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OM PAL SINGH

v.

STATE OF U.P.

(Criminal Appeal 973 of 2003)

B

NOVEMBER 09, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860: s.302 – Murder – Previous enmity C *between deceased and accused – Deceased shot dead by accused – Conviction based on evidence of eyewitnesses and dying declaration – Interference with – Held: The eyewitnesses gave consistent version of various incidents which precipitated the enmity between the deceased and the* D *accused – The evidence of eyewitnesses was clear and consistent with the medical evidence and dying declaration – No reason to interfere with the order of conviction – Evidence – Dying declaration.*

Evidence: Dying declaration – Reliability on – Held: If the E *statement made by injured was candid, coherent and consistent, then there is no reason to disbelieve it – Merely because the dying declaration was not in question-answer form would not render it unreliable – In the circumstances, absence of certificate of fitness by doctor would also not be* F *sufficient to discard it – Penal Code, 1860 – s.302.*

The prosecution case was that there was previous enmity between the victim-deceased and the accused-appellant. Few months prior to the incident also, the G **appellant had tried to kill the deceased but at the time the deceased had managed to escape. On the day of incident, the deceased was on his way accompanied with PW-2 and PW-3. The appellant came there on a motorcycle armed with a double barrelled gun. The deceased was**

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about 15-20 paces ahead of the rest. When the deceased saw the appellant advancing towards him, he tried to run. The appellant fired one shot from his double barrelled gun at the deceased. The deceased got injured and fell down. The appellant thereafter ran away leaving behind his motorcycle. PW-2 and others took the deceased to the hospital. Thereafter they lodged the FIR. PW-6, the Tehsildar Magistrate recorded the dying declaration. After few hours, the deceased died. The trial court convicted the appellant under Section 302, IPC. The High Court upheld the order of conviction. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. PW2 and PW3 gave clear and consistent eye-witness account. They narrated the previous incident of disharmony between the appellant and the deceased. They also adverted to the previous attempts by the appellant to harm the deceased. The entire incident of shooting was graphically described by the two witnesses. They clearly stated that they did not chase the appellant fearing for their own life. The courts below held that both PW-2 and PW-3 had given a consistent version of the various incidents which precipitated the enmity between the deceased and the appellant. Both the courts also noticed that the FIR was initially registered under Section 307 IPC on the basis of the statement given by PW-2. In the FIR, this witness narrated the history of the animosity between the deceased and the appellant. Therefore, both the trial court as well as the High Court correctly concluded that the motive was not introduced only at the time of the trial, in Court. Both the trial court as well as the High Court had held that the medical evidence was consistent with the ocular evidence. There is no reason to interfere with the findings recorded by both the courts. [Paras 15, 19, 22] [573-G-H; 573-A-B; 567-B-D; 570-B-C]

A *"Modi's Medical Jurisprudence and Toxicology"* **(19th Ed. Pg. 221 – referred to.**

2. The Tehsildar, who recorded the dying declaration appeared as PW-6. He clearly stated that although no doctor was present in the hospital, he was informed by
B **the pharmacist that the deceased was in a fit state to make a statement. He, thereafter, isolated the injured and recorded his statement. He further stated that he wrote down word by word what the deceased had stated. The contents of the statement were read to the injured who**
C **stated that he understood and accepted the same. Only thereafter, he had put his thumb impression on the statement. It is undoubtedly true that the statement was not recorded in the question and answer form. It is also correct that at the time when the statement was recorded**
D **the deceased was in a "serious condition". The trial court as well as the High Court correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it was not in question and answer form would not render the dying declaration unreliable. The**
E **absence of a certificate of fitness by the doctor would not be sufficient to discard the dying declaration. The certification by the doctor is a rule of caution, which was duly observed by the Tehsildar/Magistrate, who recorded the statement. The statement made by the injured was**
F **candid, coherent and consistent. There is no reason to disbelieve the same. Therefore, there is no reason to differ with the conclusions arrived at by the trial court and the High Court with regard to the dying declaration also. In such circumstances, the trial court as well as the High**
G **Court recorded possible as well as plausible conclusions. The judgments recorded by the courts below do not call for any interference. [Paras 20- 23] [570-D-F-G; 572-E-H; 573-A-B]**

Laxman v. State of Maharashtra **(2002) 6 SCC 710 –**
H **relied on.**

Kanti Lal v. State of Rajasthan **(2009) 12 SCC 498 – referred to.** A

Case Law Reference:

(2002) 6 SCC 710	**relied on**	**Para 11**
(2009) 12 SCC 498	**referred to**	**Para 11**

B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 973 of 2003.

From the Judgment & Order dated 26.08.2002 of the High Court of Judicature at Allahabad in Criminal Appeal No. 604 of 1980. C

Nagendra Rai, Anurag Dubey, D.P. Pandey, Meenesh Dubey, S.R. Setia for Appellant. D

S.R. Singh, Anuvrat Sharma, Alka Sinha, Ashutosh Kr. Sharma for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal has been filed against the judgment and order of the High Court of Judicature at Allahabad in Criminal Appeal No. 604 of 1980 by which the High Court has confirmed the judgment of the trial court wherein the appellant had been convicted under Section 302 IPC and sentenced to life imprisonment. E F

2. The prosecution version as noticed by the trial court as well as the High Court is that there was enmity between the deceased Rishipal and Om Pal Singh, the appellant herein for a number of years. Both the deceased and the appellant were competing for the license of a liquor shop near the railway station, Davera, about 3 years prior to the tragic incident on 11.6.1978. Since then, there had been several hostile incidents, at different times, between the two. It appears that on one occasion, the appellant had beaten up Rishipal, on the basis G H

A of which a criminal case was pending against the appellant in the local Court at Bareilly. Thereafter, there was a theft committed at the grocery shop of the deceased. Here again, he had registered a complaint of theft against the appellant at the local police station. As a consequence of these incidents, B earlier also in the month of February or March, 1978, the appellant had tried to kill the deceased but he had managed to escape. But the victim was not so lucky, when he was shot down by the appellant on 11.6.1978.

C 3. According to Ram Prakash (hereinafter referred to as PW 2) on 11.6.1978, he had gone to FCI godown in Village Ehroli to purchase food grains. Later, he, Rishipal, Ravinder Pal Singh (hereinafter referred to as PW 3) and Rambir Singh were returning form the godown on their cycles. When they were at a distance of about 200 steps form the culvert of the State tube D well, the appellant also arrived there on his Yezdi motorcycle from the village. He was armed with a double-barrelled gun. Rishipal was about 15 to 20 paces ahead of the rest. On seeing him, the appellant parked his motorcycle at a distance of about 40 steps. He then advanced towards Rishipal. Seeing E him the deceased became perplexed; he left his cycle and rushed towards the plot of one Birpal Singh. He was wearing an 'open shirt' (Ext. 1), 'Baniyan' (Ext. 2) and 'Pant' (Ext. 3). Thereafter the appellant fired one shot from his double-barrelled gun at Rishipal causing injuries to him. The deceased fell down F as a result of the injuries. The appellant thereafter escaped, leaving behind his motorcycle.

4. PW 2 and others then took the deceased in a bullock cart to Davtra. Thereafter they proceeded to Police Station G Bisauli at 6:10 p.m. on the same day and lodged the written report (Ext. Ka 2). On the basis of the written report (Ext. Ka 2), H.C Irshad Khan(PW 4) wrote FIR (Ext. Ka 4) and registered the case in GD. (Ext. Ka 5) under Section 307 IPC. He took the clothes of the injured Rishipal for which he wrote memo (Ext.

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Ka 3) and sent him to hospital Bisauli for medical examination. But unfortunately, no doctor was present there. Dr. Chandan Singh Verma (PW-1) medical officer at Bisauli was on leave on that day. Shri Bipaon Behari Khare (PW-6), the then Tehsildar Magistrate, Bisauli recorded his dying declaration (Ext.Ka9) at hospital Bisauli. He sealed this dying declaration and sent the same to CJM Budaun. The case was registered in the presence of S.I. Hawaldar Singh (PW-7). He started the investigation and recorded the statement of H.C. Irshad Ahmed and proceeded to the Hospital Bisauli. He recorded the statement of Rishipal (Ext. Ka11) there. Then he recorded the statements of Ram Prakash, Rambir and Ravinder Singh at the Hospital. He also recorded the statement of Shreepal there. Rishipal was then sent to the District Hospital, Budaun for medical examination after his dying declaration was recorded. S.I. Hawaldar Singh reached the spot along with complainant Ram Prakash. He inspected the site and prepared site plan (Ext. Ka12). He found Yezdi motor cycle at the spot. There was a basket in his motor cycle containing bags and other goods (Exts 4 & 5). He took these articles in his possession for which he wrote memo (Ext.-Ka13). He also collected blood stained earth (Ext.6), unstained earth (Ext.7) and two wads (Ext.7&9) from the spot for which he wrote memo (Ext.Ka14). He gave raid at the house of the accused but in vain. Then he recorded the statements of Rajpal Singh, Mahipal Singh, Raghubir Singh and others.

5. Dr. V.P. Kulshrestha (PW-5) medically examined Rishipal Singh on 11.6.1978 at 8.30 p.m. and found gun shot injuries on his person and opined that the injuries could be caused to Rishipal Singh on 11.6.1978 at about 3 or 3.30 p.m.

6. Rishipal Singh died on 11.6.1978 at 9.40 p.m. at District Hospital, Budaun the report of which was sent to Police Station Kotwali, Budaun. This report was received at the Police Station Kotwali at 10.30 p.m. On receipt of this information S I B.D. Sharma (PW-9) proceeded to the mortuary Budaun and held

A inquest on the dead body of Rishipal Singh and prepared papers (Exts-Ka 17 to Ka-22). He sealed the dead body and sent the same through constables Harbir Singh and Rajbir Singh on 12.6.1978 at 9.30 a.m. for post mortem examination.

B 7. Dr. E.A.K. Tiwari (PW-10) who conducted autopsy on the dead body of Rishipal on 12.6.1978 at 4 p.m. opined that Rishipal died due to gun shot injuries on 11.6.1978 at 9: 40 p.m. The information regarding the death of Rishipal was received on 12.6.1978 through constable Harishankar at 6:30 a.m. and the case was altered to 302 IPC vide G.D (Ext. Ka6). C On the receipt of the post mortem report S.I. Hawaldar Singh recorded the statement of the witnesses of inquest report. Thereafter Inspector Chander Mohan Dixit made the remaining investigation in the case. He submitted charge sheet (Ext. Ka 15) against the appellant on 18.7.1978. The chemical examiner D gave report (Ext Ka 24) that the pant, open shirt, baniyan and earth (Exts 1 to 4) were stained with blood. The appellant pleaded not guilty and was duly put on trial.

8. By order dated 21.3.1980, the Trial Court convicted the E appellant under Section 302 IPC, and sentenced him to rigorous imprisonment for life.

9. Challenging the aforesaid judgment, the appellant filed Criminal Appeal No: 604 of 1980 before the High Court of Judicature at Allahabad. The High Court vide order dated F 26.8.2002 confirmed the conviction and sentence of the appellant under Section 302 IPC. Aggrieved by the said judgment, the appellant filed Criminal Appeal No: 973 of 2003 before this Court.

G 10. We have heard Mr. Nagendra Rai, learned Senior Advocate for the appellant and Mr. S.R.Singh on behalf of the respondent State. Mr. Nagender Rai, learned senior counsel submitted that both the trial court as well as the High Court have committed a serious error in convicting the appellant for the H murder. Learned counsel submitted that the entire genesis of

the incident has been fabricated. Both the eye-witnesses PW-2 and PW-3 have stated that the appellant had fired only once from his licensed double-barrelled gun. Yet the medical evidence clearly shows that the deceased suffered multiple gun shot injuries, which are not consistent with the ocular version given by the prosecution witnesses. Learned senior counsel also submitted that if one examines the injuries carefully, it would be found that the deceased had suffered injuries on the chest as well as the back. This would not have been possible as the appellant is alleged to have fired only once. It is further submitted that the motive narrated by PW-2 and PW-3 is entirely a made up story. Neither PW-2 nor PW-3 were eye-witnesses to any of the alleged incidents. They have merely given the evidence on the basis of hearsay. Learned senior counsel further submitted that there was recovery of two empty cartridges from the spot which has not been explained by the prosecution. This would clearly belie the version that has been given by the prosecution. The evidence of PW-2 and PW-3 even otherwise ought not to have been believed as they are not consistent on any of the relevant points. Learned senior counsel submitted that the Courts below have erred in law in relying on the alleged dying declaration recorded by Tehsildar/ Magistrate, Bisauli. The dying declaration could not have been made by the deceased as he would not have been in a fit condition, in view of the seriousness of the injuries suffered. In any event, the dying declaration has been recorded without obtaining any certificate from a doctor that the deceased was in a fit state to make a statement. The statement has been recorded only because the pharmacist posted at the hospital at the relevant time had stated that the injured was in a fit state to give a statement.

11. In support of the submission, the learned counsel relied on two judgments of this Court viz., *Laxman Vs. State of Maharashtra*[1] *and Kanti Lal Vs. State of Rajasthan*[2]. Summing

1. (2002) 6 SCC 710.
2. (2009) 12 SCC 498.

A up his submissions, the learned counsel submitted that there is hardly any evidence either ocular or medical to connect the appellant with the murder. There is no clear evidence of any previous enmity between the appellant and the deceased.

B 12. Learned counsel for the State of U.P. submitted that there is clear evidence of rivalry between the appellant and the deceased. He also submitted that in view of the eye-witness evidence of PW-2 and PW-3, motive even though proved in this case, was not necessary to be proved. Learned counsel further C submitted that PW-2 and PW-3 belong to the same village, therefore, there was no reason for them to falsely implicate the appellant. The dying declaration, according to the learned counsel, is clear, cogent and has been rightly relied upon by the trial court as well as the High Court. It has been duly recorded by the Magistrate after observing all necessary legal D formalities.

13. We have considered the submissions made by the learned counsel. The trial court as well as the High Court, upon consideration of the entire ocular evidence have concluded that E both PW-2 and PW-3 have given a consistent version of the various incidents narrated above, which precipitated the enmity between the deceased and the appellant. The animosity of the appellant towards the deceased was such that only a couple of months before the present incident, he and his friends had F encircled Rishipal with the intention of killing him. On that occasion, however, the deceased had managed to escape. The next time he was not so lucky.

14. The deceased was undoubtedly expecting to be attacked by the appellant, which is evident from the fact that G he started moving away from the path of the appellant as soon as he saw him. He was running towards the field of Birpal when the appellant opened fire from his double-barrelled gun. The aforesaid incident was witnessed by PW2 and PW3, who were only 15 to 20 paces behind the deceased at the time when he H was shot down. They have clearly stated that they did not chase

the appellant fearing for their own life. A

15. Both the Courts have also noticed that the FIR was initially registered under Section 307 IPC on the basis of the statement given by PW-2. In the aforesaid statement PW2 had clearly stated that on 11.6.1978 at about 3.30 p.m. when he was returning from the FCI godown alongwith the deceased Ravinder Pal Singh and Rambir Singh, they had seen the appellant coming from the opposite direction on his motorcycle. He had stopped his motorcycle upon seeing them. He fired at the deceased from his double-barrelled gun and then fled from the scene. He did not even care to take his motorcycle with him, which was subsequently recovered from the scene of the crime. He clearly stated that they were so petrified that they did not chase him. In the FIR, this witness further narrates the history of the animosity between the deceased and the appellant. Therefore, both the trial court as well as the High Court, in our opinion, have correctly concluded that the motive was not introduced only at the time of the trial, in Court. B C D

16. Both the courts have noticed that Dr. V.P. Kulshrestha (PW-5) medically examined Rishipal Singh on 11.6.1978 at 8.30 p.m. and found the following gun shot injuries on his person as per injury report:- E

(i) Gun shot wound of entry 0."2cm x muscle deep in right shoulder front (total two in number, no blackening and tattooing), injury kept under observation. F

(ii) Multiple gun shot wounds of entries in an area of 22cm x 17 cm on front of chest both sides (total number 15) No blackening and tattooing. Injury kept under observation. G

(iii) Multiple gun shot wounds of entry in an area of 22cm x 21 cm on front of abdoment (total number 9) Injury kept under observation. H

(iv) Multiple gun shot wounds of entry in an area of 13x5 cm right upper arm front and lateral aspect (total number 6) extending upto elbow. Injury kept under observation.

(v) 4 gun shot wounds of entry on dorsum of right hand Injury kept under observation.

(vi) Seven gun shot wounds of entry on front of right thigh upper 1/3rd, Injury kept under observation.

(vii) Gun shot wounds of entry in an area of 5x22cm on right upper arm front to medical aspect of left upper arm.

17. Dr. V.P. Kulshrestha had opined that the injuries could be caused to Rishipal Singh on 11.6.1978 at about 3 or 3.30 p.m.

18. Both the Courts have also noticed that Dr. E.A.K. Tiwari, PW-10 conducted the autopsy on the dead body of Rishipal on 12.6.1978 at 4.00 p.m. According to the post-mortem report, the following injuries were found on the dead body:-

1. Multiple gun shot wounds of entry (fifteen) each measuring 0.25cm x 0.25cm roughly circular on both sides of chest (5 on the left and 10 on the right side).

2. Multiple gun shot wounds of entry (nine) in number measuring 0.25cm x 0.25cm roughly circular on the front of the abdomen.

3. Multiple gun shot wounds of entry (3) in number measuring 0.25cm x 0.25cm roughly circular on the front of the right shoulder.

4. Multiple gun shot wounds of entry (6) in number

each measuring 0.25cm x 0.25cm roughly circular on the front and the side of the right upper arm.

5. Two gun shot wounds of entry 0.25cm x 0.25cm roughly circular on the palm of the right hand (one near the base of thumb).

6. Multiple gun shot wounds of entry (7) in number each measuring 0.25cm x 0.25cm roughly circular on the front of the upper part of right thigh.

7. Multiple gun shot wounds of entry (3) three in number on the front and side of the left thigh upper part each measuring 0.25cm x 0.25cm roughly circular.

8. One gun shot wound of entry 0.25cm x 0.25cm roughly circular on the medical side of the middle of the upper arm.

9. One gun shot wound of entry 0.25cm x 0.25cm roughly circular on the outer side of the left side of neck.

This witness clearly opined that Rishipal died of gun shot injury.

19. The trial court as well as the High Court have also considered the submissions as to whether injury no. 9 was inconsistent with the ocular version that only one shot was fired by the appellant. It was also sought to be submitted before us that injury no. 9 is definitely from a different weapon. This according to Mr. Nagendra Rai would clearly show that the genesis of the crime has been suppressed by the prosecution. The trial court as well as the High Court, upon consideration of the same submission have concluded that both the doctors examined i.e. PW-5 and PW-10 were not ballistic experts. They were not able to state as to whether the injuries were caused by a single shot from a double-barrelled gun. Relying on "Modi's

A Medical Jurisprudence and Toxicology" (19th Ed. Pg. 221), the trial court has concluded that when a projectile strikes the body at a right angle, it is circular and oval when it strikes the body obliquely. Dr. V.P. Kulshrestha, PW-5, in his injury report has stated that injury no. (i) is 2 cm x 2 cm muscle deep and is on B right shoulder. According to him, if this pellet had moved slightly to the inner side, it would have caused injury on the right side of the neck like injury No. 9 on the left side. This apart, it is not disputed that all the other injuries on the deceased could have been caused by a single shot from a double-barrelled gun. Both C the trial court as well as the High Court has held that the medical evidence is consistent with the ocular evidence. We did not see any reason to interfere with the findings recorded by both the Courts.

20. This now brings us to the submissions with regard to D the dying declaration. Factually, it is to be noticed that the Tehsildar, who recorded the dying declaration appeared as PW-6, he has clearly stated that although no doctor was present in the hospital, he was informed by the pharmacist that Rishipal Singh was in a fit state to make a statement. He, thereafter, E isolated the injured Rishipal Singh and recorded his statement. He further stated that he wrote down word by word what Rishipal Singh had stated. The contents of the statement were read to the injured who stated that he understood and accepted the same. Only thereafter, he put his thumb impression on the F statement. It is undoubtedly true that the statement has not been recorded in the question and answer form. It is also correct that at the time when the statement was recorded Rishipal Singh was in a "serious condition".

G 21. This Court in *Laxman case* (supra) has enumerated the circumstances in which the dying declaration can be accepted. We may notice here the observations made in the Paragraph 3, which are as under:-

The juristic theory regarding acceptability of a dying H declaration is that such declaration is 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 the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure

A authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no B specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration C must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is D essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

22. In our opinion, the trial court as well as the High Court E correctly accepted that the dying declaration was an acceptable piece of evidence. Merely because, it is not in question and answer form would not render the dying declaration unreliable. The absence of a certificate of fitness by the Doctor would not be sufficient to discard the dying declaration. The certification F by the doctor is a rule of caution, which has been duly observed by the Tehsildar/Magistrate, Bisauli, who recorded the statement. The statement made by the injured is candid, coherent and consistent. We see no reason to disbelieve the same. We, therefore, see no reason to differ with the G conclusions arrived at by the trial court and the High Court with regard to the dying declaration also. We must also notice that PW2 and PW3 have given clear and consistent eye-witness account. They have narrated the previous incident of disharmony between the appellant and the deceased. They H have also adverted to the previous attempts by the appellant

to harm the deceased. The entire incident of shooting has been graphically described by the two witnesses. The direct testimony of these two witnesses have been corroborated by the medical evidence and the dying declaration. A

23. In such circumstances, the trial court as well as the High Court have recorded possible as well as plausible conclusions. In our opinion, the judgments recorded by the Courts below do not call for any interference. The appeal is dismissed. B

D.G. Appeal dismissed.