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WAIKHOM YAIMA SINGH

v.

STATE OF MANIPUR

(Criminal Appeal No. 802 of 2006)

APRIL 18, 2011

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[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

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Penal Code, 1860 – s.302 – Murder – Dying declaration by the victim in the hospital that appellant was guilty of assaulting him and the next day the victim expired – Acquittal by the trial court – However, conviction u/s. 302 by the High Court, on basis of the dying declaration of the deceased – On appeal, held: Factum of the dying declaration is suspicious – Dying declaration is oral – No evidence about the fitness of the victim to make the dying declaration – Exact words of the dying declaration not available – They differ from witness to witness – Though the witnesses claimed to have reported to the informant about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR – Trial court took a perfectly probable view which could not have been set aside for the mere fact that some other view could be taken on the basis of the dying declaration – Thus, the High Court erred in holding that the dying declaration was creditworthy – Order of acquittal by the trial court is restored.

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Evidence Act, 1872 – s. 32 – Dying declaration – Evidentiary value – Held: Dying declaration can be the sole basis for conviction, however, it has to be proved to be wholly reliable, voluntary, and truthful – Maker of the dying declaration must be in a fit medical condition to make it – Oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it.

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According to the prosecution, PW-4 found the victim lying in an unconscious state on the road. He alongwith his friends and relatives took the victim to the hospital around 10 pm. The victim was given some treatment and he came to his senses and gave a dying declaration that he was assaulted by the appellatant. The victim expired the next day at about 3 am. The dying declaration was made in the presence of PW-1, PW-2, PW-4, PW-5 and PW-7. PW-14 relative of the victim, was present with the victim almost till 3 am but not when the dying declaration was made. The aforesaid witnesses reported to PW-14 about the dying declaration and the FIR was lodged. The trial court did not believe the prosecution case and acquitted the appellatant. However, the High Court relying on the dying declaration, convicted the appellatant. Therefore, the appellatant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 There is the evidence of some prosecution witnesses who claimed that the deceased made a dying declaration after he regained consciousness which was within 1 to 1½ hours after the deceased reached the hospital. The witnesses have generally stated that the deceased reached the hospital by about 10 or 11 pm. This is in sharp contradiction to the evidence of PW-14, the cousin of the deceased, who claimed that till 3 pm, there was no dying declaration made. This is the first circumstance which would make the factum of the said dying declaration suspicious. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about the dying declaration is that, firstly, it is oral and secondly, there is no medical evidence

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A suggesting that the deceased was in a fit medical condition to make such a dying declaration. [Para 13 and 14] [457-E-H; 458-A]

B 1.2 The dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the instant case also, the exact words are not available. They differ from witness to witness. Some witnesses say about the name of the village of the appellant having been uttered by the deceased and some others do not. PW-12, doctor who cross-examined the deceased, was also not cross-examined by the Public Prosecutor about the medical condition of the deceased and further fact as to whether he was in a fit condition to make any statement. Though the witnesses claimed to have reported to PW-14 about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR. [Para 15] [458-B-E]

F 1.3 Had the witnesses heard the dying declaration and reported the matter to PW-14 who made the FIR, he would never have failed to mention the name. Instead, in the FIR it is stated that it was some unknown person who had beaten up the deceased. The FIR was almost immediately after PW-14 came to know about the death of his cousin (deceased). If under such circumstances, the trial court felt it unsafe to rely on the so-called dying declaration, the trial court was justified in taking that view. A perfectly probable view has been taken by the trial court which could not have been set aside for the mere fact that some other view could be taken on the

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basis of the dying declaration. It cannot be understood as to how the High Court held in that the victim was in a fit state of mind to make the declaration. In fact, there is absolutely no evidence about the fitness of the victim to make the said declaration. [Paras 16 and 17] [458-H; 459-A-B]

1.4 The only reason why the High Court found fault with the judgment of the trial court was that the trial court had misconstrued and misunderstood the evidential value of the FIR. According to the High Court, the dying declaration was neglected/ignored on the ground that in the FIR, the name of the accused was not mentioned. In fact, that, was a good reason. The High Court is also not correct in observing that PW-14 was not present throughout the night of 30.10.1989 at the Hospital. The High Court has given reasons that the FIR could not be used to discredit the testimony of the other reliable witnesses. The High Court has ignored the fact that if in reality the dying declaration had been made and PW-14 was informed about the name of the assailant, he would never have failed to mention the same in the FIR. Therefore, the High Court was wholly wrong in observing that the dying declaration was creditworthy and that the trial court had erred in acquitting the accused. The judgment of the High Court is, therefore, set aside and that of the trial court is restored confirming the acquittal of the appellant/accused. [Paras 18 and 19] [459-B-G]

Ravi Kumar vs. State of Punjab AIR (2005) SC 1929 – referred to.

Case Law Reference:

AIR (2005) SC 1929 Referred to Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 802 of 2006.

A Ranjit Kumar, Pukhrambam Ramesh Kumar and Rajiv Kumar for the Appellant.

Khwairakpam Nobin Singh for the Respondent.

The Judgment of the Court was delivered by

B **V.S. SIRPURKAR, J.** 1. The appellant herein is challenging the judgment of the High Court, whereby his acquittal as ordered by the trial Court, was set aside and he was convicted for the offence of murder punishable under
C Section 302 of the Indian Penal Code (IPC).

2. Shortly stated, the prosecution story is that one Lourembam Biren Singh (since deceased) was lying in an unconscious state on the road when he was found by one Oinam Deben Singh (PW-4) at about 8 pm on 30.10.1989. He
D was attracted by a strange sound when he was passing near the gate of one Ahongshangbam Herachandra Singh. Oinam Deben Singh (PW-4) informed this to some of his friends and relatives and when he came back on the spot with other people with a light, they found the said deceased in an unconscious
E condition. The deceased was then immediately taken to Regional Medical College (RMC) Hospital at about 10 pm, where the unconscious Lourembam Biren Singh was given some treatment because of which he came to his senses and gave a dying declaration. However, the deceased expired at
F about 3'O clock in the next morning. According to the prosecution, in that dying declaration, the appellant was accused of having assaulting the deceased and the same was made in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4), L. Chanbi Singh
G (PW-5) and L. Subhaschandra Singh (PW-7). L. Ningthouren Singh (PW-14), who is the relative of the deceased, lodged the First Information Report (FIR). In fact, L. Ningthouren Singh (PW-14) was there alongwith the injured (deceased) almost till 3 am. However, he was not present at the time when the dying

declaration was made to the other witnesses. On the basis of the said FIR, further investigation ensued, wherein the necessary panchanamas were drawn up and the statements of the witnesses were also recorded. After filing of the chargesheet, the accused/appellant abjured the guilt. In support of the prosecution, 15 witnesses came to be examined. The prosecution heavily relied on the dying declaration made by the deceased in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4), L. Chanbi Singh (PW-5) and L. Subhaschandra Singh (PW-7). The trial Court did not believe the prosecution case. According to the trial Court, if after the death of the deceased, the witnesses who had heard the dying declaration of the deceased had gone back to the house of the deceased and informed L. Ningthouren Singh (PW-14), his cousin, of the death, then certainly L. Ningthouren Singh (PW-14) would have come to know of the name of the person who assaulted the deceased and in that case he could not have failed to mention that name in the FIR. On this basis, the trial Court acquitted the accused/appellant. However, the High Court upset this acquittal and believed the dying declaration and ultimately convicted the accused/appellant necessitating this appeal.

3. We have been taken through the evidence as also the judgments of the Courts below. Shri Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellant, took us through the evidence. His contention was that the judgment of the trial Court did not suffer from any illegality and the trial Court had taken a probable view. He pointed out that the High court has hardly given any reason to show that the view taken by the trial Court was perverse and not possible at all. He also pointed out that the FIR was given by L. Ningthouren Singh (PW-14) who was the elder cousin of the deceased and on being informed by Oinam Deben Singh (PW-4) and L. Chanbi Singh (PW-5) about the deceased lying in the darkness, he himself had gone and on finding the deceased in an injured condition, took him to the hospital. The learned Senior Counsel pointed

A out that this witness was present in the hospital for some time and then left; however, at about 6' O clock in the next morning, Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) went to him to inform about the death of the deceased in the hospital. The learned Senior Counsel pointed out that L. Ningthouren Singh (PW-14) was specifically informed by Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) that the deceased had made a dying declaration involving the appellant herein; however, when he thereafter went to Thoubal Police Station, very surprisingly, he did not name the accused in the FIR. The learned Senior Counsel, therefore, argued that either the said witness was never informed of the names by Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) or in fact there was no dying declaration made at all by the deceased.

D 4. We have seen the whole evidence. The only explanation that this witness has given is that he did not mention the name of the accused in the FIR as he could not properly hear the name of the culprit when the matter was informed to him by his younger brother. This witness has specifically admitted that he was in the hospital from 10 pm to 3 am and he looked after the injured person. He also asserted that he never went outside the hospital during that period. He also admitted that when he found the deceased, the deceased was unconscious and could not speak. The witness also admitted that till 3 am, inspite of the medical treatment by the doctor at RMC Hospital, the injured (deceased) could not speak. He also admitted that there was another person in the village who was related to them bearing the same name as that of the appellant. A specific suggestion was given to him that Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) had never informed him about the dying declaration made by the deceased involving the present appellant. The learned Senior Counsel pointed out that the whole story of the so-called dying declaration was a myth and that if the dying declaration was made in presence of the prosecution witnesses, they would never have failed to mention

the name of the assailant and eventually the name was bound to appear in the FIR. A

5. The learned Public Prosecutor, however, strongly supported the evidence of Oinam Deben Singh (PW-4) and contended that merely because the name of the accused was not there in the FIR, that by itself could not wipe out the evidence of the witnesses who had heard the dying declaration. B

6. In this backdrop, we would first examine the evidence of the other witnesses who claimed to have heard the alleged dying declaration as also the evidence of the doctor, namely, Dr. Ningombam Shyamjai Singh (PW-12), who attended the deceased. C

7. Dr. Ningombam Shyamjai Singh (PW-12), in his evidence, specifically alleged that he was posted at Casualty Department of the RMC Hospital at Lamphelpat and that the deceased L. Biren Singh was brought to him in an injured condition. The witness also asserted that he gave him whatever assistance he could, by giving him first aid treatment. He also asserted that the injured person "gained some consciousness". He, however, further stated that he could not remember as to whether the injured person stated or uttered anything during his brief conscious period. He also named one House Surgeon, namely, Thokchom Ibomcha to be present alongwith some relatives of the deceased. He was declared hostile. He denied his statement to the effect that the injured person regained sense and took the name of the accused. Since he was declared hostile, the trial Court ignored his evidence. The house surgeon is not examined by the prosecution. D
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8. That leaves the evidence of Oinam Deben Singh (PW-4) who claimed that on hearing the unusual sound at about 8' O clock in the evening, he rushed to the house of L. Hementa Singh (PW-3), but not finding him there, he narrated the incident to L. Chanbi Singh (PW-5) and after gathering some other persons, he reached the spot, where L. Biren Singh (deceased) H

A was lying in an injured condition. He then claimed that he
alongwith some other persons, took the injured (deceased) to
the hospital. He claimed that after about "one and half hours",
the injured gathered senses and said in presence of L. Jiten
Singh (PW-1), L. Ranachandra Singh (PW-2), L. Chanbi Singh
B (PW-5), L. Subhaschandra Singh (PW-7) and one medical
officer that the injured was assaulted by Waikhom Yaima Singh
(appellant herein), a resident of Thokpam Khunou Arong
Thongkhong Manak. In his cross-examination, he denied that
the injured never regained his consciousness. He contradicted
C his earlier statement that the deceased had merely stated that
he was assaulted by Waikhom Yaima Singh of Thokpam
Khunou Arong Thongkhong Manak. His explanation was that
the police might have shortened his statement. He also
admitted that there was one other person called Yaima Singh
D in their locality.

9. L. Jiten Singh (PW-1) also referred to the incident of
finding the deceased in an injured condition. He also referred
to the dying declaration. He is none other, but the son of the
deceased. He claimed that his father came to senses at about
E 1½ am and that after giving the dying declaration, his father
died within 10-20 minutes. This is in sharp contradiction with
the evidence of PW-14 according to whom Biren Singh was
alive till 3 p.m. In his cross-examination, he denied that his father
was speaking in delirium. He also denied that his father had
F never made dying declaration or that his father died without
speaking any word as he had got serious bleeding injuries
which incapacitated him to speak.

10. L. Ranachandra Singh (PW-2) also reiterated about
the dying declaration. The evidence of L. Hementa Singh (PW-
G 3) is of no consequence as he has not referred to the dying
declaration. He, however, admitted that in the next morning,
Oinam Deben Singh (PW-4) and L. Subhaschandra Singh
(PW-7) had come to the house and reported about the death
of the victim.

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11. L. Chanbi Singh (PW-5) also claimed that he was with the injured (deceased) in the hospital and that the injured took the name of the accused and that this was in presence of L. Jiten Singh (PW-1), L. Ranachandra Singh (PW-2), Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7). This witness asserted that Oinam Deben Singh (PW-4) and L. Subhaschandra Singh (PW-7) were sent to the house for giving the information of the death. Though the other witnesses have admitted, this witness denied that there was any other person called Yaima Singh or Waikhom in the village. This witness admitted that in his earlier statement, he had not mentioned the surname of Yaima Singh.

12. L. Subhaschandra Singh (PW-7) is still another witness who had accompanied the deceased to the hospital. He claimed that the deceased had made a dying declaration in his presence. He also asserted that after making the dying declaration, the injured (deceased) died. In his cross-examination, he was also given the similar suggestion that he had not stated the name of L. Jiten Singh (PW-1) being present, which he denied. The other witnesses are not relevant.

13. We, therefore, have the evidence of some prosecution witnesses who claimed that the deceased made a dying declaration after he regained consciousness which was within 1 to 1½ hours after the deceased reached the hospital. The witnesses have generally stated that the deceased reached the hospital by about 10 or 11 pm. This is in sharp contradiction to the evidence of L. Ningthouren Singh (PW-14), the cousin of the deceased, who claimed that till 3 pm, there was no dying declaration made. We have referred to the evidence of this witness in details. This is the first circumstance which would make the factum of the said dying declaration suspicious.

14. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution.

A The most important circumstance about this dying declaration is that, firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.

B 15. There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact words are not available. They differ from witness to witness. Some witnesses say about the name of the village of the appellant having been uttered by the deceased and some others do not. Further, Dr. Ningombam Shyamjai Singh (PW-12) was also not cross-examined by the Public Prosecutor in this case about the medical condition of the deceased and further fact as to whether he was in a fit condition to make any statement. Last, but not the least, though the witnesses claimed to have reported to L. Ningthouren Singh (PW-14) about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR.

F 16. In our opinion, had the witnesses heard the dying declaration and reported the matter to L. Ningthouren Singh (PW-14) who made the FIR, he would never have failed to mention the name. Instead, we have it in the FIR that it was some unknown person who had beaten up the deceased. It must be remembered that the FIR was almost immediately after L. Ningthouren Singh (PW-14) came to know about the death of his cousin Biren Singh (deceased).

G 17. If under such circumstances, the trial Court felt it unsafe to rely on the so-called dying declaration, we do not think that the trial Court was not justified in taking that view. In our view, H a perfectly probable view has been taken by the trial Court

which could not have been set aside for the mere fact that some other view could be taken on the basis of the dying declaration. We are at a loss to understand as to how the High Court held in paragraph 26 of its judgment that the victim was in a fit state of mind to make the declaration. In fact, there is absolutely no evidence about the fitness of the victim to make the said declaration.

18. The only reason why the High Court found fault with the judgment of the trial Court was that the trial Court had misconstrued and misunderstood the evidential value of the FIR. According to the High Court, the dying declaration was neglected/ignored on the ground that in the FIR, the name of the accused was not mentioned. In fact, that, in our opinion, was a good reason. The High Court is also not correct in observing that L. Ningthouren Singh (PW-14) was not present throughout the night of 30.10.1989 at the RMC Hospital. The High Court has given reasons that the FIR could not be used to discredit the testimony of the other reliable witnesses. The High Court has ignored the fact that if in reality the dying declaration had been made and L. Ningthouren Singh (PW-14) was informed about the name of the assailant, he would never have failed to mention the same in the FIR. The reliance of the High Court on the reported decision in *Ravi Kumar Vs. State of Punjab* [AIR (2005) SC 1929] is wholly uncalled for. In our opinion, therefore, the High Court was wholly wrong in observing that the dying declaration was creditworthy and that the trial Court had erred in acquitting the accused.

19. The judgment of the High Court is, therefore, set aside and that of the trial Court is restored confirming the acquittal of the appellant/accused. The appellant shall be set to liberty forthwith unless required in any other matter.

N.J. Appeal allowed.