Anil Kumar Vs. State

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Court : Delhi

Decided On : Nov-28-2013

Judge : Kailash Gambhir

Appellant : Anil Kumar

Respondent : State

Advocate for Pet/Ap. : Dr. Bharat Singh

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: November 28, 2013 + (1) CRL.A. 456/1998 ANIL KUMAR Through ..... Appellant Mr.Vikrant Sarin, Advocate versus STATE Through ..... Respondent Mr.Sunil Sharma, APP for the State with Insp. Ravindra Ahlawat, PS Karol Bagh, New Delhi AND + (2) CRL.A. 481/1998 SARAVJEET SINGH Through ..... Appellant Mr.K.B.Andley, Sr.Advocate with Mr.M.L.Yadav, Advocate versus STATE Through ..... Respondent Mr.Sunil Sharma, APP for the State with Insp. Ravindra Ahlawat, PS Karol Bagh, New Delhi AND + (3) CRL.A. 549/1998 TILAK RAJ ..... Appellant Through Mr.K.B.Andley, Sr.Advocate with Mr.M.L.Yadav, Advocate versus STATE Through CRL.A. Nos.456/1998, 481/1998 & 549/1998 ..... Respondent Mr.Sunil Sharma, APP for the State with Insp. Ravindra Ahlawat, PS Karol Bagh, New Delhi Page 1 of 34 CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

KAILASH GAMBHIR, J.

1. By this common order we propose to decide three appeals under Section 374 of the Code of Criminal Procedure,1973 (hereinafter referred to as Cr.P.C) preferred by Anil Kumar, Saravjeet Singh and Tilak Raj, respectively, challenging the judgment and order on sentence dated 07.10.1998 and 09.10.1998, whereby the learned Additional Sessions Judge, Delhi has convicted them under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as IPC) and sentenced to undergo imprisonment for life together with fine of Rs. 500/- each and in default thereof to further undergo rigorous imprisonment for a period of one month.

2. The case of the prosecution as it is unfolded in the chargesheet is as under:

On 06.09.1985 Duty Constable Sultan Singh informed the police that Shri Trilok Chand s/o Shri Santram had been admitted in the hospital in an injured condition by Mr. Ashoki, son of Shri Risal Singh. On this information DD. No.30-A at P.P Prasad Nagar was recorded and copy of it was handed over to ASI Balbir Singh. Who went to hospital and obtained the MLC of the injured. Since doctor declared him fit for statement ASI Balbir Singh recorded his statement wherein he stated that he was residing at 1250, P.R Road, Delhi and was doing the work of tailoring. One Rajju was running a rationing shop and was his friend. About two weeks earlier Rajju had taken 1330/- Rs. From him, promising him to return them in 10 days. On that day he had gone to Satyam cinema to watch a show, at about 11:40 p.m raju and his friend who runs motor mechanical shop, tilak resident of Dev Nagar, Anil resident of Bapa Nagar, and Survjeet resident of Government quarters met him at the cinema. He asked Raju to return his money but raju asked him to come to Dev Nagar and them he would return his money. On that day at 07:30 p.m he after leaving his house was present at Rajram Kharoodewala at P.L.Road, a three wheeler scooter in which a boy aged 19/20 years was sitting and he told him that his friends are calling. On this he sat in the scooter and he was brought to subzi wala chownk Dev Nagar. At around 07:40, Raju with all his friends asked him that now tell what do you wasnt, and in the meantime the auto left. All the accused persons started inflicting injuries on the deceased when he asked them to return money. When he cried and raised alarm, Mr. Ashoki brother in law of his

elder brother came and removed him to Willington Hospital, in an auto rickshaw. All the accused person were known to deceased.

3. To bring home the charges, the prosecution in all examined 25 witnesses. In their statements recorded under Section 313 Cr.P.C., all the accused denied their complicity in the crime and pleaded that they were falsely implicated in the case. In defence, the accused persons had examined 3 witnesses.

4. On behalf of Tilak Raj- appellant in CRL.A. 549/1998 and Saravjeet Singh- appellant in Crl.A.481/1998 arguments were addressed by Mr.K.B.Andley, Sr. Advocate duly assisted by Mr.M.L.Yadav, Advocate and on behalf of Anil Kumar- appellant in Crl. A. 456/1998, the arguments were addressed by Mr.Vikrant Sarin, Advocate. The State was represented by Mr. Sunil Sharma, APP for the State. Written submissions were also filed by the counsel for the appellants.

5. The contentions raised by both the counsel for the appellants were not much in variance except that in the case of appellant- Anil Kumar, one of the arguments raised by the counsel was that there was no recovery of any incriminating article from him during the disclosure statement. The main attack of both the counsel for the appellants, otherwise, was on the authenticity, genuineness and truthfulness of the dying declaration made by the deceased to ASI Balbir Singh- PW-18, who rushed to the Ram Monohar Lohia hospital (hereinafter referred to as RML) after information was received at Police Station- Karol Bagh vide DD No.38 dated 06.09.1985 regarding the admission of an injured person- Trilok Chand. Learned counsel for the appellants also contended that it was quite surprising that the victim in his dying declaration gave the number of injuries which were inflicted on his person, as if, before his dying declaration he could count them. Learned counsel for the appellants also argued that after having suffered so many injuries the victim could not have been in a fit state of mind to make his dying declaration. Impugning, the said dying declaration, learned counsel for the appellants submitted that ASI-Balbir Singh had recorded the statement of the injured himself without taking any step to call the area SDM for recording his statement. Learned counsel for the appellants also submitted that the said statement was recorded by IO in Urdu language and nowhere was it proved on record by the prosecution that

deceased Trilok Chand knew Urdu language or that the said statement was read over to him in the language known to him. Learned counsel for the appellants further submitted that the fitness certificate given by Dr. Padmalaya Devi before the dying declaration does not bear any time and even Dr. Padmalaya Devi was not examined by the prosecution in the evidence. Learned counsel for the appellants further submitted that below the signature of Dr. Padmalaya Devi there were signatures of another doctor referred to as Dr. Khetrapal but neither he was produced by the prosecution as a witness nor his signatures were proved by the record clerk who appeared in the witness box as PW-23. Learned counsel for the appellants also argued that there was an apparent improbability in the recording of dying declaration by ASI-Balbir Singh, as the police had received information about the incident vide DD No.38 at 8.45 p.m. on 06.09.1985 and the rukka reached the Police Station at about 10.25 p.m. and within such a short span of 1 hour 40 minutes the ASI reached at the hospital; got the fitness certificate of the doctor; recorded the dying declaration of the victim and thereafter returned back to the Police Station at 10.25 p.m. Learned counsel for the appellants also submitted that there is a distance of at least 6 km. between the hospital and the Police Station and therefore, it was impossible for ASI-Balbir Singh, to record the dying declaration, within such a short time, after the travel time to and fro is counted. Learned counsel for the appellants further argued that after the admission in the RML hospital on 06.09.1985, the victim had died on 15.11.1985 after a gap of two months and nine days and therefore, the statement made by the deceased cannot be termed as a dying declaration. Learned counsel for the appellants also argued that the prosecution has not been able to demonstrate as to how the police had zeroed in the appellant- Anil Kumar as in the rukka no parentage or address of accused Anil Kumar was mentioned and accused Anil Kumar was falsely implicated by the police only because of some previous disputes between the family of Anil Kumar and the family of the deceased and the deceased was even being tried under Section 307 IPC for stabbing the brother of accused Anil Kumar. The contention raised by the counsel for the appellants was that had the said Anil Kumar been the accused, the deceased could have named him after giving a clear reference of his family litigation with him. Learned counsel for the appellants also argued that the three witnesses, namely, PW3-Ashok Kumar, PW6-Ramesh

Kumar and PW10-Suresh Kumar did not support the case of the prosecution and PW5-Pritam, also turned hostile. Learned counsel for the appellants also argued that no reliance can be placed on the testimony of PW4- Gyan Chand as his statement under Section 161 Cr.P.C. was recorded after the death of the deceased. Learned counsel for the appellants further submitted that the statement of PW4- Gyan Chand was recorded belatedly by the prosecution to fill up the lacunae in the prosecution case. Learned counsel for the appellants further argued that presence of PW4- Gyan Chand in the hospital was not disclosed by the deceased in his dying declaration. Learned counsel for the appellants also argued that the theory of motive as propounded by the prosecution also has no basis as nobody would kill a person for a paltry amount of Rs.1300/-.

6. Learned counsel for the appellants further contended that the death of the deceased was not on account of the injuries received by him but due to medical negligence of the attending doctors who were treating the deceased. Inviting attention of this Court to the deposition of PW1-Dr. Bharat Singh, learned counsel for the appellants submitted that PW-1 in his testimony stated that if the pus is drained regularly then there will be no deposit of pus in large quantity in abdominal cavity and there was 400 ml of pus in the abdominal cavity of the deceased which as per PW-1, Dr. Bharat Singh, was of definitely a large amount. CRL.A. Nos.456/1998, 481/1998 & 549/1998 Learned counsel for the appellants thus Page 7 of 34 submitted that it was the infection of the peritoneum which ultimately resulted in the death of the deceased and not because of the injuries suffered by him in the incident. Learned counsel for the appellants placed reliance on a Division Bench decision of this Court in the case of Rajaram vs. State of NCT of Delhi reported in 2013 (1) JCC41 Based on the above submissions, learned counsel for the appellants urged for acquittal of the appellants.

7. Refuting the said submissions, Mr. Sunil Sharma, APP for the State, vehemently contended that the dying declaration recorded by the IO is free from any suspicion or doubt and the same was recorded by the ASI-Balbir Singh after Dr. Padmalaya Devi had declared the deceased fit for statement. Learned APP for the State submitted that there was no one present at the time of recording of the dying declaration except the doctor and the deceased had clearly named all the

accused persons with the name of the localities where they were residing and also the motive which led the accused persons to inflict such serious injuries on the body of the deceased. Learned APP for the State also argued that instead of appreciating the promptness of the police in reaching the hospital and recording the dying declaration of the deceased, learned counsel for the appellants made a vain attempt to discredit the efficiency of the police in taking a prompt action after DD No.38 was recorded at Police Station Karol Bagh at 8.45 p.m. Learned APP for the State also argued that the testimony of PW18- ASI Balbir Singh remained unrebutted and unchallenged as the defense in her cross-examination never challenged the fitness of the victim. The defense neither put any question to PW18 as to whether he had recorded the correct statement of the victim in Urdu language or not and nor as to why he did not requisition the service of area Magistrate in recording the dying declaration of the deceased. The contention raised by the learned APP for the State was that without there being any challenge to the deposition of PW18-ASI, Balbir Singh, the appellants cannot build up a new defence at the stage of appeal. Learned APP for the State further argued that before the dying declaration was recorded by ASI Balbir Singh, the doctor of the hospital had given a fitness certificate, an endorsement to this effect is duly recorded on the dying declaration itself. Learned APP for the State further submitted that the said endorsement of Dr. Padmalaya Devi was duly proved on record by PW-23, record clerk of Deen Dayal Upadhyay hospital and this witness was also not cross-examined by the defense and his testimony also remained unrebutted and uncontroverted. Learned APP for the State also submitted that Dr. Padmalaya Devi was no more in service during the relevant period, and therefore, she could not be summoned to give her evidence. Learned APP for the State also argued that there is no reason to doubt the impartiality and independence of the police official who had recorded the dying declaration especially in the absence of any material placed on record by the defence to attribute any motive on his part. Learned APP for the State also argued that there was a clear motive on the part of all the accused persons to kill the deceased, as he was insisting for repayment of Rs.1300/which was lent by him to Accused - Raju, to be returned within a period of 10 days and this demand was raised by the deceased when he had gone to see a movie at Satyam Cinema and was called by Accused - Raju and ultimately was

given serious stab wounds by all the accused persons instead of returning back his money. Learned APP for the State also argued that the testimonies of PW-4 and PW-5, fully corroborate the dying declaration made by the deceased and even the testimony of PW-6 also fully support the prosecution case on material facts although he turned hostile. Learned APP for the State also argued that clothes of accused, namely, Saravjeet and Tilak Raj were also recovered during their disclosure statement and as per the FSL report, the blood group found on their clothes fully match the blood group of the deceased. Based on these submissions, learned APP for the State submitted that the defence has not been able to create any shadow of doubt or dent on the prosecution case and the testimonies of the material witnesses remained unscratched and unchallenged and there is no reason to doubt the genuineness of the dying declaration made by the deceased after he was declared fit by the attending doctor - Dr. Padmalaya Devi. Learned APP for the State submits that the present appeal is devoid of any merit; the same may be dismissed.

8. We have heard learned counsel for the parties at considerable length and gave our thoughtful consideration to the arguments advanced by them. We have also carefully gone through the records of the Trial Court.

9. In the present case, the deceased, Tirlok Chand, was a tailor by profession. He had advanced a sum of Rs.1,300/- to his friend Harbhajan Singh @ Raju (deceased) who was running a ration shop possibly in the same vicinity. Raju had promised to return the said money to the deceased within a period of 10 days. Having not returned the said money, Raju met the deceased at about 11.40 a.m. on 06.09.1985 along with his other friends at Satyam Cinema where the deceased had gone to watch a movie. The deceased demanded money from Raju and Raju asked him to come to Dev Nagar and then he would return his money. The deceased reached to Subzi Wala Chowk near Dev Nagar where instead of returning the money to him, he was inflicted with 16/17 injuries on various parts of his body by all the accused persons. The deceased was removed to Willington hospital by one Mr. Ashoki- PW-3, the brother-in-law of his elder brother and the accused persons ran away after committing the said crime. The deceased had succumbed to his injuries on 15.11.1985 after having remained admitted in the

hospital for a period of two months nine days. The deceased could not get back the sum of Rs. 1,300/- and also lost his life at the barbaric and brutal hands of the accused persons. The case in hand shows, how cheap a human life has become. For a paltry amount of Rs.1300/-, a man can kill another man.

10. The duty constable Sultan Singh- PW-9, who was posted at the hospital, informed about the said incident which was recorded by the police post vide DD No.20-A, and handed over to ASI Balbir Singh and with the said DD, ASI Balbir Singh rushed to the hospital. ASI Balbir Singh had obtained MLC of the injured and he had also recorded the statement of the injured after the injured was declared fit for statement by the doctor. All the accused were named by the victim in his statement including the localities where they were residing. The deceased in his statement also very clearly stated that all the five accused persons brought out knives and started inflicting injuries on his stomach, buttock, arm, thighs and his entire body. He also stated that atleast he was attacked 16/17 times while he was crying and shouting save me save me and at that very time Mr. Ashoki, the brother-in-law of his elder brother, reached there and took him to the Willington hospital after putting him in an Auto Rickshaw. He also stated that he very well knew all the assailants who had conspired to kill him and therefore had attacked him 16/17 times and thereafter all of them ran away. FIR under Section 307/34 IPC was registered by the police based on the said first statement made by the victim Tirlok Chand. Injured, Tirlok Chand remained in the hospital from 06.09.1985 to 15.11.1985 when finally he died in the same hospital. The inquest proceedings under Section 174 Cr.P.C. were conducted and dead body of the victim was sent for post mortem to civil hospital Subzi Mandi. As per the post mortem report, the death of Tirlok Chand took place due to shock and peritonitis following injury in abdomen.

11. As already stated above, the principal challenge by both counsel for the appellants concerns the dying declaration. The contentions raised interalia being that the said dying declaration proved on record as Ex-PW12/DA, cannot be treated as a dying declaration because of time gap between the recording of dying declaration and date of death of the victim; the same not being recorded by the Magistrate; the same was recorded in Urdu language which was not in vernacular

language of the deceased; signatures of the victim were obtained without explaining the contents of the same; doctors who gave fitness certificate were not produced in the evidence; the parentage and the exact address of the accused was not disclosed by the victim and finally how the victim spelt out the number of injuries inflicted on his body.

12. The learned Trial Court has very ably and comprehensively dealt with the above contentions raised by both the counsel for the appellants in the impugned judgment and we find no reason to record our disagreement with the same. The learned Trial Court is right in observing that the said statement of the victim Tirlok Chand proved on record as Ex. PW18/A was in the nature of a complaint but even then ASI Balbir Singh-PW18 took a precaution in first obtaining the opinion of the concerned doctor about the fitness of the injured. The learned Trial Court also rightly observed that there was no occasion for IO to record the dying declaration of the victim by calling the Magistrate as there was no danger to the life of injured Tirlok Chand and in the later period also no intimation was received by him that injured was in any precarious or serious condition. The learned Trial Court also rightly observed that it is only after the death of the Tirlok Chand that his statement Ex. PW-18/A became the dying declaration. To support his said reasoning, the learned Trial Court has relied on the decision of the Apex Court in the case of Jai Prakash & Anr. v. State of Haryana, reported in 1987 AIR2225where in similar facts, the Apex Court took a view that in the cases where the police had initially recorded the statement in the nature of complaint, the same was later on treated as a dying declaration in case victim dies, if it discloses the cause of death of the victim. The learned Trial Court also observed that based on the said statement, FIR under Section 307 IPC was recorded and an endorsement to this effect was made by ASI on the said statement of Tirlok Chand which was proved on record as Ex. PW18/B. The learned Trial Court is also right in observing that the only precaution which IO could have taken was to record the statement of the injured after he was declared fit for statement. After having taken the said precaution, neither any fault nor any lapse can be attributed to the said ASI nor can any dispute be raised to the veracity of the statement made by the victim, Trilok Chand.

13. As would be seen from the above, the statement which was made by the victim Trilok Chand to ASI Balbir Singh- PW18 ultimately turned into his dying declaration after he had succumbed to his injuries on the fateful day of 15.11.1985. Had he remained alive, his statement would have been considered under Section 161 Cr.P.C. which could be useful only to corroborate or contradict him during his deposition in the court, however, in a case where such victim dies, the same statement becomes substantive piece of evidence under Section 32(1) of the Indian Evidence Act (hereinafter referred to as IEA). The death, however, in such cases should be proximate in time and as a result of the injuries caused to the victim and not because of any negligence or external factor.

14. Victim Trilok Chand had received 17 injuries on his body as per MLC proved on record as Ex. PW-12/DA, and as per post mortem report proved on record as Ex.PW-1/A , the death of the victim was due to shock and peritonitis following injury to abdomen. The said victim remained admitted in the hospital continuously for a period of 2 months nine days, and therefore, there cannot arise even a shadow of doubt that the death of the deceased was a natural consequence of the injuries sustained by him in the incident of 06.09.1985.

15. With regard to the contention raised by both the counsel for the appellants to challenge the said dying declaration, we do not find that there is any merit in any of the contentions raised by both the counsel for the appellants. ASI- Balbir Singh was not required to bring the area Magistrate when he was merely recording the complaint of the victim. So far the objection raised by both the counsel for the appellants, that the deceased only knew Hindi language and not Urdu in which ASI Balbir Singh had recorded the statement is concerned, this fact alone will not vitiate the statement made by the deceased. In State of Rajasthan v. Bhoop Singh, reported in 1997 10 SCC675 wherein similar situation, the Apex Court took a view that the dying declaration would not be vitiated merely because it was in a different language. The essential requirement being, that the person who records the dying declaration must be satisfied that the deceased was in a fit state of mind and the statement being made by the victim/deceased was free from any kind of tutoring, prompting or influence. The principles governing the dying declaration were eloquently summed up by the decision of the Supreme Court in Paniben v. State

of Gujarat reported in 1992 SC1817and the same are reproduced as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (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. (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration has to look to the medical opinion. But where the eyewitness has said that the deceased was in a fit conscious state to make this dying declaration, the medical opinion cannot prevail. (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.

16. It will also be useful here to refer to the judgment of the Supreme Court in the case of State of Haryana v. Mange Ram & Ors, reported in AIR 2003 SC558 wherein the Apex Court took a view that under Indian law, for dying declaration to be admissible in evidence, it is not necessary that the maker of the statement at the time of making his statement should be under the shadow of death. Relevant parts of the same is reproduced as That is not what Section 32 of the Indian Evidence Act says. That is not the law in India. Under Indian Law, for dying declaration to be admissible in evidence, it is not necessary that the maker of the

statement at the time of making the statement should be under shadow of death and should entertain the believe that his death was imminent. The expectation of imminent death is not the requirement of law.

17. The concept of dying declaration was also extensively discussed by the Constitution Bench of the Supreme Court in the case of Laxman v. State of Maharashtra, reported in 2002 6 SCC710wherein it was held as under:

The justice theory regarding acceptability of a dying 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 death bed 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 court 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 to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting 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 look 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 in 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 is absolutely necessary, although to assure 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 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 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 essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

18. In the light of the aforesaid settled legal position, we do not find that the counsels for the appellants could succeed in creating any suspicion to doubt the credibility, truthfulness and trustworthiness of the statement made by the deceased, who was declared medically fit by the attending Dr. Padmalaya Devi. We also cannot lose our sight from the fact that the testimony of PW-23, who had proved the endorsement of Dr. Padmalaya Devi on the dying declaration of Trilok Chand, remained unchallenged and unrebutted as he was not cross-examined by the defence witness. No question was put to PW-18 ASI Balbir Singh about the fitness of the deceased and about his not contacting the area SDM and on the other material aspects, and therefore, also the defence cannot raise all these pleas which were not put by the defence to the prosecution witnesses. We also do not find any force in the argument of the counsel for the appellants that the deceased did not disclose the parentage or address of the accused persons as a person having suffered 17 wounds on his body is not expected to give exact parentage or address of the accused persons. In any case, even under such a frenetic state, the deceased gave particulars of the localities where the accused persons were residing. The statement of the victim was recorded by ASI Balbir Singh after his MLC was prepared, and therefore, it is not unusual for the deceased to have complete knowledge of the injuries inflicted on his body. We

also do not find any merit in the contention raised by both the counsel for the appellants that the time gap was to too short between the time of admission of the victim and the registration of the FIR, and therefore, no time was left in between to record the said statement of the victim. A time gap of 1.40 minutes was enough to complete the said process and the statement of the deceased was not running into several pages which could have consumed more time. The victim was admitted in the hospital at about 8.15 p.m. and he was declared fit to give statement by Dr. Padmalaya and the said endorsement was also counter signed by Dr. Khetrapal under whose signatures time indicated is 9.35 p.m. and the rukka prepared at RML hospital and further there was sufficient and reasonable time to record the statement of the victim. One of the contentions raised by both the counsel for the appellants was that Dr. Khetrapal was not examined by the prosecution. This contention of the counsel for the appellants also lacks merit as Dr. Khetrapal had also left the service of the hospital at the relevant time and her whereabouts were not known to the hospital authority as per the deposition of PW14- Puran Mal. The death summary of the deceased was prepared by Dr. Khetrapal and his death summary report was proved on record by PW-14 Puran Mal-record clerk of RML hospital and the signatures of Dr. Khetrapal on the death summary report and on the MLC totally match with each other, as can be seen by our naked eyes and there is no room to doubt the signatures of Dr. Khetrapal on the MLC and the time indicated under his signatures.

19. Based on the above discussion, we are fully satisfied that the deceased was in a fit state of mind to make the statement and there is no reason to disbelieve the fitness certificate given by Dr. Padmalaya Devi. It is also a settled legal position that once the court finds that dying declaration was truthful and voluntarily made then the same can be the sole basis of conviction of the accused even in the absence of any corroboration. Great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not expected to tell a lie or to concoct a case so as to implicate an innocent person. This principle is based on the maxim nemo moriturus proesumitur mentiri which means a dying person would not normally tell a lie.

20. Deceased Trilok Chand who had received 17 injuries on his body must have seen his death very near and therefore, he was not expected to make any false statement to ASI Balbir Singh or to have falsely implicated accused persons who were in fact well known to him and who wanted to teach him a lesson for having dared to ask for return of his money. The said dying declaration made by the deceased also finds its corroboration from the evidence of PW4- Gyan Chand & PW5- Pritam. PW4-Gyan Chand, is the real brother of the deceased Trilok Chand and he had gone to visit RML hospital to meet his brother on the evening of 06.09.1985 and he had enquired from his brother as to who had stabbed him and in answer to the same, the deceased had named these accused persons who had injured him with the help of knives. To the same effect is the deposition of PW5-Pritam, who also happens to be the brother of the deceased and had visited the hospital after the said incident. The learned Trial Court is right in observing that the statement made by the deceased to his said two brothers also amounts to dying declaration and the same were totally in consonance with his own statement as made by him to the ASI Balbir Singh. The corroborative evidence of PW-4 and PW-5 further lend support in accepting the dying declaration made by the deceased being most truthful, reliable and free from any kind of suspicion or doubts.

21. Dealing with the next plank of arguments raised by the counsel for the appellants that the death of the deceased was not on account of injuries received by him but due to the negligence of the attending doctors treating the deceased. At this juncture we would also like to examine whether the case of the accused persons falls under section 300 IPC or under Section 299 IPC i.e. are they liable for offence of culpable homicide amounting to murder or culpable homicide not amounting to murder.

22. We may, therefore, produce Sections 299 and 300 as follows: Section 299: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. And; Section 300: Except in the cases hereinafter excepted, culpable homicide is murder .... 3rdly.-if it (if the act by which the death is caused)

is done, with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

23. It was held by Honble Apex Court in matter of Kishore Singh & Anr. vs. The State of Madhya Pradesh reported in AIR 1977 SC2267held that the distinction between culpable homicide (Section 299 IPC) and murder (Section 300 IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 IPC. Unlawful homicides fall under both the categories i.e culpable homicide amounting to murder and culpable Homicide not amounting to murder. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 IPC. But even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 IPC, namely, firstly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 IPC.

24. On the facts and circumstances of the present case in order to sustain the charge under Section 302 IPC the prosecution has to establish the ingredients of the clause "3rdly' under Section 300 IPC.

25. In the landmark judgment of Virsa Singh v. State of Punjab reported in (1958) 1 SCR1495 the Honble Supreme Court held that the following are the four steps of inquiry involved in the offence of Murder under section 300 IPC, clause thirdly::

i. ii. Second, what is the nature of the injury; iii. Third, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended; and iv.

26. First, whether bodily injury is present; fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature.

In the present case as per the MLC proved on record. The exact nature of injuries as recorded in the MLC are reproduced as under:

1. Multiple incise wound over (i) 1 x right iliac fossa above the mid inginial Omentmuam is coming out of the wound. point.

2. 1 x right epigastic region 1 lateral to mid line and 1 below the right costal margin.

3. 1 x over medial aspect of left lower arm 2 above elbow crease.

4. 1 x over medial aspect of right upper fore-arm 1 below the elbow crease.

5. 2 x 1 over medial aspect of right mid forearm.

6. 1 x over lateral side of extensor surface of left fore-arm 2 below the left elbow right.

7. x 1/4 over lateral surface of left upper arm.

8. 2 x over postero lateral aspect of left lower thigh 2 above the knee joint.

9. 1 x over pesto lateral aspect of left upper thigh.

10. 1/2 x over lateral aspect of left upper thigh 2 and medial to the wound No.9.

11. 1/4 x 1/4 over lateral aspect of left upper thigh 1 infero lateral to wound No.9.

12. 1 x 1/4 over postero medial aspect of the lower thigh 4 above the knee joint.

13. 1 x 1/4 over lateral aspect of right upper leg 3 below the tip of right fibular.

14. 1 x 1/2 over right gluteal region 1/2 below the mid right ileac crest.

15. 1 1/2" x 1/2 over mid left guleral region.

16. 1 x over left para vertebral region 1/2 lateral to the mid vertebral line.

17. 2 x 1/2 over left infra scapular region 1/2 below the apex of left scapular 2 lateral to mid vertebral line. The nature of injuries was sharp.

27. The aforesaid MLC was proved on record as Ex. PW-8/A in the evidence of PW-8 Dr. K.K. Pandey. Immediately after the incident, the victim was admitted in RML hospital where he remained under treatment for a period of two months and nine days and finally he succumbed to his injuries. PW-1 Dr. Bharat Singh had conducted the post mortem on the dead body of Trilok Chand, and in his post mortem he found the following external injuries on the body of the deceased:

1. Tracheostomy wound on the neck with mild infection over the wound; 2. Cut open wound on the right upper arm outer upper part; 3. Healed wound scar on right upper arm, front upper part 1/2 long, white in colour; 4. Healed wound scar on the right fore-arm front upper third 1/2 long, white in colour; 5. Healed would scar on the left fore-arm upper outer side long, white base; 6. Healed wound scar on the left upper arm front part in the upper third obliquely placed size 1 long, white in colour; 7. Healed wound scar on the right fore-arm mid front part place horizontally, size 3/4 long with white base 8. Healed wound scar on the right side epigastic area, size 1/4 long obliquely placed, linear in shape, white base; 9. Infected gaping wound on the right paramedian line placed vertically size 5 x 1.1/4 x abdominal cavity deep with pus deposit on the surface; 10. Healed wound scar on left paramedian line placed vertically, size 7 long with suture markings on either side; 11. Drainage tube wound on right iliac fossa (still healing); 12. Healed wound scar on the right thigh front mid area size 1 1/4 long placed horizontally linear in shape; 13. Healed wound scar on the right leg mid outer part placed horizontally size 11/4 long; 14. Healing cut open wound on the right ankle 15. Healed wound scar on the left thigh lower outer part size 11/4 x 1/4 white in colour; 16. 11/4 x 1/4 white in colour on the left thigh upper outer part size 1 x 1/4 white in colour; 17. Bed sore on the sacral area size 4 x 3 x muscle deep; 18. Healed would scar liner in shape on the left lumber area size 1 x 1/10 white in colour; 19. Healed wound scare on the left scapula inferior angle size 1/2 x 1/10 liner in shape; 20.

28. Healed wound scare on the left buttock upper outer part size 1 x 2/10 white in colour.

On the internal examination of the body of the deceased, the post mortem doctor gave following report:

INTERNAL EXAMINATION: Scalp was pale. Skull bones were normal. Brain was pale. Left tissues are inflamed. Both lungs were pale and partially collapsed. Heard was normal. Abdominal cavity contained about 400 ml of greenish pus which was foul smelling. Omentum was adherent. There was sutured wound on small bowels in a circular manner (operational). Loops of the bowel were adherent to each other. Stomach contained two ounce of bile. Mucous membrane was pale. Liver spleen, kidneys, adrenals and pancreas were normal. Rectum was empty. Bladder contained clear urine. All injuries were old. Original stab injuries as mentioned in MLC had healed. Infected injury No.9 was operational wound which is infected.

29. As to the cause of the death the post mortem doctor opined that the death was due to shock and peritonitis, following injuries to abdomen. In his cross-examination PW1-Dr. Bharat Singh deposed that injury Nos.1, 2, 9, 10 & 14 were operational wounds and there was an infection over injury Nos. 1 and 9. He further deposed that all other wounds were healed, while injury No.11 was in the process of healing and the same was also operational wound.

30. As would be seen from the above MLC report, the deceased had received multiple incise wounds 17 in number on various portions of his body. Out of 17 injuries, 5 injuries were inflicted on the right and left arm of the deceased, 5 injuries were inflicted on his left lower and upper thighs, injury No.1 was inflicted on the right iliac fossa 1/2 above the mid inginial point and Omentum was coming out of the wound, while injury No.2 was inflicted on the right epigastic region 1 lateral to mid line and 1 below the right costal margin. In all five accused persons were involved holding separate knives in their hands and inflicted those injuries. As per the MLC, the wounds were incised wounds and not stabbed wounds even the depth of the injuries was nowhere mentioned against any injury. From these injuries, it clearly emerges that there was no forcible blow on the part of any of the accused persons which could have caused serious deep injuries to the deceased. Further majority of the injuries were also inflicted on non-vital parts of the body of

the deceased.

31. The Honble Apex Court in the matter of Chenda @ Chanda Ram vs. State of Chhatisgarh reported in 2013(10)SCALE637 held that for proving the case under clause thirdly of Section 300 the Prosecution must categorically prove that the injury inflicted was sufficient in the ordinary course of nature to cause death.

32. Taking into account the above legal position and said injuries suffered by the deceased as per MLC and the post mortem report, and also the fact that no where the doctor had opined that any of the injuries were sufficient in the ordinary course of nature cause the death of a victim, we think that clause thirdly of Section 300 IPC has not been sufficiently established by the prosecution.

33. However the evidence fulfils one of the ingredients of Section 299 namely, that the appellants cause the death by doing an act with the intention of causing bodily injury as is likely to cause death.

34. Now dealing with the contention raised by the appellant that the death of the deceased was not on account of injuries received by him but due to the negligence of the attending doctors treating the deceased. Here it will be important to quote the Explanation 2 to section 299, which is as follows:

Explanation 2.--Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

35. As per the above factual matrix, it is amply clear that the death of the deceased was caused due to these wounds only, although it was not immediately caused. The wounds inflicted upon the deceased by the accused persons were causa sine quo non for the death of the deceased and the medical negligence was causa causans. It is a settled legal position that in cases where death is caused due to injuries inflicted by the accused persons, the argument that the deceased could have been saved by proper medical care, is wholly irrelevant. It was held by the Honble Supreme Court in the landmark judgment case of Morcha vs. State of

Rajasthan reported in AIR 1979 SC80hat:

The mere fact that if immediate expert treatment had been available and the emergency operation had been performed, there were chances of survival of the deceased can be of no avail to the appellant. Explanation 2 to Section 299 of the Indian Penal Code clearly lays down that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented

36. Further is pertinent to mention that the defence never raised this ground of medical negligence during the trial and even during the cross examination of the concerned doctor PW-1, the defence neither contradicted him nor did it put any suggestion to this effect. In the light of the above facts and circumstances we do not find any merit in the contention of Ld. Counsel for the appellant that the death of the deceased was not on account of injuries received by him but due to the negligence of the attending doctors treating the deceased.

37. In the view of the above, we are of the considered view that the offence of the appellants would not fall under Section 302 IPC and the same can be altered to Section 304 Part-I IPC. Consequently, we hold the appellants guilty of the offence under Section 304 Part-I IPC.

38. In the view of the aforesaid, the judgment and the order of the learned Additional Sessions Judge dated 07.10.1998 and 09.10.1998, respectively, convicting the appellants for the offence punishable under Section 302 IPC is modified to the extent that the appellant is convicted under Section 304 IPC first part and accordingly the sentence of life imprisonment imposed upon him by the Ld. trial court is converted to the Sentence of period of 10 years.

39. The appellants are on bail. Their bail bonds are forfeited and they are directed to be taken under custody forthwith to serve the remaining sentence.

40. A copy of this order be sent to learned trial court for compliance.

41. The present appeals filed by the appellants are partly allowed. KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

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