

2023 SCC OnLine Gau 808 : (2023) 3 Gau LR 701 : (2023) 3 GLT  
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In the High Court of Gauhati  
(BEFORE MICHAEL ZOTHANKHUMA AND MALASRI NANDI, JJ.)

Ashok Murah ... Appellant;

*Versus*

State of Assam ... Respondent.

Crl. A. No. 38(J) of 2018

Decided on March 9, 2023

Penal Code, 1860, S. 302 — Appellant assaulted the deceased — Deceased later succumbed to his injuries — Dying declaration made by the deceased found to be truthful, voluntary and correct — Deceased was attacked on his head repeatedly from behind with a dao, with the allegation being made by the appellant that the deceased had eloped with the wife of the appellant and had taken his son with them — Premeditation and motive on the part of the appellant to kill the deceased — No infirmity in the decision of the trial court in convicting the appellant under section 302, IPC — Appeal dismissed.

[Para 22 and 33]

Criminal Trial — Dying declaration — Oral dying declaration can form the basis of conviction, if the maker of the same was in a condition to speak, provided it is truthful and correct — Not mandatory that there should be corroboration to an oral dying declaration though as a matter of prudence, courts should look for corroboration to an oral dying declaration

Criminal Trial — Dying declaration — Dying declaration, which does not contain the signature or thumb impression of the deceased, can be believed and relied upon for the purpose of convicting an accused, provided the said dying declaration is true, made voluntarily and inspires the confidence of the court — Dying declaration recorded by the doctor — Doctor by way of an inference and/or impliedly certified in his cross-examination that the deceased was in a condition to speak and give the dying declaration — Dying declaration can be relied upon.

[Para 31]

Criminal Trial — Discrepancies found in the ocular account of the witnesses

unless they are so vital, cannot affect the credibility of the evidence of the witnesses.

[Para 24]

Advocates who appeared in the case:

Mr. B. Nath for the appellant.

Ms. S. Jahan for the respondent.

*Cases referred : Chronological*

*Balbir v. Vaxir*, (2014) 12 SCC 670.

*Parbin Ali v. State of Assam*, (2013) 2 SCC 81.

*Sukanti Moharana v. State of Orissa*, (2009) 9 SCC 163.

*Babu Lal v. State of Madhya Pradesh*, (2003) 12 SCC 490.

*Laxman v. State of Maharashtra*, (2002) 6 SCC 710.

*State of U.P. v. Naresh*, (2011) 4 SCC 324.

*Leela Ram (Dead) through Duli Chand v. State of Haryana*, (1999) 9 SCC 525.

*Paniben v. State of Gujarat*, (1992) 2 SCC 474.

The Judgment of the Court was delivered by

MICHAEL ZOTHANKHUMA, J.:— Heard Mr. B. Nath, learned amicus curiae. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State.

2. This appeal has been filed against the impugned judgment and order dated 24.1.2018 passed by the learned Additional Sessions Judge, Dibrugarh, in Sessions Case No. 60/2015, by which the appellant has been convicted under section 302, IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 10,000, in default, to undergo further simple imprisonment for 6 months.

3. The Prosecution case in brief is that an FIR dated 11.1.2012 had been lodged by PW-8, who was the Acting Manager of Green Wood Tea Estate to the Officer In-charge, Mohanbari Police Outpost under Lahoal Police Station. The FIR stated that it had been reported by the Line Chowkidar, PW-1 that Samaru Karmakar (deceased) had been assaulted by the appellant on 10.1.2012 at 4 : 30 p.m. The deceased was immediately shifted to Garden Hospital and from there he was referred to Assam Medical College & Hospital (AMCH) Dibrugarh. At 3 : 30 a.m., he was declared dead.

4. Pursuant to the FIR, Mohanbari GDE No. 183 and Lahoal P.S. Case No. 3/2012 under section 302 were registered. The Investigating Officer after completion of his investigation filed a charge sheet, as he found a prima facie case under section 302, IPC against the appellant.

5. Charge was framed under section 302, IPC against the appellant, to which the appellant pleaded not guilty and claimed to be tried.

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6. Thereafter, 9 Prosecution witnesses were examined by the learned trial court. After examination of the appellant was done under section 313, Cr. P.C., the impugned judgment and order was passed by the learned trial court.

7. The learned amicus curiae submits that the appellant has been found guilty of the crime only on the basis of the dying declaration of the deceased, which does not contain the date and time when the said dying declaration was recorded. Also the deceased did not give his signature or thumb impression on the alleged recorded dying declaration. He further submits that the evidence of PW-1 is to the effect that the deceased had died in the Tea Garden Hospital and the dead body of the deceased had been taken to the AMCH, Dibrugarh. He also submits that the Inquest Report, which was exhibited as Ext.I, would prove the deceased died in the Tea Garden Hospital. He also submits that the Doctor, PW-6, had stated in his cross-examination that the dying declaration was recorded in the operation theatre, while PW-7, who is a Naik in the Assam Police' had stated that the dying declaration was recorded by the attending doctor in the general ward of the ENT Department. He, thus, submits that the place where the dying declaration was made is not clear from the above deposition of the prosecution witnesses. Accordingly, there is no proof that the dying declaration was actually made and if it was made, the dying declaration has been made under suspicious circumstances. Thus, the same cannot be regarded to be truthful and voluntary. It cannot also be made the basis for convicting the appellant.

8. Ms. S. Jahan, the learned Additional Public Prosecutor, on the other hand submits that though there appears to be a discrepancy in the evidence of PW-1, vis-a-vis the evidence of the other prosecution witnesses, with regard to whether the deceased had died prior to reaching the AMCH, Dibrugarh, the evidence of the other witnesses clearly proved that the deceased had been attended to in AMCH, Dibrugarh and that he had given his dying declaration in AMCH, Dibrugarh, prior to his death. She also submits that the fact that the appellant was the perpetrator of the crime is proved due to the dying declaration made by the deceased. Further, the weapon used in the crime, i.e., Dao, was also seized from the house of the appellant. She

also submits that the dying declaration was recorded by the Doctor, who had attended the appellant in the Dibrugarh Hospital. As the Doctor was not an interested witness, there is no reason to doubt the veracity of the dying declaration recorded by him. The learned Additional Public Prosecutor submits that as the dying declaration of the deceased has categorically pointed out that the appellant had attacked him with a Dao, causing injuries which ultimately led to the death of the

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deceased, the impugned judgment and order should not be interfered with.

9. We have heard the learned counsels for the parties.

10. PW-1, in his evidence has stated that he was the Chowkidar of Green Wood Tea Garden and the deceased was a labourer in the Garden. The appellant was also a worker in the Tea Garden. While working in the Tea Garden Office at around 5 p.m. on the date of incident, PW-1 was informed by his wife that the deceased was lying near their house. PW-1 informed the Manager PW-8, who took the deceased to the Tea Garden Hospital in his vehicle. Thereafter, PW-1 came to know that the deceased had died around 3 : 00 a.m.

11. PW-2, who is the wife of PW-1 in her statement under section 161, Cr. P.C. states that the deceased came to her house in search of her husband. However, as her husband was not there, she gave him a chair to sit and the deceased told her that he would wait for her husband, i.e., PW-1. PW-2 then said that she was cooking rice at that point of time. After some time the appellant came. There was a quarrel and then she heard someone shouting "I am dying". She came out and saw the deceased lying injured. Then she went and informed her husband.

However, in her evidence before the learned trial court, PW-2 states that while cooking food at around 5 p.m. in her house, she went outside to throw dirty water. She saw the deceased falling down on the road and despite calling him, the deceased did not respond. Being frightened she went to the office to inform her husband, who in turn informed the Manager. The Manager thereafter took the deceased to the hospital in his vehicle. PW-2 further states that she came to know the next morning that the deceased had died.

It may be mentioned that the statement recorded by the police under section 161, Cr. P.C. are not evidence for prosecution and they can be used by the defence for contradicting the prosecution witnesses.

12. PW-3, who is a Welfare Staff, in his evidence has stated that while he was in his Tea Garden Office in the afternoon, he heard that a quarrel had taken place between the deceased and the appellant. The Manager of the Garden informed the police and the police came to their garden. Thereafter PW-3 went with the police to the house of the appellant. The police took the appellant and also seized one Dao from the house of the appellant. PW-3 was also made a seizure witness. In his cross-examination, PW-3 states that the Dao resembling the seized Dao is found in every household. He also denied the suggestion that a quarrel

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had not taken place between the appellant and the deceased. However, no evidence was given by any person to show from whom PW-3 had heard that there was a quarrel between the appellant and the deceased.

13. PW-4, who is a Doctor working as the Assistant Professor in the Department of Forensic Medicine, AMCH, Dibrugarh, states in his evidence that on 11.1.2012 he conducted the Post Mortem Examination on the dead body of the deceased, which was brought from the Surgical Unit No. II. He also states that his finding in the Post Mortem Examination was that there were injuries which had been stitched and there was a cut in his scalp. The opinion of PW-4, on the cause of death of the deceased, was that it was due to haemorrhagic shock, as a result of injuries sustained which were ante-mortem and caused by sharp cutting weapon. The relevant extract of the Post Mortem Report is reproduced herein below:

*"Injury:*

1. Stitched wound over the right angle bendible with 6 sithearat 8 cm obliquely placed with dark present. On opening one incise wound of 9 cm length, clean-cut margin present, muscle cut vessel cut.
2. Incised wound of 6 cm vertical present of 90.5 cm muscle deep 3 cm from tip of shoulder (right) redish in colour.
3. Stitched wound four Nos. stitch of 6 cm length over left parietal bone, obliquely placed, on opening incised wound clean-cut with neck over parietal bone, redism.
4. Stitched wound of 12 Nos. stitch 21 cm in length extending from left back of neck to the front of the head 3 cm from left ear, on opening one incised wound clean cut, muscles, scalp present.

*Examination of Cranium and spinal canal:*

*Scalp*— white haenotona present in the scalp. *Skull*— Left parietal bone cut over outerpart. Left side of bone clean cut over mastoid bone and bone of middle cranoid fossa dean cut. Vertabre healthy. Brain and membrane pale, cleancut over left side of mastoid region. Spinal cord not dissected. Wallsribs and cartilages healthy. Pleurae, larynx and trachea pale. Heart pale and empty.

*Opinion:*

Death is due to haemorrhagic shock as a result of injuries sustained as described. All injuries are antemorem and caused by sharp cutting weapon. Homicidal in nature. Injury No. 4 is independently sufficient to cause death of a person in the ordinary course of nature. Time since death approximately 4-6 hours. Ext. 3 is the post mortem examination report."

14. PW-5 states that the deceased was his nephew and that he came to

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learn that the deceased was in Dibrugarh Hospital due to illness. On reaching AMCH, Dibrugarh, he found the deceased being kept covered with a white cloth. At this stage, the prosecution declared PW-5 as a hostile witness. In his cross-examination, PW-5 denied having made the statement to the police, which is as follows:

"Deceased Somaru Karmakar was my brother (relative). He died last night at AMCH. Yesterday, Ashok Mura, a resident of the same 'Line' grievously injured him (Somaru) by hacking him with a dao while he (Somaru) was sitting in the house of the 'Line' chowkider as a result of which he died. Ashok Mura had inflicted cut injuries to Somaru yesterday because Somaru had eloped with Ashok's wife a year ago and had also taken their son along".

15. The evidence of Dr. Pankaj Kumar Roy, PW-6, who was working as a Post Graduate Trainee in the E.N.T. Department of the AMCH, Dibrugarh was that he was on emergency duty on 10.1.2012. He states that the deceased was sent from Casualty Department to ENT Department. As the condition of the deceased was serious, Dr. Chandamita Pathak, the Registrar of the Department gave information to the Borbari Police Outpost, whereupon police personnel from the outpost came and requested him (PW-6) to record the dying declaration of the deceased. Accordingly, PW-6 recorded the dying declaration of the deceased.

The dying declaration was exhibited as Ext. 5 and his signature was

exhibited as Ext. 5(1). He also states that the deceased was given treatment in the AMCH, Dibrugarh and had been given Registration No. ML.210/12. In his cross-examination, PW-6 stated that there was no mention in Ext. 5 that the deceased was of sound mind at the time of recording Ext-5. PW-6 also states in his cross-examination that the dying declaration was recorded in the operation theatre and stitching of the injuries was done by the Dr. Chandamita Pathak and himself. At that time Dr. Nabajyoti Saikia had also come there and was present at the time of recording of the dying declaration. He also states that Exbt.5 was recorded as told to him by the deceased. He also states that from the operation theatre the injured was shifted to the ICU. PW-6 has also denied the suggestion that the deceased was not in a condition to speak or that the contents of the dying declaration were not stated by the deceased. PW-6 however states that there was no signature or thumb impression of the deceased on the dying declaration.

16. PW-7, who is a Naik in the police at Barbari Outpost, states in his evidence that information being received from Dr. Pathak, the In-charge of the outpost had sent ASI Basanta Bora to the Medical College and he

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accompanied ASI Basanta Bora. As the condition of the deceased was serious, the Doctor recorded the statement of the injured (deceased) in their presence. PW-7 also states that he put his signature on the dying declaration as a witness. PW-7 in his cross-examination states that the dying declaration was recorded by the attending doctor in the General Ward of the ENT Department. He also denies the suggestion, that the dying declaration was not recorded as per the statement given by the injured (deceased).

17. The evidence of PW-8, who is the Acting Manager of Green Wood Tea Estate is to the effect that at around 4 p.m., PW-1 informed him that the appellant had assaulted the deceased. Thereafter the deceased was brought to the Garden Tea Hospital, from where he was referred to the AMCH, Dibrugarh for better treatment. He also states that he had submitted the FIR. In his cross-examination, PW-8 denies the suggestion that PW-1 did not inform him that the appellant had assaulted the deceased.

18. The evidence of PW-9, who is the I.O. of the case, is to the effect that he found the appellant in his house and the appellant had shown him the Dao which was used to assault the deceased. He also states that after finding sufficient material against the appellant, charge sheet


was filed under section 302, IPC. The weapon (dao) was also exhibited in the court. In his cross-examination, PW-9 states that he did not examine the doctor from, Green Wood Tea Estate Hospital, who had given first aid to the deceased. He also denied the suggestion that the appellant did not admit before him and that he had killed the deceased.

19. The appellant, during his examination under section 313, Cr. P.C., has made a blanket denial of having committed the offence and taken the stand that the allegation made against him was false and he was innocent.,

20. At the outset, it is noticed that while PW-1 did not state in his evidence that he had seen the appellant assaulting the deceased, the evidence of PW-8, who was the Acting Manager of Greenwood Tea Estate, is to the effect that PW-1 had informed him that the appellant had assaulted the deceased.

21. PW-5, during cross-examination, states that he did not make any statement before the police under section 161, Cr. P.C., which was allegedly to the effect that the appellant had inflicted cut injuries on the deceased, because the deceased had eloped with the wife of the appellant a year ago and they had also taken the son of the appellant along. The evidence of PW-8 implies that there was an eyewitness to the incident, as he had

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been informed by PW-1 that the appellant had assaulted the deceased. However, PW-1 is silent on this aspect, even though the PW-2 (wife of PW-1) saw the deceased falling down on the road.

22. A perusal of the inquest report which is exhibited as Ext. 1 shows that the same had been made at AMCH, Dibrugarh on 11.1.2013 at 3 : 00 p.m. Though the PW-1 had stated that the deceased had died in the Tea Garden Hospital, the evidence of PWs-4 and 6, who are both doctors and who had treated the deceased in AMCH, Dibrugarh, along with the evidence of PWs-5, 7, 8 and 9, clearly shows that the deceased had died in AMCH, Dibrugarh. Though there is some discrepancy as to the room in which the deceased died in AMCH Hospital, the fact remains that the deceased had died in AMCH Hospital and had been attended to by PWs-4 and 6. Besides the discrepancy with regard to which room the deceased died in within the AMCH, Dibrugarh, there is some discrepancy with regard to the time the crime was committed. On considering the evidence of the prosecution witnesses, we are of the view that minor inconsistencies can happen due to the fact that the evidence of the witnesses were taken more than 3 to 5<sup>1</sup>/<sub>2</sub> years after



the occurrence of the incident, by which time some facts might have become hazy. However, we find that there is nothing to doubt the credibility of the witnesses and the discrepancies could be due to errors in memory, due to lapse of time. The same however does not affect the core of the prosecution case. As such, we find that the minor inconsistencies are not fatal to the prosecution case.

23. In the case of *State of U.P. v. Naresh*, (2011) 4 SCC 324, the Apex Court has held that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

24. In the case of *Leela Ram (Dead) Through Duli Chand v. State of Haryana*, (1999) 9 SCC 525 the Apex Court has held that discrepancies found in the ocular account of the witnesses unless they are so vital, cannot

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affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimensions, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

Thus, on considering the decisions of the Apex Court, we are of the view that the discrepancies in this case do not affect the core of the prosecution case and hence, can be over-looked.

25. A perusal of the dying declaration shows that the time and date of recording of the dying declaration has been made in the said document. However, there is no signature or thumb impression of the

deceased in the said document. Accordingly, the question that is to be answered is whether the said recorded dying declaration can be relied upon as evidence, in the absence of the signature of the deceased. The other question to be answered is whether an oral dying declaration can be used for coming to a finding of guilt against the alleged perpetrator of the crime.

The dying declaration of the deceased is reproduced herein below as follows:

"Assam Medical College & Hospital  
DIBRUGARH  
OUT PATIENT DEPARTMENT

Ext. 5  
Case No. S.C. 60/15  
Sd/-illegible  
Addl. Sessions Judge (F.T.C.)  
Dibrugarh  
Dying declaration of Sumaro  
Karmakar.

At 6 p.m. today while I was sitting in the house of the chowkider, Ashok Mura attacked me with a dao thereby injuring me. Ashok Mura repeatedly attacked me on my head from behind. Ashok alleged that I had eloped with his wife taking his son along.

NK  
240 Molin Borah at 9 p.m.  
10.1.2012, Bonbari OP.

Ext. 5(2)  
Case No. S.C. 60/15  
Sd/-illegible  
Addl. Sessions Judge (F.T.C.)  
Dibrugarh  
28.1.2016  
Ext. 5(1)  
Case No. S.C. 60/15  
Sd/-illegible  
Addl. Sessions Judge (F.T.C.)  
Dibrugarh 17.9.2015

Sd/- illegible  
PGTENT  
10.1.2012

Ext. 6  
Case No. S.C. 60/15  
Sd/- illegible  
Addl. Sessions Judge (F.T.C.)  
Dibrugarh 17.9.2015."

26. In the case of *Parbin Ali v. State of Assam*, (2013) 2 SCC 81, the Apex Court has held that a dying declaration can be oral.

In the case of *Smt. Paniben v. State of Gujarat*, (1992) 2 SCC 474, the Apex Court has held that a dying declaration is entitled to great weight. Once the court is satisfied that the declaration was true and voluntary, it can base its conviction without any further corroboration. It further held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboation is merely a rule of prudence.

27. The Constitution Bench of the Apex Court in the case of *Laxman v. State of Maharashtra*, (2002) 6 SCC 710 made it clear that a dying declaration can be oral or in writing and any adequate method of communication, whether by words or otherwise will suffice, provided the indication is positive and definite. The Apex Court further held that in fact it is the duty of the court to examine a dying declaration with studied scrutiny, to find the truthfulness and correctness and if made in conscious state of mind and further it is without any influence. It further held that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate. What the evidential value or weight has to be attached to

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such statement depends on the facts and circumstances of each particular case. It also held that certification by a Doctor is a rule of caution.

28. In the case of *Babu Lai v. State of Madhya Pradesh*, (2003) 12 SCC 490, the Apex Court held that great solemnity and sanctity is attached to the words of a dying man, because he is not likely to tell lies or concoct a story to implicate an innocent man. The Apex Court in paragraph 7 has stated as follows:

".....A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the

verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his maker with a lie in his mouth" (*nemo moriturus praesumitur mentire*). Mathew Arnold said, "truth sits on the lips of dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

29. In the case of *Balbir v. Vaxir*, (2014) 12 SCC 670, the Apex Court has held that oral dying declaration can form the basis of conviction, if the deponent is in a fit condition to make the dying declaration and if it is found to be truthful and correct. As a matter of prudence, Court looks for corroboration to a oral dying declaration.

30. In the case of *Sukanti Moharana v. State of Orissa*, (2009) 9 SCC 163, the Apex Court held that a dying declaration, which was recorded by a doctor which did not contain the signature or thumb impression of the deceased cannot be disbelieved or not relied upon, if it is found that the dying declaration is true and has been voluntarily made. Paras 32 and 33 of the judgment of the Apex Court in *Sukanta Moharana* (supra) is reproduced below:—

"32. The doctor who recorded the dying declaration was examined as a witness and he had in his deposition categorically stated that the deceased while making the aforesaid statement was conscious and in a fit mental condition to make such a statement. The aforesaid position makes it, therefore, clear that the aforesaid dying declaration could be relied upon as the same was truthfully recorded and the said statement gave a vivid account of the manner in which the incident had taken place.

33. There was another objection raised by the counsel appearing for the appellant regarding the admissibility of the aforesaid recorded dying declaration contending, inter alia, that the signature or the thumb impression of the deceased was not taken on the said dying declaration. The said objection according to us also is without any basis. The deceased had suffered. about 90 to 95 per cent burn injuries covering 90 to 95 per cent body surface. The post mortem

report also indicates that there was bandage in her thumb as it was burnt. In such a situation, it was not possible to take her signature or LTI on the dying declaration. There is also no reason why a dying declaration which is otherwise found to be true, voluntary and correct should be rejected only because the person who recorded the dying declaration did not or could not take the signature or the Left Thumb Impression of the deceased on the dying declaration. Once it is found that the dying declaration is true and made voluntarily and as also trustworthy, there is no reason why the same should not be believed and relied upon. In this case, the said dying declaration is corroborated by the oral dying declaration made by the deceased before EW-1 and PW-3 which is also corroborated by the medical evidence and the facts contained in the FIR.”

31. In view of the various decisions cited above, it is clear that a recorded dying declaration, which does not contain the signature or thumb impression of the deceased, can be believed and relied upon for the purpose of convicting an accused, provided that the said dying declaration is true, made voluntarily and inspires the confidence of the court. In this case', the doctor who recorded the dying declaration was examined as a witness and in his cross-examination, he has stated that it was not mentioned in the dying declaration that the injured was in sound mind at the time of recording the dying declaration. He also denied the suggestion that the deceased was not in a condition to speak at the time of recording the dying declaration. He also denied the suggestion that, the contents of the dying declaration were not stated by the deceased. The above facts clearly show that the Doctor, PW-6, has by way of an inference and/or impliedly certified in his cross-examination that the deceased was in a fit mental condition to make the dying declaration, Besides the doctor, PW-7, who was a witness to the recording of the dying declaration has made a denial in his cross-examination, to the suggestion that the deceased was not, in a position to speak and that the dying declaration was not recorded as per the statement made by the deceased. On considering the fact that the dying declaration had been recorded by a doctor, who was treating the deceased and as the doctor has by way of an inference and/or impliedly certified in his cross-examination that the deceased was in a condition to speak and give the dying declaration, we are of the view that the aforesaid dying declaration can be relied upon.

Further, in the case of *Sukanti Moharana* (supra), the Apex Court has held that there is no reason why a dying declaration, without the

signature or thumb impression of the deceased, if otherwise found to be truthful, voluntary and correct, should be rejected. Accordingly, we hold that the dying declaration made by the deceased was correctly relied upon by the learned trial court for convicting the appellant.

32. Besides the above, an oral dying declaration can form the basis of conviction, if the maker of the same was in a condition to speak, provided it is truthful and correct. Though it is not mandatory that there should be corroboration to an oral dying declaration, as a matter of prudence, courts should look for corroboration to an oral dying declaration. The doctor who recorded the dying declaration is an independent and uninterested witness. There is nothing to show that he would gain anything or would want harm to come to anybody, by speaking the truth. In that view of the matter, we hold that the dying declaration recorded by the Doctor in this case, even in the absence of the signature or thumb impression of the deceased, can be the basis for convicting the accused, as we are satisfied that the declaration was true and had been made voluntarily. We are also of the view that the dying declaration can be relied upon without corroboration.

33. The question whether there was any premeditation on the part of the appellant in killing the deceased, would have to be considered in relation to sections 299 and 300, IPC. For culpable homicide to be murder, the act of the accused would have to come within Firstly to Fourthly of section 300, IPC. Further, it should not come within Exceptions 1 to 5 of section 300. In the present case, the dying declaration of the deceased is to the effect that while the deceased was sitting in the Chowkidar's house, the deceased was attacked on his head repeatedly from behind with a dao, with the allegation being made by the appellant that the deceased had eloped with the wife of the appellant and had taken his son with them. The above shows that there was premeditation and motive on the part of the appellant to kill the deceased. As such, there is nothing to show that the Exception 1 to 5 to section 300, IPC could be attracted to the facts of this case. Accordingly, we do not find any infirmity with the decision of the learned trial court in convicting the appellant under section 302, IPC.

34. The appeal accordingly stands dismissed.

35. Send back the LCR

36. In appreciation of the assistance provided by the learned amicus



curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

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