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2023 SCC OnLine Gau 1158 : (2023) 3 GLT 672

In the High Court of Gauhati[†]

(BEFORE MICHAEL ZOTHANKHUMA AND MALASRI NANDI, JJ.)

Anurag Goswami

Versus

State of Assam, rep. by P.P. and Another

Crl.A./55/2020

Decided on April 4, 2023

Advocates who appeared in this case:

Advocate for the Petitioner : Mr. RP Sarmah

Advocate for the Respondent : PP, Assam

The Judgment of the Court was delivered by

MALASRI NANDI, J.:— Heard Mr. R.P. Sarmah, learned Senior counsel appearing for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor appearing for the State and Mr. D. Bora, learned counsel appearing for the respondent No. 2.

2. This appeal has been preferred by the appellant Anurag Goswami challenging the judgment and order dated 16.12.2019 passed by the learned Sessions Judge, Kamrup(M), Guwahati in Sessions Case No. 258/2015, whereby the accused/appellant was convicted under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- in default of payment of fine to undergo simple imprisonment for 6(six) months.

3. The prosecution case is that the informant Mon Mohan Barman lodged an FIR dated 26.11.2012 stating inter alia that on 25.11.2012 at about 6.30 p.m. while his uncle Khagen Barman was on duty at S. Tel office, at Monal Tower under Dispur police Station, the Accused/appellant Anurag Goswami along with another person had assaulted him with steel strip and other sharp weapon inside the said office, thereby injuring him grievously in various parts of his body. Immediately, his uncle was admitted to Guwahati Medical College and Hospital(GMCH) with the help of 108 service but on the next date i.e. on 26.11.2012, his uncle died in GMCH during treatment.

4. On receipt of the complaint, a case was registered vide Dispur P.S. Case No. 2537/2012 under Sections 448/302/34 IPC and the investigation has been commenced. During investigation, the statement of the victim was recorded but subsequently, he died. The investigating officer also recorded the statement of other witnesses, visited the place of occurrence and seized the weapon of offence from

the place of occurrence and after completion of investigation, charge-sheet was submitted against the accused/appellant Anurag Goswami and another person Bimal Bonia under Section 302/34 IPC before the Additional Chief Judicial Magistrate, Kamrup(M). As the offence under Section 302 IPC is exclusively triable by the court of Sessions, the case has been committed accordingly.

5. During trial, the learned Sessions Court has framed charge under Section 302/34 IPC against the accused/appellant Anurag Goswami and other accused Bimal Bonia which was read over and explained to them to which they pleaded not guilty and claimed to be tried.

6. To prove the guilt of the accused persons, ten witnesses were examined by prosecution and marked 14 exhibits before the trial court and three material exhibits. On the other hand, the accused/appellant also adduced one witness in support of his case. After completion of trial, the statement of both accused persons were recorded under Section 313 Cr. P.C. and all the incriminating materials found in the evidence of the witnesses were put before them to which they denied the same. According to them, they have been falsely implicated in this case. After hearing the argument advanced by the learned counsel for the parties, the learned trial court has convicted the accused/appellant Anurag Goswami as aforesaid but acquitted the other accused Bimal Bonia. Hence, this appeal filed by the accused/appellant.

7. Mr. R.P. Sharma, learned Senior counsel for the appellant has argued that the learned trial court failed to consider the evidence of P.W.9 in its proper perspective who was attached to Dispur Police Station at the relevant time of incident and recorded the statement of the deceased in the place of occurrence. The learned trial court also failed to consider that the witness admitted in his cross-examination that he had recorded the statement of the victim(Ext.-13) but the case was not registered. He received information at about 7 p.m. and he recorded the statement of the deceased at 8 p.m. According to P.W.9, at that time, in the hospital, the deceased was in conscious state of mind and in the hospital, definitely there would have been doctor and nurses also whose signatures ought to have been taken in Ext. 13 which was considered to be dying declaration after taking the statement of the victim immediately after the incident.

8. It is also submitted by the learned Senior counsel for the appellant that the co-accused Bimal Bonia was acquitted by the learned trial court. From the medical report, it appears that the deceased sustained 14 number of injuries which leads clearly to reveal that the appellant alone could not have attacked the deceased. The accused Bimal Bonia was acquitted only on the flimsy ground shown by the trial court. Thus, the story of attack alleged to be caused by the appellant was a product of figment of imagination and afterthought.

9. It is also the submission of the learned Senior counsel for the appellant that the so called dying declaration made by the deceased was not properly recorded with all impartiality and reasonableness which lent the said declaration unreliable. The learned trial court erred interpretation of the provisions of Section 32 of the Indian Evidence Act, 1872 and the judicial decisions as cited thereon. According to the learned Senior counsel for the appellant that the judgment and conviction is bad in law and is liable to be set aside.

10. In support of his submission, learned Senior counsel has relied on the following case lawsi-

i. *Atbir* v. *Government of NCT of Delhi* reported in (2010) 9 SCC 1.

ii. *State of Rajasthan* v. *Teja Ram* reported in (1999) 3 SCC 507.

iii. *Thanu Ram* v. *State of Madhya Pradesh* reported in (2010) 10 SCC 353.

iv. *Smt. Kamla* v. *State Of Punjab* reported in (1993) 1 SCC 1 : AIR 1993 SC 374.

11. Per contra, Ms. Bhuyan, learned Additional Public Prosecutor has opposed the submission of learned Senior counsel for the appellant and she has submitted that the statement of the deceased was recorded by P.W.9 when he was alive immediately after the incident. Subsequently, he died in hospital during medical treatment. At the time of recording statement of the victim, the investigating officer did not feel it necessary to take the signatures of other persons as he was in a position to speak when the injured brought to the hospital. As did not survive, his statement before the police can be treated as a dying declaration. It is a settled position of law that conviction can be solely based on a dying declaration. There is no irregularity found in the judgment of the learned trial court convicting the accused/appellant and coming to a finding that the appellant was the perpetrator of the crime and as such, needs no interference by this Court.

12. The Additional Public Prosecutor for the State has also submitted that the learned Senior counsel for the appellant only stressed his argument on the point that as the another accused Bimal Bonia was acquitted by the learned trial court on the same incident, the appellant is also entitled to benefit of doubt.

13. On the other hand, Mr. D. Bora, learned counsel for the respondent No. 2 also supported the submission of learned Addl. Public Prosecutor and has contended that though the learned Senior counsel for the appellant has submitted that there were multiple dying declarations in fact, there is only one dying declaration made by the deceased before P.W.9 which was exhibited before the learned trial court as Ext.13. The learned counsel for the respondent No. 2 by referring to the judgment of *Nagabhushan* v. *The State of Karnataka*

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reported in (2021) 5 SCC 222, submitted that though the dying declaration was recorded by a police officer, the same was admissible in evidence.

14. From the judgment of the learned trial court, it reveals that the conviction is mainly based on dying declaration made by the deceased, the report of the finger print expert and the circumstances found in the evidence of the witnesses.

15. P.W.1 Devojit Rajkhowa was working as Assistant Manager (commercial) in S. Tel Pvt. Ltd. at Guwahati at the relevant time of the incident. He deposed in his evidence that the occurrence took place in the month of November, 2012 at Monal Tower under Dispur police station. On that day at about 7 p.m. he received a telephone call from one Nath who informed him that Khagen Barman, Security Guard of Monal Tower was being assaulted by some unknown persons and 108 ambulance was called and shifted him in an injured condition to the hospital for treatment. On receipt of the information, he went to Monal Tower and found that the police had already arrived at the place of occurrence and started investigation. He noticed blood stains on the floor of the gate of the security guard's room. Police seized blood stained clothes and other articles vide Ext. 1, seizure memo wherein, he put his signature. The cross-examination of P.W.1 was declined.

16. P.W.2 is the informant who is the cousin brother of the deceased. According to him, on the date of the incident, he received a phone call from his cousin brother Nilakanta Barman, who informed him that the deceased was being assaulted by the accused Anurag Goswami and Bimal Bonia and he was admitted to GMCH, Guwahati. On receipt of the information, he rushed to GMCH. In the hospital, he found his cousin brother undergoing treatment in the emergency ward. He noticed bleeding from his head and on being asked, the deceased disclosed that Anurag Goswami who came to S. Tel Pvt. Ltd. Company office at Monal Tower on the date of incident, had attempted to steal computer sets, but the deceased stopped him and thereupon, he was assaulted by a stick plate and an empty bottle of wine. The deceased also told him that accused Bimal Bonia had assaulted him with an empty wine bottle. P.W.2 noticed bleeding injury on his left shoulder. On the next day of the incident i.e. on 26.11.2012 Khagen Barman died. Thereafter, he lodged the FIR before Dispur police station in connection with the incident vide Ext. 2. It is also stated by P.W.2 that one Mr. Rajkhowa reported the incident over phone to Dispur police station and accordingly 108 ambulance shifted him from the place of occurrence to the GMCH in an injured condition.

17. In his cross-examination, P.W.2 replied that he came to know about the incident in detail from the deceased, while he was in injured condition. P.W.2 admitted that he did not mention the name of accused

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Bimal Bonia in his FIR.

18. P.W.3 Kumud Bharali, who was working as a Private Security Guard in Sagar Security Agency at Bhangagarh, Guwahati stated that he knew the deceased who was working as a security guard in the S. Tel Company Pvt. Ltd., Guwahati. He deposed in his evidence that on the relevant night, Managing Director of Sagar Agency informed him over phone that some quarrel had taken place at S. Tel office and he rushed to the spot and on enquiry, he came to know that the incident of assault had taken place and that the injured was shifted to GMCH for treatment. Thereafter, he went to the GMCH and found the deceased was under treatment. On the next day, Khagen Barman succumbed to his injuries in the hospital.

19. P.W.4 is the finger print expert. From her deposition, it reveals that in connection with Dispur P.S. Case No. 2537/2012, she was directed by the Director, State Finger Print Bureau, CID, Ulubari, Guwahati, Assam to examine the finger prints collected from the place of occurrence. On examination of the specimen finger print of the accused Anurag Goswami in relation to finger prints specimen which were collected from the place of occurrence, she found both the specimen finger prints were identical with 14 characters of the appellant. The report and the finger prints were exhibited vide Ext. Nos. 5 and 6 respectively.

20. In her cross-examination, P.W.4 replied that the specimen finger prints of Anurag Goswami were obtained by Dispur police. When she reached the place of occurrence at about 10 p.m., she found some employees of S. Tel company and police personnel.

21. P.W.5 is the medical officer, Dr. Raktim Pratim Tamuli who conducted postmortem examination on the dead body of the deceased on police requisition and on examination he found the following injuries -

> External Appearance- A male dead body average built and swarthy complexion was found dressed with a brown coloured trouser, a brown coloured full shirt, a brown underwear, a green half sweeter and a white vest. Blood clots were seen over the face (nostrils) and wearing garments, scalp hair was shaved. Eyes and mouth remain closed. Anus-penis serotim were healthy. Body was warm to touch and rigor mortis were fully developed all over the body. Postmortem hypostasis was present over the back and fixed.
>
> 1. Stitched wound of length 3 cm apposed with single stitch was present over the left frontal area of scalp which lies 4 cm aboveleft eye brow and 3 cm left of midline.
> 2. 4 cm long stitched wound was present over left frontal area of scalp apposed with 2 nos. of stitches which lies 0.5 cm behind injury No. 1 and 3 cm left of midline.

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3. Stitched wound of length 5 cm apposed with 4 nos. of stitches was present over left frontal area of scalp which lies 8 cm left of midline and 10 cm above left rings.
4. Stitched wound of length 7 cm apposed with 7 nos. of stitches was present over left parietal eminence which lies 7 cm left of midline and 10 cm above left ear.
5. 6 cm long stitched wound apposed with 5 nos. of stitches was present over left parietal area of scalp which lies 1 cm left of midline and 17 cm behind left eye brow.
6. Stitched wound of length 5 cm apposed with 4 nos. of stitches which lies transversely in the midline in parietal area which lies 2 cm infront of injury No. 5.
7. Stitched wound of length 3 cm apposed with single stitch was present over right frontal area of scalp which lies 10 cm behind right eyebrow and 3 cm right 7of midline.
8. Stitched wound of length 2 cm apposed with single stitch is present over right frontal area of scalp which lies 9 cm above right eyebrow and 6 cm right to midline.
9. 5 cm long stitched wound lies transversely over right frontal area which is apposed with 4 nos. of stitches, 1 cm right to midline and 12 cm behind right eyebrow.
10. An irregular stitched wound was present over right parietal eminence with greatest dimension of 10 cm apposed with 15 nos. of stitches.
11. Stitches wound of length 11 cm was present the midline of occipital area obliquely and apposed with 9 nos. of stitches.
12. Right hand was contused and swollen.
13. Left hand was contused and swollen.
14. Fracture of left index finger (proximal phalange) with contusion.
15. Laceration of right thumb distal phalange (dorsum) with missing of nail.
16. Laceration of size 0.5 cm × 0.2 cm × bone deep was present over dorsum of left little finger.
17. Abrasion of size 1.5 cm × 1.5 cm was present over front of left knee.
18. Contusion of size 3 cm × 0.5 cm was present over left lateral wall of chest in the midaxillery line in 5th intercostal space.

No ligature mark was detected around the neck. On dissection underlying neck tissues are found healthy.

Cranium and Spinal Canal - Scalp Externally as described. On dissection whole scalp was found contused Haematoma formation was seen over right parietal area. Skull and Vertebrae were healthy.

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Membrane and Brain-Pale, Spinal Cord-not examined. Liver-Congested, Both Kidneys were congested. Bladder-Mucosa congested. Uterus-Healthy, rest were are healthy. Mark of ligature on neck-as described.

Abdomen:— Walls healthy. Peritoneum-Pale. Mouth, Pharynx and Esophagus-Mucosa pale and others healthy. Stomach-Mucosa pale and contains fluid mixed with blood. Small intestine-Mucosa pale. Large intestine-Mucosa pale and contains gas and faecal matter.

Thorax:— Walls-as described, Ribs and Cartilage-Healthy. Pleurae -pale. Larynx and trachea-Mucosa pale and blood clots are found adherent to mucosa in trachea. Both lungs were pale. Heart-healthy and empty. Vessels pale.

22. The Doctor opined that death was due to hemorrhage and shock following injuries sustained over the body during life which were being caused by blunt weapon and was homicidal in nature.

23. P.W.6 is the police constable who took the dead body of the deceased from the GMCH.

24. P.W.7 is the Executive Magistrate, who conducted inquest on the dead body of the deceased. According to him, during inquest, he found 14 numbers of cut marks on the head. The left hand was swollen and there was an injury on the right thumb of the deceased.

25. P.W.8 is the inspector of police S.B. Headquarter. According to him, after collecting the finger print report and after perusal of the case diary, he submitted the charge-sheet, against the accused Bimal Bonia and Anurag Goswami vide Ext. 12.

26. P.W.9 Sri. Chandi Singha, S.I. of Police had recorded the statement of the deceased. His deposition discloses that on 25.12.2012, he was attached to Dispur police station. On that day, at about 7 p.m. he was on patrolling duty at Dispur area along with staff. Then he received a phone call from the police station that an incident occurred in the first floor of Monal Tower. On receipt of the information, he visited the place of occurrence and saw a person bleeding on the first floor. Thereafter, he recorded the statement of the injured person Khagen Barman. At that time, O/C, Dispur police station reached the place of occurrence along with staff and on his instruction, he took the injured person to the hospital for treatment. The statement of the victim, which was recorded under his handwriting vide Ext. 13 at the place of occurrence, was not taken in a separate sheet.

27. In his cross-examination, P.W.9 stated that he received information at about 7 p.m. He recorded the statement of the injured person at about 8 p.m. and at that time, the deceased was in his senses. There was no pagination in the case diary. The suggestion that the case diary contained manipulated documents was denied by P.W.9.

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28. P.W.10 is the investigating officer. He deposed in his evidence that on 25.11.2012 at about 6.30 p.m. he was informed by O/C Dispur PS over phone that some miscreants had illegally entered Monal Tower, in the 1st Floor of S. Tel Office and by assaulting the Security guard on duty, they had attempted to take away the Laptop from the said office. On receipt of the information he proceeded to Monal Tower under the jurisdiction of Dispur police station, where he found other police personnel, including P.W.9 on the spot. At that time, the victim had already been taken to GMCH for medical treatment. He noticed blood stains everywhere in the floor. Immediately after his arrival, the CID Officers also arrived there with photographers. They started inspecting the place of occurrence. Thereafter, he seized the articles with blood stains in presence of the witnesses, vide Ext.1, seizure list. He also prepared a sketch map of the place of occurrence vide Ext. 14. The CID officials also took finger prints from the place of occurrence. On the next date, an FIR was lodged by one Monmohan Barman vide Ext. 2. He was entrusted to do the investigation after filing of the FIR. On the next morning, two witnesses, Debajit Rajkhowa and Kumud Bharali appeared at the Police Station and he recorded their statements. Before filing of the FIR, the investigation was initiated on the basis of GDE No. 1725 dated 25.11.2012. In the FIR, the name of Anurag Goswami was disclosed as the prime accused. Subsequently, he was arrested by the police of Narayanpur police station under North Lakhimpur District. As the name of Bimal Bonia cropped up as one of two perpetrators of the crime, the police sent information to him to appear before the police. Accordingly, Bimal Bonia appeared before the police station and he was also arrested. On 26.11.2012, the victim Khagen Barman expired in the GMCH. The inquest was conducted by the Executive Magistrate and the dead body was sent for postmortem examination. He collected the postmortem report and as he was transferred, he handed over the case diary to O/C, Dispur police station.

29. In his cross-examination, P.W.10 stated that the dying declaration was placed in the case diary. He could not say whether it was submitted before the court or not along with the charge-sheet. P.W.10 also admitted that the case diary was not paginated.

30. It is an admitted fact that the deceased was an employee of S. Tel Office, located at Monal Tower under Dispur police station at the relevant time of the incident. The allegation against the appellant is that on the date of the incident he came to S. Tel office and attempted to steal computer sets and when the deceased tried to stop him, he was assaulted by the accused/appellant along with another person Bimal Bonia. Admittedly, there is no eye witness to the incident, except the deceased.

31. The learned Senior counsel for the appellant has stated that

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there are multiple dying declarations which do not tally with each other and as such, the dying declaration cannot be the basis of conviction of the appellant, as the other accused had already been acquitted by the learned trial court.

32. The learned Senior counsel for the appellant also pointed out that according to P.W.9, the statement of the victim was recorded at the place of occurrence, but from the Ext. 13, it reveals that it was recorded at GMCH and there is no pagination in the case diary. He also contended that as per Section 172 of Cr. P.C., the pagination in the case diary is mandatory which has not followed in the case in hand. Under such a backdrop, the dying declaration cannot be taken into consideration for convicting the appellant.

33. It is also the case of the appellant that as the Magistrate did not record the dying declaration, it must be regarded as suspicious and should be discarded.

34. It is true that a police officer(P.W.9) has recorded the dying declaration. The deceased died on the next day of the incident, after the dying declaration was recorded by P.W.9. A Magistrate could and should have been called to record a dying declaration. From the case record, it also reveals that there was no pagination mark in the case diary. The dying declaration was not recorded in a separate sheet, it was recorded in the case diary in the handwriting of P.W.9. However, the dying declaration itself can be treated as the FIR and the case can be registered on the basis of a dying declaration. Another police officer has made the investigation on the basis of the FIR lodged by P.W.2, the day after the death of the deceased.

35. It will have to be seen whether a dying declaration recorded by a police officer can be accepted in the absence of any other dying declaration recorded by any Magistrate and whether such a dying declaration can be the sole basis to uphold a conviction made thereupon by the learned trial Court. It will be apt to consider the jurisprudence in this behalf at this stage itself.

36. In the case of *Laxman* v. *State of Maharashtra*, reported in 2002 ALL MR (Cri) 2259, it has been held that recording of the dying declaration by the Magistrate is a rule of caution. Though it is the usual practice, there is no requirement of law in that behalf. There is also no specified statutory form required for recording it. The evidentiary value and the weight to be attached to it depends upon the facts and circumstances of each case. The court is required to be satisfied about the state of mind of the person making the statement. Hence, even if it is not recorded by the Magistrate or even if it does not contain the endorsement showing the examination by the Doctor, if the person recording it satisfies himself about the condition of the deceased and if it is found to be truthful it can be accepted by the court.

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37. In the case of *State* v. *Singari*, reported in (2002) 6 KLJ 52, the dying declaration came to be challenged before the Division Bench of the Karnataka High Court, as it did not contain the doctor's certificate in the prescribed form, regarding the fitness of the victim to make the statement. It was held that where the dying declaration can inspire confidence in the court's mind with regard to the veracity and credibility and also the acceptability of the dying declaration, a mere technical lapse would not water down its evidentiary value. In that case the dying declaration was accepted even in the absence of a doctor's certificate. Conviction on that basis was held to be correctly made. In that case the incident took place on 25/04/1994. The deceased died of gunshot injuries on 27/04/1994. He had stated about the three accused in his statement, which came to be recorded after the duty doctor's sanction was taken by the police officer. The Doctor had examined the patient and opined that he was in a sufficiently fit condition to make a statement. The dying declaration did not contain the requisite certificate in the prescribed form. The contention that the doctor's certificate should have been superscribed on the dying declaration by the Doctor's endorsement was rejected.

38. The Hon'ble Supreme Court had held that where the recording of dying declaration would inspire confidence in the mind of the court about the veracity, credibility and acceptability of the dying declaration, mere absence of the certificate was not a good enough technical lapse to reject the dying declaration.

39. In the case of the *Vidhya Devi* v. *State of Haryana*, reported in (2004) 9 SCC 476 : AIR 2004 SC 1757, the dying declaration recorded by a police officer and endorsed by a Doctor came to be accepted, even though no further dying declaration was recorded by the Magistrate during the four days when the deceased lived, after her dying declaration was recorded. In that case the deceased had stated that her husband, father-in-law, mother-in-law, sister-in-law and brother-in-law had tortured her in respect of dowry. She had earlier lodged a written complaint with the police. On 16.11.1993 at about 10 : 30 AM when her husband and father-in-law were away, her mother-in-law, brother-in-law and sister-in-law set her ablaze. Her mother shifted her to the hospital. The medical officer sent information to the police station. The police arrived in the hospital. The medical officer initially opined that the victim was not in a fit position to make the statement. Later in the evening, the police once again contacted the Medical officer with a written request. That time the Doctor opined that she was fit to make the statement. Before the police officer recorded the statement of the victim, the Magistrate was contacted. He refused to record any statement before the case could be registered. Hence the police officer himself recorded her statement. In the statement she made a

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complaint of dowry demands against the whole family. She complained about only three of her family members with regard to setting her on fire that day. She ultimately expired on 20-11-1993. The prosecution relied upon the FIR which was registered as a dying declaration. It was contended that the dying declaration recorded by the police officer on 17/11/1993 could not be accepted, as she was not in a fit and proper condition to give a statement and the dying declaration was recorded by the police officer. Since it was seen to have been recorded on obtaining the opinion of the doctor, it was signed by the deceased and hence was held by the Court not to have suffered from any infirmities.

40. In the case of the *Tejram s/o. Ukandrao Patil* v. *State of Maharashtra*, reported in 2009 ALL MR (Cri) 1047, it was held that though the dying declaration was not recorded by the Special Magistrate, it could be accepted if it was otherwise reliable. In that case the accused came home in a drunken condition and seeing his mother-in-law in the house he went into a rage, abused his wife and her mother and poured kerosene over his wife and set her on fire. Her mother, as well as the landlady who intervened, both tried to save her. In the process they all sustained injuries. The Special Judicial Magistrate recorded the dying declaration of the mother-in-Law, but not of the wife. The wife's statement was recorded by the police officer who failed to obtain the medical fitness certificate from the Doctor regarding her physical and mental condition. Despite the absence of these two important facts, upon considering the evidence as a whole and placing reliance upon the case of *P.V. Radhakrishnan* v. *State of Karnataka*, (2003) 6 SCC 443 : AIR 2003 SC 2859 and *Laxman* v. *State of Maharashtra*, (2002) 6 SCC 710 : AIR 2002 SC 2973, the dying declaration of the wife showing homicidal death came to be accepted.

41. The observations of the Supreme Court in *Laxman's case* (supra) that the dying declaration could be recorded by the Magistrate, a doctor or a police officer were taken into account. The observations of the Hon'ble Supreme Court that there was no legal impediment in admitting the dying declaration recorded by the police officer would guide us in this case also in accepting the dying declaration of Khagen Barman. Consequently, as held in that case, we are satisfied that we can accept his dying declaration also though it was not recorded by the Magistrate, if the other facts and circumstances of the case reflected its truthfulness and authenticity. In such circumstances there would be no legal impediment to make it the basis of conviction.

42. Before we revert to the facts of this case, we may refer to the judgment in the case of *Subash Sony* v. *State of Madhya Pradesh*, reported in (2009) 6 SCC 647, which has laid down the requirements for acceptance of a dying declaration thus:

1. Dying declaration does not necessarily require corroboration.

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2. If it is true and voluntary it can be accepted even without corroboration to be a basis for conviction.
3. The court is to scrutinise the dying declaration carefully to observe whether the deceased was in a fit state to make the declaration.
4. If it is suspicious it should not be acted upon without corroborating evidence.
5. If the deceased was unconscious and could not have made it, it should be rejected.
6. A dying declaration which suffers from infirmity cannot form the basis of conviction.
7. It has not to be rejected merely because it does not contain all the details of the occurrence.
8. It has not to be discarded merely because it is brief. The court normally looks up to the medical opinion as to see the fit medical condition of the deceased, but an eye witness account stating that the deceased was in a fit mental condition could be accepted over the medical opinion.
9. If the prosecution version differs from the dying declaration, the dying declaration could not be accepted.
10. Whenever more than one statement is made, the first in time was to be preferred. However if a plurality of the dying declaration is shown to be trustworthy and reliable, it had to be accepted.

43. In that case a doctor drove the deceased to the hospital in his car. He deposed that he heard the deceased replying to his friend the names of his assailants. The Doctor was an independent witness. His deposition was accepted. The deceased was injured in the leg and thigh. It was observed that lack of consciousness would be progressive. Hence, the oral statement made before reaching the hospital was accepted.

44. In the light of the aforesaid legal propositions, the statement of the witnesses are to be considered to arrive at a decision whether the dying declaration made by the deceased is trustworthy or not. According to P.W.2, he had received information regarding injury sustained by the deceased that he was admitted at GMCH, Guwahati. He went to the hospital and found his cousin brother i.e. the deceased undergoing treatment in the emergency ward. On being asked, the deceased disclosed that Anurag Goswami, who came to S. Tel office Pvt. Ltd. Company office at Monal tower, attempted to commit theft of computer sets but the deceased stopped him and thereupon, he was assaulted by him with a stick plate and an empty bottle of wine. The accused Bimol Bonia also assaulted the deceased with an empty wine bottle.

45. From the evidence of P.W. 2, it reveals that at that time he i.e.

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deceased was in conscious state of mind and P.W.2 also noticed injuries on his head and others parts of his body. P.W.2 also stated that at the time of narration about the incident in detail by the deceased, his relatives Champak Majumder, Puna Majumdar and Hitesh Barman; two private security in-charges; two police personnel were also present. Though, P.W.2 was cross-examined by the defence, no question was raised regarding the mental condition of the deceased, except a suggestion put to P.W.10 that the deceased was not in a sound physical and mental condition to speak about the incident to P.W.2, which was denied.

46. According to P.W.9, on receipt of an information regarding the incident which occurred in the first floor of the Monal Tower, he went to the place of occurrence and found the deceased in an injured condition and he immediately recorded the statement of Khagen Barman. At that time, the O/C, Dispur police station reached the place of occurrence along with his staff and on his instruction, he took the injured to the hospital for treatment. The statement of the deceased was recorded at the place of occurrence vide Ext.13, but from the Ext.13 it reveals that the statement of the deceased was recorded at GMCH at 8 p.m. on the day of the incident. The incident occurred on 25.11.2012. The evidence of P.W.9 was recorded on 24.04.2017 i.e. after 5 years of the incident. Naturally P.W.9 was not in a position to recollect the exact place where he recorded the statement of the deceased, but in his cross-examination P.W.9 stated that at that time in the hospital, the deceased was in his senses, which implies that the deceased in a fit state of mind to narrate the incident.

47. From Ext. 13 it also reveals that he brought the deceased to GMCH and issued requisition for providing treatment. After questioning the injured person in connection with the case, he recorded the statement of the deceased which reads as under-

> *"I am working as a security guard in a private company called S. Tel situated at Monal Tower. At about 6 a.m. today, i.e. on 25.11.12, while I was on my duty, one boy by name Anurag Goswami came along with another boy. Earlier, Anurag Goswami was a security guard at S. Tel Company. At present, he doesn't work here. I know him. Anurag Goswami tried to take away the computer which was there inside the office. When I resisted him, Anurag Goswami and his companion assaulted me with iron pipe and rod which were there inside the office. I sustained grievous wound on my head. As I fell down on the ground, Anurag Goswami and his companion fled from the spot. When I somehow went upstairs and knocked at the door of a office, the people of that office came out and informed 108 ambulance service."*

48. What transpires from the statement recorded by P.W.9 and the

evidence of P.W2 is that there is no material difference between the oral and the written dying declaration of Khagen Barman(deceased). It is true that in Ext.13 the deceased stated the name of Anurag Goswami and another person, but according to P.W.2 the deceased stated the name of Anurag Goswami and Bimol Bonia, who assaulted him with an iron pipe and an empty wine bottle. It appears from the medical evidence that the deceased sustained 14 number of injuries on his person. It also transpires that not only the present appellant, but the other person also assaulted the deceased causing several injuries on the person of the deceased. However, as the other accused Bimol Bonia was acquitted by the learned trial court and there is no appeal preferred by the State against his acquittal, we have nothing to say at this stage whether the acquittal was right or wrong.

49. Another point to be noted herein is that after the occurrence of the incident, the CID inspector visited the place of occurrence, took the photographs and the finger prints from the place of occurrence, which matched the finger prints found in the place of occurrence with the present appellant, which cannot be overlooked.

50. The accused/appellant has examined one witness i.e. D.W.1 Nihar Jyoti Goswami who is the brother of the appellant. From his deposition, it reveals that on 26.11.2012, police came to their house from Narayanpur police station in search of his younger brother i.e. the appellant and he told them that he was not at home. The police told him that there had been an incident of fight and assault in Guwahati. Then he told the police that his brother came from Guwahati on 22.11.2012. He then brought his brother to the police station and police arrested him and brought him to Guwahati.

51. In his cross-examination, D.W.1 replied that his brother was working at S. Tel office for about one year. He was all along residing at Narayanpur. He did not know what had happened in Guwahati. He came to know about the incident only when police came to his house.

52. By examining the witness D.W.1, the appellant tried to prove that he was not present on the spot when the incident took place. Though D.W.1 was examined to prove the appellant's plea of alibi, it was not proved that he was at his home at Lakhimpur since 22.11.2012. No independent witness like any neighbour etc. was examined to prove the plea of alibi that they had seen the appellant in Lakhimpur on the date of incident. It also reveals that when the statement of the appellant was recorded under Section 313 Cr. P.C., he did not utter a single word that he was not present on the spot and he was at Lakhimpur in his house on the date of incident and he was there at Lakhimpur since 22.11.2012. In his statement under Section 313 Cr. P.C., the appellant only alleged that he has been wrongly arrested by police. He took the plea that he did not know anything about the

incident and that all the evidence against him were false.

53. Apparently, the plea of alibi is not proved beyond reasonable doubt. Apart from that, the appellant himself was not examined to prove the plea of alibi. Under such backdrop, it cannot be said that the accused/appellant was not present in the place of occurrence on the day of incident i.e. 25.11.2012.

54. We shall now examine whether the approach made by the learned Sessions Court, in judging the guilt of the appellant on the premise that the acquitted person also participated in the offence has resulted in any error.

55. The powers of the appellate court in dealing with an appeal against an order of conviction is defined under Section 386(1)(b) of the Criminal Procedure Code, 1973 corresponding to Section 423(1)(b) of the Code of 1898. In the matter of appreciation of the evidence, the powers of the appellate court are as wide as that of the trial court. It has full power to review the whole evidence. It is entitled to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused.

56. In *Sunder Singh* v. *State of Punjab* reported in AIR 1962 SC 1211, *it was held that the provisions of Section 423(1)(a) do not create a bar against the appellate court considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who are convicted. In considering the evidence as a whole, the appellate court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the appellate court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality.*

57. The general principle of criminal liability is that it primarily attaches to the person who actually commits an offence and it is only such person that can be held guilty and punished for the offence. Sections 34 and 149 of the Penal Code deal with the liability for constructive criminality. Section 149 creates a specific offence and postulates an assembly of five or more persons having a common object. Section 34 has enacted a rule of coextensive culpability when offence is committed with common intention by more than one

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accused. The offence of criminal conspiracy punishable under Section 120-B IPC, consists in the very agreement between two or more persons to commit a criminal offence. Before these Sections can be applied, the court must find with certainty that there were at least two persons sharing the common intention of five persons sharing the common object of two persons entering into an agreement. The principle of vicarious liability does not depend upon the necessity to convict a requisite number of persons; it depends upon proof of facts beyond reasonable doubt which makes such a principle applicable.

58. In the case of *Harshadsingh* v. *State of Gujarat*, (1976) 4 SCC 640 : AIR 1977 SC 710, it was held that *if some out of several accused are acquitted but the participating presence of plurality of assailants is proved, the conjoint culpability of the crime is inescapable. When more persons than one are prosecuted and one of them is convicted and others are acquitted, the order of acquittal cannot be set aside unless an appeal has been duly preferred in that behalf against the said order. But there is no bar to the appellate court acting under Section 386 of the Code of Criminal Procedure to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. The evidence examined as a whole may show that the appellant is guilty under Section 34 of the Penal Code, 1860 having shared a common intention with the other accused who are acquitted and the acquittal of these persons was bad. There is nothing in law to prevent the appellate court from expressing that view and recording that finding. The conviction of the appellant in such a case could be maintained on the basis of that finding. This is the correct legal approach to prevent miscarriage of justice. A wrong and erroneous order of acquittal though irreversible in the absence of an appeal by the State would not operate as a bar in recording constructive liability of the co-accused when concerted action with common intention stands proved.*

59. In *Sunder Singh case* (supra), four persons were tried for offence under Section 302/34, IPC. The Sessions Judge gave the benefit of doubt to Rachpal Singh and acquitted him, but convicted the other three of the offences charged. No appeal was preferred against the acquittal of Rachpal Singh. But the three convicted persons appealed to the High Court. The High Court held that Rachpal Singh was present at the scene of occurrence and all the four accused had the common intention alleged by the prosecution. The appellants in that case contended before the Supreme Court that the High Court had no jurisdiction or authority to embark upon an enquiry into the propriety or validity of the acquittal of Rachpal Singh and that its finding that Rachpal Singh had taken part in the offence as alleged by the prosecution had introduced serious infirmity in the judgment of the

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High Court. It was pointed out that when the High Court considered the criticism against the prosecution evidence based on the assumption that the said evidence was found to be unreliable in so far as Rachpal Singh is concerned, it was not appreciating that evidence with a view to reverse the order of acquittal passed in favour of Rachpal Singh; it was appreciating evidence only with a view to decide whether the said evidence should be believed against the appellants before it and observed thus-

> "Indeed, as an appellate court, the High Court has to consider indirectly and incidentally the evidence adduced against an accused person who had been acquitted by a trial court in several cases where it is dealing with the appeals before it by the co-accused persons who had been convicted at the same trial and in doing so, the High Court and even this Court sometimes records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that acquittal may in that sense be regarded as unjustified."

60. These observations indicate that the High Court is entitled to evaluate the prosecution evidence and arrive at its own conclusion. Such assessment is for the limited purpose of determining whether the infirmity which led to the acquittal of one of the accused persons could be availed of by the other accused who had been convicted. On re-examination of the evidence the appellate court is free to reach its own conclusion which may be contrary to the one reached by the trial court while acquitting the co-accused. It can certainly come to an independent finding that evidence against the acquitted accused was satisfactory and could not have been discarded. On the basis of such a finding, the appellate court does not proceed to disturb the order of acquittal which has become final. It can certainly consider the impact of its conclusion on the case of the appellant before it. If on the evidence, the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of Section 34 is legal. It would be a travesty of justice if no conviction can be founded with the aid of Section 34, notwithstanding the finding that the acquitted person was in fact one of the participants in the offence.

61. The question whether conviction under Section 120-B is maintainable in view of the fact that the alleged co-conspirators have been acquitted was considered in *Bimbadhar Pradhan* v. *State of Orissa*, reported in 1956 SCR 206. In that case, *the appellant and his four companions were charged with criminal conspiracy under Section 120-B IPC. All the four co-accused were acquitted, but the appellant alone was convicted. The Court found that the conviction can be supported as the approver was one of the co-conspirators. It was*

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argued that the approver was not named in the charge and, therefore, the appellant was entitled to acquittal. The Court held as under-

> *"Learned counsel for the appellant pressed upon us the consideration that notwithstanding the state of affairs as disclosed in the evidence, the appellant was entitled to an acquittal because in the charge as framed against him there was no reference to the approver. He contended that the rule upon which the accused was entitled to an acquittal was not a matter of practice but of principle. In the instant case we are not sure that the acquittal of the co-accused by the trial court was well founded in law or justified by the evidence in the case. The trial court has not disbelieved the evidence led on behalf of the prosecution. It has only given the benefit of the doubt to the accused whom it acquitted on grounds which may not bear scrutiny. But as the case against those acquitted persons is not before us, we need not go any further into the matter."*

62. In the case In *Marachalil Pakku* v. *State of Madras*, AIR 1954 SC 648, two appellants were charged and convicted along with five others for having constituted an unlawful assembly and committed murder under Section 302 read with Section 149 IPC. In appeal before the High Court, five accused were given the benefit of doubt and acquitted. Before the Court in appeal, it was contended that the said five accused having been acquitted and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held to be members of the unlawful assembly which had the common object. The Hon'ble Supreme Court after reviewing the evidence and weighing the judgment of the High Court held that there was no scope left for introducing into the case the theory of benefit of doubt, and the High Court was in error in acquitting accused 3 to 7, and that though the acquittal stands, that circumstance could not have affected the conviction of the appellants under Section 302 read with Section 149. Where in very firm language a finding has been given that seven persons took part in the crime, the conviction of the two appellants for murder under Section 302/149 was held fully justified.

63. Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates from the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing

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the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34.

64. In the case of *Sukh Ram* v. *State of U.P.*, reported in (1974) 3 SCC 656 : (1974) 2 SCR 518, it was held that *in view of the unambiguous evidence tendered by the prosecution in the Sessions Court, no prejudice can be said to have been caused to the appellant by reason of his conviction under Section 302 read with Section 34, IPC, even though the two other accused specifically named in the charge had been acquitted. The High Court was certain that there were three culprits and the appellant was one of them. It is clear that notwithstanding the charge, the acquittal of the two accused raised no bar to the Conviction of the appellant under Section 302 read with Section 34 IPC.*

65. The authorities cities above thus show that it is not essential that more than one person should be convicted of the offence and that Section 34 Penal Code, 1860 can be invoked if the Court is in a position to find that two or more persons were actually concerned in the criminal offence sharing a common object. Where the evidence examined by the appellate court unmistakenly proves that the appellant was guilty under Section 34, having shared a common intention with the other accused who were expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding.

66. We have noticed the series of decisions where the view held is that when a definite number of known persons were alleged to have participated in the crime and all except the appellant were acquitted, the appellant alone cannot be convicted under Section 34 I.P.C. and he would be liable only for his individual act of assault, [(*Probhu Babaji Navle* v. *State of Bombay*, AIR 1956 SC 51; *Krishna Govind Patil* v. *State of Maharashtra*, (1964) 1 SCR 678; *Baul* v. *State of U.P.*, (1968) 2 SCR 450 (454); *Maina Singh* v. *State of Rajasthan*, (1976) 2 SCC 827 : (1976) 3 SCR 651; *Karnail Singh* v. *State of Punjab*, (1976) 4 SCC 816 : AIR 1977 SC 893 and *Piara Singh* v. *State of Punjab*, (1980) 2 SCC 401.]

67. In view of the aforesaid discussion, we are of the view that the learned Sessions Court was justified in convicting the accused/appellant under Section 302 IPC, which is therefore maintained. Regarding the acquittal of other accused, there is no appeal preferred by the State Government. Under such a backdrop, we are not in a position to reverse the acquittal of the co-accused in absence of a State appeal.

68. In the result, the appeal is dismissed.

69. Send down the LCR.

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† Principal Bench at Guwahati

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