 25, 30, 34 & 39** |

**JUDGMENT**
**12.09.2019**

**As per: Sujoy Paul, J.**

This common Judgement will dispose of Criminal Appeal Number 4833/2018 and Criminal Appeal Number 3824/2018.

These criminal appeals are directed against the impugned judgment of conviction and sentence dated 09.05.2018 passed in ST. No.119/17 by

learned 1st Additional Sessions Judge, Narsinghpur whereby the appellants were held guilty for committing the offences under Section 148 and 302/149 of IPC and were directed to undergo R.I. for two years with fine of Rs.2,000/- and life imprisonment with fine of Rs.5,000/- respectively with default stipulation. It is also directed by the Court below that all the sentences will run concurrently.

**CRA. No. 4833/18**

**2**. Draped in brevity, the case of the prosecution is that a '*Dehati Nalisi*' was lodged by complainant Akash Patel (PW/3), the brother of deceased, at around 8:55 pm in the evening of 24.01.2017 stating that the appellants of these appeals came to his house armed with weapons and caused injuries on him as well as his brother deceased Arjun Patel, which resulted into the death of Arjun Patel. It is further stated that after causing aforesaid injuries, all the appellants fled away. Govind Kashyap (PW/1) Manju Kashyap (PW/2) had seen the incident. Thereafter, Arjun Patel was sent to hospital where during the treatment, he died.

**3**. On the basis of said '*Dehati Nalisi*', an FIR was lodged by the police in the late evening of the date of incident i.e. 24.01.2017. In turn, the police recorded the statements of witnesses and other related persons and submitted a final report before the Court below under Section 173 of Cr.P.C. Thereafter, the Court below framed the charges against the appellants, which were denied by the appellants. In turn, evidence of parties was recorded and arguments were heard. By impugned judgment dated 09.05.2018, the appellants were convicted and directed to undergo the sentence mentioned hereinabove.

**4**. Shri Datt, learned senior counsel urged that although the prosecution witnesses entered the witness box, the alleged eye-witnesses Govind Kashyap (PW/1) and Manju Kashyap (PW/2) and even the complainant (the brother of deceased), who was an injured witness namely Akash Patel (PW/3) also turned hostile. Similarly, the seizure witness Ram Milan Yadav

(PW/5) also turned hostile. Manju Patel (PW/6), the (Sister-in-law) of Arjun Patel could not lead any credible evidence. She did not claim that she was an eye-witness. Her statement at best can be treated as a *hearsay* evidence on the strength of which no conviction can be recorded. There are glaring contradictions in the statements of parents of deceased namely Gammat Kachhi (PW/8) and Shanti Bai (PW/10). If their statements are tested on the anvil of expert evidence of Dr. Sanjay Kumar Nigam (PW/7), it will be clear that it cannot be said that at the time of oral dying declaration given to the parents by the deceased Arjun Patel, he was in a fit state of mind. Statement of Dr. G.C. Chourasiya ((PW/9), who conducted the postmortem, was also relied upon to submit that there was no fatal injury found on the person of deceased. Thus, no case is made out for conviction under Section 302 of IPC.

**5**. In addition, learned senior counsel urged that the present appellant Ramesh Kacchi is an elected Corporator and at the time of incident, he was attending a meeting in the Municipal Council. The defence witness/colleague of this appellant entered the witness box and narrated it with accuracy and precision that this appellant was present with them in a meeting at the time of incident. This appellant has been falsely implicated by the prosecution. In view of statements of parents of deceased, there was previous enmity between the present appellant and the family of the deceased. Thus, it is clear that this appellant has been unnecessarily arraigned in the incident.

**6**. Shri Datt, by taking this Court to the statement of Shanti Bai (PW/10), contended that when she came to know about the incident, she directly reached to the hospital where Arjun Patel was admitted. The treating doctor categorically deposed that at 3:50 pm, Arjun Patel was not in a fit state of mind to depose any statement. In this backdrop, it is completely unsafe to accept the statements of Shanti Bai (PW/10) and Gammat (PW/8) that before

the death, Arjun Patel was in a fit state of mind and informed them that he was assaulted by the appellants.

**7**. To buttress the aforesaid contentions, reliance is placed on ***(2014) 12 SCC 670 (Balbir vs. Vazir & Others) and (2019) 4 SCC 739 (Sampat Babso Kale vs. State of Maharashtra)***. It is submitted that an oral dying declaration can be accepted, if it is established that at the time of recording of statement, the person was in a fit state of mind to make such declaration and such declaration is really trustworthy. Furthermore, it is urged that the parents took more than three days to disclose the incident to the police. The alleged dying declaration is made to the mother. Such declaration, in absence of corroboration, is unacceptable. In addition, heavy reliance is placed on ***(2008) 11 SCC 232 (Arun Bhanudas Pawar vs. State of Maharashtra)***. To elaborate, it was further argued that the statements of witnesses were recorded after so many days by the police under Section 161 of Cr. P.C. which makes the entire prosecution story as highly doubtful and untrustworthy. The arguments is supported by ***AIR 1976 SC 2488 (State of Orissa vs. Brahmananda Nanda), (2016) 16 SCC 418 (Harbeer Singh vs. Sheeshpal) and AIR 2019 SC 96 (Gupteswar Behera vs. State of Odisha & Others)***.

**8**. The appellants relied on ***AIR 1930 Madras 632 (Sadayan Chetti & Ors. vs. Emperor), AIR 1960 SC 391 (State of Bombay vs. Rusy Mistry) and AIR 1972 SC 283 (Sheikh Hasib @ Tabarak vs. State of Bihar)*** in support of argument that FIR can be used either for corroborating or for contradicting the maker/complainant. Since the complainant Akash Patel (PW/3) has turned hostile, this FIR cannot be used by prosecution for any purpose whatsoever.

**9**. Apart from this, Shri Datt, learned senior counsel placed reliance on the postmortem report and the nature of injuries mentioned therein. It is urged that since no injury was found on the vital parts of the body of deceased and reason of death of deceased was multiple injuries coupled with

shock and hemorrhage, no case is made out to convict the appellant under Section 302 of IPC. Reference is made to ***(1976) 4 SCC 362 (Molu & Others vs. State of Haryana) and 1993 Supp.(2) SCC 356 (Sarman & Others vs. State of M.P.)*** in support of argument that at best the appellant can be held guilty for committing an offence under Section 304 Part-II of IPC. Hence, the conviction needs to be altered from Section 302 of IPC to 304 Part-2 of IPC.

**CRA. No.3824/2018**

**10**. Shri R.S. Shukla, learned *Amicus Curiae* at the outset adopted the arguments of learned Senior Counsel advanced in the connected case. In addition, he urged that as per prosecution story, two sticks were allegedly recovered from the appellants Rupesh Kachhi and Raju Kachhi through Ex.P/14 and P/25 and a baseball bat was recovered from the appellant Arpit Dhobi through Ex.D/24 but the said recovery was not proved. Ram Milan Yadav (PW/5), the alleged seizure witness has turned hostile. The aforesaid weapons, allegedly recovered from the appellants, were sent to Forensic Science Laboratory on 25-04-2017. No report of said laboratory was received and produced before the Court below to prove that the said weapons were ever used. It was not established that any blood stains were found on the said weapons. Thus, it is common ground that all the appellants have been falsely implicated and they deserve blotless exoneration in their appeals.

**11**. *Per contra*, Shri Brindavan Tiwari, learned Government Advocate opposed the said contention. By taking this Court to the statement of Akash Patel (PW/3), Shri Tiwari argued that this witness although has turned hostile, he has clearly admitted that '*Dehati Nalisi*' contains his signature. The said witness must have turned hostile because of pressure of the appellants, otherwise there is no reason to take a u-turn by this witness. It is prayed that the statements of parents of deceased may be read carefully, which will show that there is no material inconsistency in their statements,

which will make their statements untrustworthy. The oral dying declaration can be the sole basis for conviction.

**12**. The postmortem report shows that the reason of death was multiple injuries caused by the appellants. The defence of alibi by Ramesh Kachhi is rightly disbelieved by the Court below by taking assistance of Section 11 and 106 of the Evidence Act. Moreso, when defence witness Bhola Thakur (DW/1) clearly admitted that from the alleged place of meeting, it is possible to reach the place of incident within 5-10 minutes.

**13**. So far the question of delay in recording the statements under Section 161 of Cr.P.C. is concerned, it is submitted that the delay is not fatal to the case of prosecution. Reliance is placed on ***AIR 2004 SC 1920 (Dhanraj Singh vs. State of Punjab)***. The legal maxim of *falsus uno* was relied upon on the strength of ***(2009) 13 SCC 480 (Rajendra & Anr. vs. State of U.P.)***. Shri Brindavan Tiwari has taken pains to contend that dying declaration of this nature is creditworthy in view of judgment of Supreme Court reported in ***(2008) 4 SCC 265 (Sher Singh vs. State of Punjab) and (2016) 4 SCC 583 (Gulzari Lal vs. State of Haryana)***.

**14**. In the rejoinder submission, Shri Datt placed reliance on the aspect of alibi by referring to the judgments of Supreme Court in ***(2013) 4 SCC 422 (Sunil Kundu & Another vs. State of Jharkhand)***. Lastly, it is submitted that in a case where there existed a previous enmity between the parties, previous enmity is held to be like a double edged sword and it is totally unsafe to rely on related witnesses, who allegedly heard the deceased. In the peculiar factual backdrop of this matter, it cannot be said that the deceased was in a fit state of mind when he narrated about the incident to his parents.

**15**. No other point is pressed by the parties.

**16**. We have heard the parties and perused the record.

**17**. In the impugned judgment, the Court below recorded that the eye witnesses namely Govind Kashyap (PW/1), Manju Kashyap (PW/2) and Akash Patel (PW/3) turned hostile and did not support the prosecution story. Dr. Sanjay Kumar Nigam (PW/7) opined that the injuries were caused by hard and blunt objects within three hours before the time of examination. In the admission report of hospital, the name of Shanti Bai (PW/10) is mentioned as a person who brought the injured to the hospital. It was also taken note of by the Court below that the said witness Dr. Sanjay Kumar Nigam (PW/7) deposed that he had received an application from the Police Help Center, District Hospital Narsinghpur for informing the condition of injured Arjun Patel to make statement/declaration. Dr. Sanjay Kumar Nigam (PW/7) deposed that he submitted his report about the condition of injured, which is marked as Ex.P/20. This report was sent at 3:50 pm on 24-01-2017. The Court below recorded that admittedly at the time of admission of injured in the said hospital, he was alive and it was the mother of Arjun, who brought him for admission to the hospital.

**18**. The Court below by impugned judgment opined that the oral dying declaration is trustworthy and cannot be brushed aside. In the impugned judgment, the defence of appellants that delay in recording the statements under Section 161 of Cr.P.C. caused a dent on the case of prosecution is rejected on the strength of ***Dhanraj Singh*** (supra). No material inconsistency/contradiction was found by the Court below in the statements of parents of deceased namely Gammat (PW/8) and Shanti Bai (PW/10). The Court below also placed reliance on ***Rajendra*** (supra) and ***(2008) 13 SCC 271 (Mahesh vs. State of Maharashtra)*** in support of its analysis that when a material witness turns hostile for no valid reasons, it creates serious doubt on the testimony of said witness. Such statement shows that the witness is trying to conceal the material truth from the Court with the sole purpose of helping and protecting the accused persons for the reasons best known to him. The statement of such witness will not give any benefit/favour to the accused persons. It was further held that in the instant case, there is no

contradiction between FIR and dying declaration. Lastly, the Court below disbelieved the statement of Bhola Thakur (DW/1) on the strength of Section 11 and 106 of Evidence Act. Considering the nature of injury and evidence available on record, the appellants were held guilty.

**Evidence of hostile witnesses-**

**19**. *Dehati nalishi* (Exhibit P/3) was lodged by Akash Petel (PW/3), brother of the deceased. By placing reliance on the judgments of ***Sadayan Chetti, Rusy Mistry*** and ***Sheikh Haseeb***(supra), it was urged that since PW/3 turned hostile and FIR/*dehati nalishi* can be used either for corroboration or for contradiction, this *nalishi* cannot be relied upon for any purpose. The argument on its face value looks attractive but lost its force when examined on the anvil of settled legal principles.

**20**. Admittedly, Akash Patel (PW/3) is the real brother of deceased Arjun. His statement to the extent he admitted existence of his signatures in Exhibit P/3 and seizure memo Exhibit P/9 is beyond any pale of doubt. This witness turned hostile and stated that Exhibit P/3 and marg intimation P/4 was not recorded by police at his instance. Curiously, PW/3 deposed that when he visited the hospital to see his brother Arjun, he did not inquire about the reason because of which his brother was hospitalised and later on died.

**21.** In ***State vs. Sanjeev Nanda, (2012) 8 SCC 450,*** the Apex Court expressed deep concern about the menace of/tendancy of witnesses turning hostile and termed it as a "major disturbing factor" faced by criminal courts in India. Reasons behind this factor, in the opinion of Supreme Court, may be many i.e. due to monitory considerations, pressure or because of other tempting offers etc. This factor gives impression that mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

**22.** This is trite that statement of a hostile witness is admissible to the extent it does not disturb the credibility of part of his statement. The statement of Akash (PW/3) to the extent he admitted that *dehati nalishi* contains his signature, can be safely relied upon. PW/3 has not assigned any reason as to

why the investigating officer/police could record something which has not been stated by him. This is not the case of defence that Akash(PW/3) did not approach the police at all because existence of his signatures on the *dehati nalishi* is clearly established. In ***State of U.P. vs. Ramesh Prasad Misra, (1996) 10 SCC 360***, the Apex Court opined that if a witness has not given any reason as to why the investigating officer could record statements contrary to what had been disclosed, the evidence of the hostile witness would not be totally rejected if spoken in favour of prosecution or the accused, but it can be subjected to close scrutiny and that portion of evidence which is consistent with the case of prosecution/defence may be accepted.

**23.** The evidence of Akash(PW/3) may be viewed from another angle. If a person comes to know that his real brother is hospitalised because of an assault on him and is in critical condition, upon reaching the hospital, his first anxiety would be to know regarding health condition of his brother and the reason behind his hospitalization. In the instant case, the statement of Akash(PW/3) that upon reaching the hospital, he did not inquire about the reason behind the incident and death of his brother is completely amounts to an unnatural human behaviour. He further narrated that he had not seen his brother carefully in the hospital and therefore is not in a position to state whether there was any bleeding in his head and whether he sustained injuries. In ***Rathinam vs. State of Tamil Nadu, 2011 (11) SCC 140***, it was ruled that the best check on the veracity of a witness is the test of normal human behaviour. If the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. Such statements are held to be untrustworthy if measured by applying any yardstick. Thus, we are constrained to hold that Akash has tried to conceal the material truth from the court in order to shield/protect the appellants for the reasons best known to him. In ***Mahesh vs. State of Maharashtra, (2008) 13 SCC 271***, the PW/1, the maker of complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness (in absence of any plausible and tenable reasons pointed out on record) was held to be doubtful and testimony of investigating officer who had sincerely and honestly conducted the investigation of the case was held to be acceptable. The court below has rightly

relied upon the judgment of ***Mahesh***(supra) in this regard. In view of ***Bhagwan Singh vs. State of Haryana (1976) 1 SCC 389, Karuppanna Thevar vs. State of T.N. (1976) 1 SCC 31, Bhajju vs. State of M.P. (2012) 4 SCC 327, Ramesh Harijan vs. State of U.P. (2012) 5 SCC 777, Gudu Ram vs. State of H.P. (2013) 11 SCC 546, State vs. Sanjeev Nanda(2012) 8 SCC 450, State of U.P. vs. Ramesh Prasad Misra (1996) 10 SCC 360, Manu Sharma vs. State (NCT of Delhi)(2010) 6 SCC 1*** and ***Mahesh vs. State of Maharashtra (2008) 13 SCC 271***, it cannot be ruled that statement of hostile witness cannot be seen for any purpose.

**24.** In view of foregoing analysis, we are unable to hold that court below has committed any error of law in appreciating and evaluating the evidence of the hostile witness. J.N. Gyarasia(PW/4) proved the *dehati nalishi* Exhibit P/3 and the FIR Exhibit P/12. Similarly, PW/11 D.V.S. Nagar who recorded *dehati nalishi* satisfactorily proved it. In no uncertain terms, he deposed that the *dehati nalishi* was recorded at the instance of complainant Akash Patel. His statement and also the statement of PW/4 could not be demolished. We concur the finding of the court below in the manner the statement of hostile witness/PW/3 was analyzed. The judgments cited by Shri Datt are of no assistance in the factual matrix of this case because prosecution has established that *dehati nalishi* contains PW/3's signatures and court below rightly opined that in the manner he deposed in the court while turning hostile, his statement is unacceptable and statement of PW/4 and PW/11 inspires confidence in the light of principle of law laid down in ***Mahesh***(Supra).

**Effect of belated recording of statements U/s 161 Cr.P.C.-**

**25.** The appellants contended that statements of parents of deceased Arjun were recorded after ten days from the date of incident which makes the investigation totally unreliable. The trial founded upon such a polluted investigation and the judgment impugned needs interference. The effect of defective investigation was considered by Supreme Court in ***Karnel Singh vs. State of M.P., 1995 (5) SCC 518*** and in ***Amar Singh vs. Balvinder Singh, 2003 (2) SCC 518***. It was ruled that because of negligence of prosecution alone the story of prosecution cannot be discarded otherwise faith and confidence of people would be shaken not only in

the law enforcing agency but also in the administration of justice. (See: ***Rambihari Yadav vs. State of Bihar, 1998 (4) SCC 517***). The principle laid down in these cases is that if evidence led by prosecution is worthy of credence, the point that investigation was faulty or statements were belatedly recorded under Section 161 Cr.P.C. pales into insignificance. (See: ***2004 (3) SCC 654 Dhanaj Singh v. State of Punjab)***. In the instant case, the mother (PW/8) deposed in her statement (Para 18) that on the next date of incident, police came to her house and she informed the police that his son was assaulted by the accused persons and they are also under threat of being assaulted. She pleaded ignorance whether police had recorded her statement at that point of time or not.

**26.** In this case, for the reasons mentioned in separate paragraphs, we have recorded the findings that prosecution has satisfactorily established that appellants have assaulted Arjun because of which he died. In view of this satisfaction recorded by us, the interference on the ground that statements were belatedly recorded is unwarranted. The judgments of Supreme Court cited by appellants i.e. ***AIR 2019 SC 96 :Gupteswar Behera vs. State of Odisha and Ors*** and ***AIR 1976 SC 2488 : State of Orissa v. Brahmananda Nanda*** cannot be pressed into service in this case in favour of appellants because evidence led by prosecution is otherwise credible and cogent. **(See: 1992 (3) SCC 106 *Ganeshlal v. State of Maharashtra* , 2002 (7) SCC 334 *Mohd. Khalid v. State of W.B.*, 2004 (13) SCC 279 *Prithvi (Minor) v. Mam Raj* and 2010 (6) SCC 1 *Manu Sharma v. State (NCT of Delhi)*).**

**<u>Oral dying declaration given to parents</u>**-

**27.** Shri S.C. Datt, learned senior counsel placed reliance on the judgment of Supreme Court in ***Balbir*** and ***Sampat***(Supra) wherein it was held that oral dying declaration is acceptable provided it is established that the maker was in a fit state of mind. The statement of treating doctor Sanjay Kumar Nigam (PW/7) was relied upon wherein he had deposed that at 3:50 p.m. On 24.01.2017, Arjun was not mentally fit to make a statement. He was not in a position to speak. In addition, judgment of Supreme Court reported in ***2008 (11) SCC 232 : Arun***

***Bhanudas Pawar vs. State of Maharashtra*** was relied upon to submit that oral dying declaration given to mother, in absence of corroboration is not acceptable.

**28.** In our view, learned senior counsel has rightly contended that a dying declaration is acceptable only when it is proved that it was given by a person who was in a fit state of mind at the time of giving such declaration. The dying declaration of the present case needs to be examined on the said principle. The court below recorded the statement of PW/10, mother of Arjun. This witness stated that incident of assault had taken place between 1:00-1:30 p.m. She was selling vegetables in Gulab Chowk where she received the information of assault on Arjun. She immediately rushed to the place of incident and found that Arjun was lying on the road. She took her to the hospital immediately. In the hospital, she asked Arjun who has assaulted him. Arjun informed her the names of appellants who had assaulted him. During extensive cross-examination, her statement could not be demolished. Similarly, father of Arjun (PW/8) categorically deposed that when he visited Arjun in the hospital, he was in the fit state of mind. Arjun died after about two hours. Pertinently, statement of this witness wherein he deposed that Arjun narrated about the incident and informed the names of appellants could not be demolished during lengthy cross-examination.

**29.** In para 30 of the impugned judgment, the court below has analyzed the statements of parents in the light of deposition of Dr. Sanjay Kumar Nigam (PW/7) wherein he stated that Arjun was not in a fit condition to speak. It was held that a holistic reading of statement of PW/7 shows that he received an application from police at 3:50 p.m. on 24.01.2017 containing a request to record the dying declaration. At 3:50 p.m., as per this witness, Arjun was not in a fit condition to give any declaration. The court below meticulously examined the factual matrix and opined that the District Hospital, Narsinghpur informed police chowki, District Hospital, Narsinghpur at 2:30 p.m. that Arjun has been hospitalized and its a medico legal case. The Court below on the strength of statement of Shanti Bai(PW/10) and the document Exhibit P/18 opined that Shanti Bai came with Arjun to the hospital. The finding given in para 30 is that as per *dehati nalishi* incident had taken place at around 2:30 p.m. and after 1 hour 20

minutes, application was sent to the doctor for recording the dying declaration. There is no evidence of doctor to show that before 3:50 p.m., Arjun was not in a fit state of mind. We do not find any infirmity in this conclusion drawn by the court below. Prosecution has satisfactorily established that upon receiving information of assault on his son, Shanti Bai took her injured son to the hospital. As noticed above, both the parents categorically deposed that their son Arjun was in a fit state of mind at the time of giving declaration and their statements could sustain the test of cross-examination, hence we are of the view that statement of doctor which reflects condition of Arjun at 3:50 p.m. will not cause any dent to the statements of parents. Putting it differently, the statement of doctor (PW/7) reflects the condition of Arjun at 3:50 p.m. and on the basis of this statement, it cannot be presumed that when Arjun gave declaration to his parents which is much prior to 3:50 p.m., he was not in a fit state of mind. As per statement of doctor(PW/7), there was no injury on the vital parts of body of Arjun. For this reason also, the prosecution version cannot be doubted that Arjun was in a fit state of mind when brought to the hospital and when he gave declaration to PW/8 and PW/10. We, accordingly, countenance the finding of court below in this regard.

**30** Apart from this, there is no rule of thumb that evidence of related witness must be discarded solely on the ground that he is relative of the deceased. In view of judgment of Supreme Court reported in ***(2017) 6 SCC 1 (Mukesh & Another vs. State (NCT of Delhi) & Ors.) and (2017) 16 SCC 466 (Suresh Chandra Jana vs. State of West Bengal & Ors.)***, there is no scintilla of doubt that there is no absolute rule of law that dying declaration cannot form sole basis of conviction. In the case of ***Vijay Pal***(supra), the oral dying declaration was given to deceased victim's brother which was held to be acceptable. In the case of ***Arun Bhanudas***(Supra), the Apex Court disbelieved the statement of a related and interested witness and insisted for corroboration because in the factual backdrop of that case, the deceased became unconscious by the time he was brought to the hospital. The mother arrived at the hospital only on the following day at around 3:30 p.m. Her statement was held to be not acceptable because it could not be proved that deceased Raju had regained consciousness when mother met him in the hospital. In ***Arun Bhanudas***(Supra),

while making statement to police under Section 161 Cr.P.C., the mother did not name the appellant therein as assailant. Because of this peculiar factual backdrop, in our opinion, the Apex Court disbelieved the statement of mother and insisted for corroboration. At the cost of repetition, in our view, both the parents deposed about dying declaration in harmony and there is no material in consistency in their statements which may destroy its evidenciary value.

**31.** The Court below on the strength of ***2006 (2) SCC (Cr.) 331 Ghanshyam Vs. State of Assam*** opined that the statement of parents is in tune with the story mentioned in the *dehati nalishi*. In absence of any contradiction, statements of these witnesses and consequently the dying declaration is trustworthy. This finding of court below is in consonance with law and deserves our stamp of approval.

**The plea of alibi by appellant Ramesh Kachi**-

**32.** The plea of alibi and the admitted fact that family of deceased had an enmity with this appellant is a major point of defence in Criminal Appeal No.4833/2018. Bhola Thakur(DW/1), a Corporator in Municipal Council, Narsinghpur entered the witness box and deposed that on the date of incident he alongwith this appellant and other persons was in a meeting in the said Municipal Council. The meeting started between 12:30 to 1:00 and continued upto 3:30-4:00. In the entire meeting, this appellant remained present. During this meeting, this appellant received a phone informing him about the assault on Arjun. Considering the previous animosity with the family of PW/8 and PW/10, they immediately approached the police and informed that they may be falsely implicated. Later on, higher police officers were also informed about the incident.

**33.** This statement of defence witness could not inspire confidence of court below. In para 46 of impugned judgment, court below opined that this statement shows that the distance between the place of incident and municipality where meeting was allegedly convened is hardly of 5-10 minutes if one travels by a motorbike. On the strength of Section 11 and 106 of the Evidence Act, the Court below disbelieved this statement.

The Illustration (a) below Section 11 of the Evidence Act reads as under:

*"(a) The question is, whether A committed a crime at Calcutta on a certain day.*
*The fact that, on that day, A was at Lahore is relevant.*
*The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, thought not impossible, that he committed it, is relevant."*

**34.** The Latin word alibi means "elsewhere". In order to establish that appellant was far away from place of occurrence and it is extremely improbable that he would have participated in the crime, he has to establish it with absolute certainty by excluding the possibility of his presence at the place of occurrence. If evidence adduced by accused is of such a quality and is of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused undoubtedly is entitled to the benefit of doubt. (See: **1997 (1) SCC 283 *Binay Kumar Singh vs. State of Bihar* and 2015 (4) SCC 749 *Vijay Pal v. State (Govt. of NCT of Delhi)).***

**35.** In the instant case, the court below has rightly held that no minutes, register or documentary evidence is produced by defence to establish that this appellant was indeed present in the said meeting. The meeting as per DW/1 was called by Chairman of Municipal Council and attended by representative of Member of Parliament. Neither said Chairman nor the representative was called in the witness box to support this statement. The court below rightly applied Explanation (a) of Section 11 because Bhola Thakur (DW/1) admitted that travel time between Municipal Council and place of incidence is 5-10 minutes. The judgment of ***Ramesh Kachi***(Supra) has no application in the present case for the simple reason that in the said case, prosecution could not establish its case and yet adverse inference was drawn by the court because of weakness of defence evidence. Thus, finding of court below in this regard deserves to be accepted.

**Regarding alteration of conviction/sentence**-

**36.** As per medical evidence, the following injuries were found on the body of deceased Arjun:

**Following injuries were present on the body-**

1. Multiple stitched wound were over left leg.

A – stitched wound of about 2 – 4 cm were below knee extended from knee to sole

B. Single Stitched wound were over thigh outer aspect.

2. Single stitched wound were over right leg below knee.

3. Right arm was fractured and were multiple contusions.

4. Two stitched wound were over right elbow, about 3 cm and 2 cm were separated by 6 cm from each other.

5. Left forearm was fractured and were multiple contusion.

6. Contusion and abrasion were over forehead right side.

**Internal examination-**

2-Cranium and Spinal Cord – Contusion with abrasion over right side of forehead with internal ecchymosis, 3-Thorax-Healthy and Pale, 4-Abdomen -Healthy and Pale.

**Description of Injury or disease-**

Injuries described on page no 3 were caused by hard , blunt and heavy objects and collectively injuries were dangerous to life.

**Opinion in relation to articles sent with corpse**

1. His clothes in which one T- shirt, one paint and one red underwear

2. His dressing in which cotton and bandage

All this were preserved and sealed and handed over to concerned constable.

**Opinion-**

According to his opinion, the mode of death of Arjun is Hypovolemic shock which were possible due to collective injuries found in body. Duration of death, was within 24 hours from the time of PM examination. PM Report presented by him is Exhibit P-21 in whose A to A part, there is my signature."

**37.** As per medical evidence, no injury was found on the vital parts of the body of the deceased. The cause of death is multiple injuries, hemorrhage and excessive bleeding. No internal injuries were found. The injuries were outcome of assault by hard and blunt objects. As per prosecution story, the appellants were mounting pressure on Arjun to enter into a compromise in relation to a criminal case. Arjun did not succumb to such pressure. During the course of mounting pressure on Arjun, the appellants assaulted him with hard and blunt object. Referring to a judgment of ***Molu and others*** and ***Sarman and others***(Supra), it was canvassed that *lathi*/rod blows inflicted by several persons causing simple injuries on non-vital parts of body will not bring the assault within the ambit of murder. Indeed, conviction should be altered to that under Section 304 Part II of IPC.

**38.** We find force in this contention of appellants. In ***Molu***(Supra) in para 3 and 4 of the judgment, the Apex Court mentioned the nature of injuries on the person of deceased. As many as 14 injuries were found on the person of deceased by the doctor who conducted the postmortem. The doctor opined that death was due to shock and hemorrhage, as a result of fracture of right ulna and bleeding from big blood vessels due to injury no.11 mentioned therein. Considering the nature of injuries, the conviction and sentence was directed to be altered.

**39.** In the instant case also, no injury is found on the vital part of the body of Arjun. There is nothing to establish that appellants intended to cause the deliberate murder of Arjun. In this backdrop, we are satisfied that there is no legal evidence in this case that the appellants intended to cause the murder of the deceased. We are, however, satisfied that appellants have caused multiple injuries on various parts of body of Arjun. Arjun died because of cumulative effect of such injuries. Appellants undoubtedly had the knowledge that cumulative effect of the injuries would result in the death of the deceased. We are also satisfied that all the appellants have acted together and assaulted the deceased with the knowledge that the injuries caused by them were likely to cause the death of Arjun.

**40.** In these circumstances, the accused persons have committed an offence under Section 304 Part II IPC and not one under Section 302 IPC. Accordingly, we deem it proper to allow these appeals in part by altering the conviction of appellants from that under Section 302 to that under Section 304 Part II IPC r/w Section 149 and their sentences reduced from life imprisonment to seven years rigorous imprisonment. The impugned judgment to the extent of fine with default stipulation and conviction under Section 148 IPC is affirmed.

**41.** The appeals are **partly allowed** to the extent indicated above.

**(Sujoy Paul)**
**Judge**

**(B.K. Shrivastava)**
**Judge**

*Mohsin/YS*