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SUBHASH SONI & ANR.

v.

STATE OF M.P.

(Criminal Appeal No. 639 of 2008)

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MAY 06, 2009

**[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]**

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Penal Code, 1860 – s. 302 r/w s.34 – Death due to armed assault – PW1's brother found lying injured on the road – Taken to hospital in car of PW4 – On way to hospital, PW4 heard him telling PW1 that appellants had assaulted him with a sword – Death of PW1's brother in hospital – Conviction of appellants on basis of dying declaration made by PW1's brother while being taken to hospital – Propriety of – Held: Proper – On facts, the conclusions of Courts below that deceased was not unconscious and was in a position to give name of the assailants while he was being taken to hospital cannot be faulted – PW4, an independent witness, had no reason to falsely implicate the appellants – His statement was categorical – Conviction accordingly upheld.

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Evidence Act, 1872 – s.32 – Dying declaration – Appreciation of – Held: Once the Court is satisfied that the declaration was true and voluntary, it can base conviction on the same without any further corroboration – Rule requiring corroboration is merely a rule of prudence:

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According to the prosecution, PW1's brother was found lying injured on the road whereupon he was taken to the Hospital in the car of PW4 and on way to the Hospital, PW4 heard him telling PW1 that the appellants had assaulted him with a sword. PW1's brother succumbed to his injuries in course of treatment at the hospital.

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Placing reliance on the evidence of PWs. 2 and 3 and the purported oral dying declaration made by deceased, the trial Court convicted the appellants under Section 302 read with Section 34 IPC. The High Court held that the evidence of PWs.2 and 3 was not credible, but by placing reliance upon the purported oral dying declaration, upheld the conviction of the appellants.

In appeal to this Court, it was submitted that after having discarded the version of PWs 2 and 3, the High Court should not have placed reliance on the so-called dying declaration.

Dismissing the appeal, the Court

HELD: 1. Though a dying declaration is entitled to great weight, the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, it can base its conviction on the same without any further corroboration. 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 corroboration is merely a rule of prudence. [Para 5] [142-B-E]

Paniben v. State of Gujarat (1992) 2 SCC 474; Munnu Raja v. State of M.P. (1976 (3) SCC 104; State of U.P. v. Ram

- A *Sagar Yadav* (1985) 1 SCC 552; *Ramawati Devi v. State of Bihar* 1983 (1) SCC211; *K. Ramachandra Reddy v. Public Prosecutor* (1976) 3 SCC 618; *Rasheed Beg v. State of M.P.* (1974) 4 SCC 264; *KakeSingh v. State of M.P.* (1981) Supp. SCC 25; *Ram Manorath v. State of U.P.* (1981) 2 SCC 654;
- B *State of Maharashtra v. Krishnamurti Laxmipati Naidu* (1980) Supp. SCC 455; *Surajdeo Ojha v. State of Bihar* (1980) Supp. SCC 769; *Nanhau Ram v. State of M.P.* (1988 Supp. SCC 152; *State of U.P. v. Madan Mohan* 1989 (3) SCC 390 and *Mohanlal Gangaram Gehani v. State of Maharashtra* (1982) 1 SCC 700, referred to.
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2. In the instant case, it could not be said that while taking the deceased to the hospital, PW1 and PW4 could not have spoken to him or that the deceased was in an unconscious condition. Place of injuries were thigh and leg. Therefore, loss of unconscious can be progressive. Therefore, the conclusions of the trial Court and the High Court that the deceased was not unconscious and was in a position to give name of the assailants while he was being taken to the hospital cannot be faulted. PW4, an independent witness, had no reason to falsely implicate the accused persons. PW4 has categorically stated that he was driving the car himself when he heard the deceased telling PW1, the names of the assailants. PW4 has also stated that there was loss of consciousness for a few minutes whereafter the deceased regained consciousness. Hence, there was no infirmity in the conclusions of the High Court. [Paras 6 and 7] [144-C-G]

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Case Law Reference:

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| G | (1992) 2 SCC 474 | referred to | Para 5 |
| | (1976) 3 SCC 104 | referred to | Para 5 |
| | (1985) 1 SCC 552 | referred to | Para 5 |

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(1983) (1) SCC 211	referred to	Para 5	A
(1976) 3 SCC 618	referred to	Para 5	
(1974) 4 SCC 264	referred to	Para 5	
(1981) Supp. SCC 25	referred to	Para 5	B
(1981) 2 SCC 654	referred to	Para 5	
(1980) Supp. SCC 455	referred to	Para 5	
(1980) Supp. SCC 769	referred to	Para 5	
(1988) Supp. SCC 152	referred to	Para 5	C
(1989) (3) SCC 390	referred to	Para 5	
(1982) 1 SCC 700	referred to	Para 5	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 639 of 2008. D

From the Judgment & Order dated 16.4.2007 of the High Court of Madhya Pradesh at Jabalpur Bench at Indore in Criminal Appeal No. 563/1998.

P.C. Agarwal, Sunil Verma, Sanjay Sharawat for the Appellant. E

Fakhruddin, M.Z. Choudhary, Abdul Karim Ansari, Munnawar Alam Sultana, Raj Kishore Choudhary, Mohd, Irshad Hanif, C.D. Singh and Sunny Choudhary for the Respondent. F

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a Division Bench of the Madhya Pradesh High Court, Indore Bench, upholding conviction of the appellant for offence punishable under Sections 302 read with Section 34 the Indian Penal Code, 1860 (in short the 'IPC'). G

2. Prosecution version, in a nutshell, is as follows:

On 20.9.1995 Anil (hereinafter referred to as the H

A 'deceased') left his house for some work and told his brother Rajendra (PW.1) that he will be returning within 10 minutes. He left the house at 8.30 p.m. Just after 15 minutes of his departure, somebody informed Rajendra (PW.1) that deceased was assaulted with sword. Having heard the news, Rajendra immediately rushed in the direction where the deceased had gone on his motor cycle. He saw a crowd of people in front of Laxmi Market surrounding to deceased who having suffered many injuries on his person lying on the road. At the same time Dr. Komal Chandra Kothari (PW.4) reached near the crowd and on request deceased was taken to Civil Hospital in his car. On the way to Hospital deceased was questioned by Rajendra (PW.1) as to who had assaulted him, deceased replied that accused Ramesh, Subhash and Heeralal had assaulted him by sword. Deceased was admitted in the hospital where he succumbed to the injuries during treatment. The FIR (Ex. P.1) was recorded in the night at 9.40 p.m. Police recorded the statements of two eye witnesses Radhesyam (PW.2) and Prakash Jadhav (PW.3) on 9.10.1995 along with other eye witnesses Manohar @ Babu, Balraj, Premsingh and Satish Shrivastave on 21.9.1995. On 22.09.1995 statements of witnesses Nankdas, Ghanshyam, Parmanand, Govindram and Jaikishore were also recorded by Investigating Officer R.S. Chundavat (PW.8). Postmortem was performed by Dr. D.K. Rathore (PW.7). Report is Ex.10. Police also seized the true copy of the documents (Ex. P.2-C) regarding civil litigation pending between deceased Anil Soni, his brother Rajendra Soni (PW. 1) and appellant Heeralal. Crime No. 715/ 1995 was registered by the police and after necessary investigation, the charge sheet was filed against the accused persons for commission of offence punishable under Section 302 read with 34 of the IPC and under Section 4 read with Section 25 (1-B), and 27 of Arms Act, 1959 (in short the 'Arms Act').

The appellants abjured their guilt and their defence was of false implication, therefore, they were put on trial. They stated in their statements recorded under Section 313 of the Code of

Criminal Procedure, 1973 (in short 'Cr. P.C.') that deceased and his brother Rajendra (PW.1) were doing colonizing business and on their behalf Radheshyam (PW.2) and Parkash (PW.3) used to collect money from the concerned persons. About three years ago one Babulal was got murdered by the deceased and Rajendra (PW.1). Dr. Komal Chandra Kothari (PW.4) was having family terms with deceased and his brother Rajendra (PW.1). They also submitted that Prakash Jadhav (PW.3) was convicted for murder of one Prabhakar Kadam and sentenced to life imprisonment by the learned Sessions Court of Dewas. In the said case, appellant Ramesh appeared as a witness against Parkash Jadhav. Because of all these reasons, appellants pleaded their false implication. Appellants examined Balraj Tiwari (DW. 1) in their defence whereas prosecution examined eight witnesses and get proved 17 documents prove its case.

The trial Court while acquitting Ramesh under Sections 4 read with 25(1-B), (b) and 27 of the Arms Act convicted the three appellants under Section 302 read with Section 34 IPC. The trial Court mainly relied on the evidence of PWs. 2 and 3 who were eye witnesses and the dying declarations.

In appeal, the primary stand was the evidence of PWs. 2 and 3 should not have been relied upon by the trial Court because of their conduct in not informing the police being eye witnesses of the incident and keeping mum. It was also submitted that the FIR Ex. P1 was ante time. The High Court held that the core question was whether the evidence of PWs.2 and 3 is credible and whether it was in line with the evidence of Rajendra Soni (PW-1) and doctor (PW-4) on the point of oral dying declaration. The High Court held that the eye witnesses version should not have been relied upon because of highly unnatural conduct of the accused and unexplained silence for long 19 days. However, the High Court found that the evidence relating to dying declaration was reliable. Accordingly, the appeal was allowed in part as the conviction of Hiralal was set aside. However, the appeal was dismissed qua accused

A Ramesh.

3. In support of the appeal learned counsel for the appellant submitted that after having discarded the version of the so-called eye witnesses, the High Court should not have placed reliance on the so-called dying declaration.

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4. Learned counsel for the respondent, on the other hand, supported the judgment.

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5. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction on the same without any further corroboration. 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 corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat* (1992(2) SCC 474) (SCC pp.480-81, paras 18-19)

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(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See: *Munnu Raja v. State of M.P.* (1976 (3) SCC 104)]

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(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without

corroboration. (See: *State of U.P. v. Ram Sagar Yadav* A
(1985(1) SCC 552) and *Ramawati Devi v. State of Bihar*
1983(1) SCC 211))

(iii) The court has to scrutinise the dying declaration
carefully and must ensure that the declaration is not the B
result of tutoring, prompting or imagination. The deceased
had an opportunity to observe and identify the assailants
and was in a fit state to make the declaration. [See: *K.*
Ramachandra Reddy v. Public Prosecutor (1976(3) SCC
618)]

(iv) Where a dying declaration is suspicious, it should C
not be acted upon without corroborative evidence. [See:
Rasheed Beg v. State of M.P. (1974(4) SCC 264)]

(v) Where the deceased was unconscious and could D
never make any dying declaration the evidence with regard
to it is to be rejected. [See: *Kake Singh v. State of M.P.*
(1981 Supp. SCC 25)]

(vi) A dying declaration which suffers from infirmity E
cannot form the basis of conviction. [See: *Ram Manorath*
v. State of U.P. (1981(2)SCC 654)]

(vii) Merely because a dying declaration does not F
contain the details as to the occurrence, it is not to be
rejected. (See *State of Maharashtra v. Krishnamurti*
Laxmipati Naidu [1980 Supp. SCC 455])

(viii) Equally, merely because it is a brief statement,
it is not to be discarded. On the contrary, the shortness of
the statement itself guarantees truth. [See: *Surajdeo Ojha*
v. State of Bihar (1980 Supp. SCC 769)]

(ix) Normally, the court in order to satisfy whether the G
deceased was in a fit mental condition to make the dying
declaration looks up to the medical opinion. But where the
eyewitness said that the deceased was in a fit and
conscious state to make the dying declaration, the medical
opinion cannot prevail. [See: *Nanhau Ram v. State of H*

A M.P.(1988 Supp. SCC 152)]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See: *State of U.P. v. Madan Mohan* (1989 (3) SCC 390)]

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(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See: *Mohanlal Gangaram Gehani v. State of Maharashtra* (1982 (1) SCC 700)]

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6. In the instant case opinion of Dr. Srivastava was given after admission of deceased in the intensive care ward during course of treatment. On the basis of this it cannot be said that while taking him to the hospital Rajendra Son (PW1) and Komalchandra Kothari (PW.4) could not have spoken to him or that the deceased was in an unconscious condition. Place of injuries were thigh and leg. Therefore, loss of unconscious can be progressive. Therefore, the conclusions of the trial Court and the High Court that the deceased was not unconscious and was in a position to give name of the assailants while he was being taken to the hospital cannot be faulted. In the instant case it has to be noted that one dying declaration was made before the Doctor Kothari (PW.4), an independent witness who had no reason to falsely implicate the accused persons. Doctor (PW4) has categorically stated that he was driving the car himself when he heard the deceased telling PW1, the names of the assailants. Doctor (PW4) has also stated that there was loss of consciousness for a few minutes whereafter the deceased regained consciousness.

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7. That being there is no infirmity in the conclusions of the High Court.

8. There is no merit in this appeal which is accordingly dismissed.

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Appeal dismissed.