

Bashir Shah and ors. Vs. Stae of Rajasthan

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Court : Rajasthan

Decided On : Mar-18-1994

Reported in : 1994CriLJ2526; 1994(2)WLC371; 1994(1)WLN455

Judge : Rajendra Saxena and; R.R. Yadav, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 147, 148, 149, 302 and 307; Arms Act - Sections 3 and 25; Code of Criminal Procedure (CrPC) - Sections 162, 374 and 374(2); Rajasthan Police Rules, 1965 - Rule 6; [Constitution of India](#) - Article 141

Appeal No. : Criminal Appeal No. 386 of 1991

Appellant : Bashir Shah and ors.

Respondent : Stae of Rajasthan

Advocate for Def. : V.R. Mehta, Public Prosecutor

Advocate for Pet/Ap. : Bhagwati Prasad, Adv.

Disposition : Appeal allowed

Judgement :

R.R. Yadav, J.

1. This appeal is preferred against the judgment dated 27-11-1991 passed by the learned Additional Sessions Judge, Chittorgarh in Sessions Case No. 22 of 1991, by which, he found the appellants guilty of offence under Section 302, I.P.C. and sentenced each of them to life imprisonment and a fine of Rs. 500/- and in default to further undergo R. I. for six months.

2. According to the prosecution story, it is alleged that on 14-8-1987 at 1 p.m., one Kamal Prakash Nakedar, Naka No. 7, Chhoti Sadri Road, Nimbahera sent an information on phone to police station, Nimbahera that 4-5 persons were beating one person near the Naka and necessary steps be taken. The said information was recorded in the Rojnamcha as Ex. P. 19. Thereupon ASI Laxmilal and Head-constable Manikant accompanied with the police force proceeded towards to the said Naka, where it was transpired that the injured was shifted to the hospital and that the assailants had fled away towards Ranikhera, ASI Laxmilal with police force went in search of the accused persons. Head-constable Manikant proceeded to see the injured in the hospital, where he found that the injured Najaru Shah s/o Allahrakh shah Fakir r/o. village Ranikhera was being medically treated. On oral enquiry, injured Najaru Shah informed the Head constable, named-above, that he had enmity with accused Bashir, Roshan and Tufail, that while he was going on cycle for prayer (Namaz) towards Nimba-hera, Bashir, Roshan, Tufail and Iqbal, who were hiding themselves behind Chungi Naka of Chhoti Sadri appeared suddenly and started belabouring him with Dharia and Lathis, that he fell down from his cycle yet they continued to beat him and that he received injuries on his head, leg, hand and chest. He further informed that when the people of the vicinity ran to save him, then, Bashir pointed his gun and that the assailants after being satisfied that he was dead, ran away. He was brought to the hospital on 'Thela' by Babu Shah and one more person and that if there were any more assailants then he would not be able to identify them.

3. Manikant, Head-constable recorded the statement of the injured Najaru Shah and examined the injuries on his person. He found three injuries on his head in front; one injury on his back; one injury above the right ear; one injury on the right ear. On the left hand he found an injury which appeared to have been caused by a sharp-edged weapon. Due to those injuries, there was profused bleeding. Left leg

and right hand were found by him to be fractured. He also found one contusion on the chest of the injured.

4. On the basis of the said oral information Ex. P. 10 of injured Najaru Shah, FIR Ex. P. 23 was scribed and a case under Section 307 read with Section 34, I.P.C. was registered and investigation was started. During investigation, the police was informed by Dr. Rajendra Gupta (PW-24) on telephone that injured Najaru Shah had expired due to his serious injuries. Upon this information, the case was converted into Section 302, I.P.C. After completion of the investigation, challan was filed against six accused persons in the court of learned Munsif and Judicial Magistrate, Nimbahera, who committed case to the learned Addl. Sessions Judge, Chittorgarh.

5. Learned Addl. Sessions Judge framed the charges against six accused-persons; namely, Iqbal Hussain s/o. Bashir Shah, Tufail Mohammed s/o. Bashir Shah, Roshan Shah s/o. Amir Shah, Shamsu Shah s/o. Allarakh Shah Fakir, Bashir Shah s/o. Amir Shah Fakir and Mustaq Khan s/o. Gafoor Shah Fakir, all r/o. village Ranikhera for the offences under Section 147, 148, 149 and 302, I.P.C. read with Section 3/25 of the Arms Act.

6. All the six accused-persons pleaded not guilty and claimed trial. The prosecution examined 26 witnesses in support of the prosecution story and produced 41 documents Ex. P. 1 to Ex. P. 41. Shamsu Shah, Roshan, Bashir Shah, Iqbal and Tufail pleaded alibi by examining DW 1 to DW 5. It is also suggested by defence in cross-examination of the prosecution witnesses and also by examining DW Abdul Hamid that no 'Maar Peet' took place on the date of occurrence as alleged by the prosecution but the deceased met with an accident on the same place and at the same time and that they have been falsely implicated due to enmity.

7. After hearing the learned Public Prosecutor and the learned counsel for the accused, the learned Addl. Sessions Judge came to the conclusion that accused Shamsu and Mustaq were innocent and that they had been falsely implicated inasmuch as, even deceased Najaru Shah did not disclose their names before the Head-constable Manikant (PW-11) immediately before his death, who had

recorded the dying declaration Ex. P. 20. It was further held by the learned Addl. Sessions Judge that the eye-witness account given by Babu Shah (PW-7) and Mansingh (PW-6) was not trustworthy. Thus, the learned Addl. Sessions Judge found that the prosecution failed to establish guilt against accused Shamsu Shah and Mustaq Khan and as such, acquitted them.

8. However, the learned Addl. Sessions Judge relying solely on the alleged dying declaration Ex. P. 20 found the present appellants viz. Iqbal Hussain, Tufail Mohd., Roshan Shah and Bashir Shah guilty of the offence under Section 302, I.P.C. and convicted and sentenced them for life imprisonment and imposed a fine of Rs. 500/- each and in case of default of payment of fine, they were directed to undergo six months further R. I. It is pertinent to mention here that the learned Addl. Sessions Judge acquitted the aforesaid accused-persons for the offences under Section 148, I.P.C. and Section 3/25 of the Arms Act.

9. We have heard the learned Public Prosecutor and the learned counsel for the appellants at length and gone through the oral and documentary evidence on record.

10. The main thrust of argument of the learned counsel for the appellants is that it is unsafe to base the conviction on the basis of the dying declaration (Ex. P. 20) alone made by deceased Najaru Shah, recorded by Manikant Head-constable (PW-11), who was admittedly an Investigating Officer. Secondly, the dying declaration ought to have been recorded in form of question and answer by requisitioning the services of a Magistrate as contemplated under the Rajasthan Police Rules, 1965 wherein the detailed procedure for recording of the dying declaration has been provided in extenso. Thirdly, the dying declaration can only be recorded after fitness certificate is issued by a doctor to the effect that the injured, whose death is immediate is physically and mentally in possession of his reason to make a lucid statement. According to the learned counsel for the appellants, in the instant case, no such certificate has been issued by the doctor nor there is any such endorsement on the 'Parcha Bayan'. Fourthly, under the Rajasthan Police Rules, 1965, it is mandatory that the dying declaration must be recorded by a Magistrate and if under the circumstances of a case, a Magistrate is

not available, then, Doctor should record the dying declaration and if the doctor is not available, then, a Gazetted Police Officer can record the dying declaration in the presence of two persons and get the dying declaration signed by them. According to learned counsel for the appellants, non-compliance of the mandatory Rules, as above, is fatal to the prosecution case. Lastly, according to him, the dying declaration recorded by PW 11 Manikant Head-constable is full of infirmities and as such, no testimonial value can be attached to such a dying declaration.

11. On the other hand, learned Public Prosecutor submitted before us that the dying declaration recorded by PW 11 Manikant Head-constable is a genuine piece of evidence and not cooked-up as argued by learned counsel for the appellants. According to the learned Public Prosecutor, the dying declaration Ex. P. 20 is a truthful version as to the circumstance of the death and assailants of the victim and that there is no question of further corroboration. According to him, the finding of guilt recorded by the trial court solely based on the dying declaration (Ex. P. 20) against the appellants is perfectly justified, legal and the same does not require interference.

12. The learned counsel for the appellants as well as learned Public Prosecutor have placed before us *Khushal Rao v. State of Bombay*, : 1958 CriLJ106 , *Munnu Raja v. State of M. P.*, : 1976 CriLJ1718 , *Ramawati Devi v. State of Bihar*, : 1983 CriLJ221 , *Navratan Mal alias Babu v. State of Rajasthan*, 1985 Cr LR (Raj) 644, *State of Rajasthan v. Smt. Lichma Devi*, 1986(1) WLN 106, *Kishore v. State of Rajasthan*, 1988 Cr LR (Raj) 376 and *Pratap Sing v. State of Rajasthan*, 1989 (1) RLR 594.

13. The aforesaid decisions have been cited by the learned counsel in support of their respective arguments mentioned in the preceding paragraphs.

14. Before entering into the merit of the case and before making analytical discussion of oral and documentary evidence on record, it would be expedient in the interest of justice to begin with the proposition of law regarding dying declaration as laid down by their Lordships in the Supreme Court as well as our own High Court in the aforesaid decisions cited at the Bar.

15. In the case of *Khushal Rao v. State of Bombay* (supra), in para 17, their Lordships have held that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But, once the Court has come to the conclusion that the dying declaration was a truthful version as to the circumstances of the death and the assailants of the victim, then there is no question of further corroboration. If on the other hand, the Court, after examining the dying declaration in all its aspects and testing its veracity comes to the conclusion that it suffers from an infirmity, then, without corroboration, it cannot form the basis of conviction.

16. In the case of *Munna Raja v. State of M. P.* (supra) their Lordships of the Supreme Court specifically ruled in para 11, which reads as under:-

'We might, however, mention before we close that the High Court ought not to have placed reliance on the third dying declaration Ex. P/2, which is said to have been made by the deceased in the hospital. The investigating officer who recorded the statement had undoubtedly taken the precaution of keeping a doctor present and it also appears that some of the friends and relations of the deceased were also present at the time when the statement was recorded. But if the investigating officer thought that Bahadur Singh was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration, Investigating Officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We have, therefore, excluded from our consideration the dying declaration Ex. P. 2, recorded in the hospital.'

17. In the case of *Ramawati v. State of Bihar* (supra), it is held that there is no requirement of law that dying declaration must necessarily be made to a Magistrate, that what evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case and that in a proper case, it may be permissible to convict a person

only on the basis of a dying declaration in the light of the facts and circumstances of the case.

18. In the case of Navratan Mal alias Babu v. State of Rajasthan (supra), a Division Bench consisting of Hon'ble Shri M. B. Sharma and Hon'ble Mrs. Mohini Kapoor, JJ. has ruled that the statement recorded after seeking information that the injured was in a fit state of mind to make statement i.e. dying declaration recorded in narration instead of question and answer form cannot be discarded but after scrutiny, if it is found to be truthful then dying declaration itself is sufficient to base the conviction. In that case, after analytical discussion, this Court found three dying declarations made to different witnesses to be trust-worthy and as such, appeal against the conviction was dismissed and judgment of conviction and sentence passed by the trial court was affirmed.

19. In the case of State of Rajasthan v. Smt. Lichma Devi (supra), a Division Bench of this Court ruled that the patient disclosing certain facts to the doctor in course of medical treatment, is relevant and admissible in evidence, although oral. In that case, the statement of doctor, who recorded the first dying declaration, was put to strick scrutiny by the court and after analytical discussion, it was found to be natural, probable and trustworthy. It was further held that the dying declaration was also corroborated by written dying declaration recorded by the SHO on the basis of which investigation started. The appeal against acquittal filed by the State was allowed and accused Smt. Lichma Devi was convicted and sentenced to death.

20. In the case of Kishore v. State of Rajasthan (supra), a Division Bench of this Court ruled that if a Magistrate failed to call a doctor, a nurse or a Ward Boy or attendant of the other patient before recording the dying declaration, then such a dying declaration was not trust-worthy. Thus, according to the aforesaid decision of the Division Bench of this Court, such dying declaration creates suspicion and no conviction can be based on such dying declaration, even if, recorded by a Magistrate. In that case, the appeal filed by accused Kishore was allowed by this Court and judgment of the learned Sessions Judge, which was based on dying declaration, was set aside and accused was acquitted of the offence under

Section 302, I.P.C.

21. The last decision cited at the bar namely Pratap Singh v. State of Rajasthan (supra), has laid down the three guidelines, as to when and how, the dying declaration can be the sole basis of conviction without corroboration. The relevant para 13 of the said decision shall be reproduced at the relevant place in this judgment in order to avoid repetition and to maintain brevity.

22. Although, we are conscious of this fact that being court of appeal under sub-sec. (2) of Section 374, Cr. P.C. we are supposed to make analytical discussion of entire oral and documentary evidence on record but since in the instant case, the learned Sessions Judge has based the finding of guilt against the appellants solely on the basis of dying declaration after disbelieving all the eyewitnesses and also after disbelieving the witnesses of recoveries who were declared hostile by the prosecution, we limit our scrutiny to the dying declaration.

23. We have gone through all the relevant statements and documents. We are in general agreement with the learned Addl. Sessions Judge in appreciation of his documentary evidence on record except dying declaration Ex. P. 20. We fully agree with the learned Addl. Sessions Judge that the eye-witness accounts given by the prosecution witnesses are not trust-worthy for the cogent and convincing reasons given by Addl. Sessions Judge except the statements of PW 11 Head-constable Manikant, who recorded the dying declaration of the deceased Najaru Shah, the statement of Dr. Rajendra Gupta (PW-24), who was medical jurist in the hospital and was giving medical treatment to deceased Najaru Shah and the statement of PW 3 Kamal Prakash Nakerdar, who gave information to the police on 14-8-87, while the occurrence was taking place. We also propose to discuss and re-appreciate and re-assess the testimonial value of dying declaration Ex. P. 20, which lead towards an irresistible conclusion that the appellants are innocent and the finding of guilt recorded by the learned Addl. Sessions Judge is not sustainable by any stretch of imagination, which is solely based on the dying declaration recorded by PW 11 Manikant Head-constable marked as Ex. P. 20.

24. Before we proceed to re-appreciate the aforesaid oral and documentary evidence and demonstrate that the prosecution has miserably failed to establish

guilt against the accused-appellants beyond reasonable doubt and the dying declaration (Ex. P. 20) alone without further corroboration cannot be the basis of conviction and sentence of the appellants it would be relevant to formulate the test of reliability of the alleged dying declaration through which, it is required to pass and if it fails to pass such a test of reliability, we have no hesitation but to set aside the finding of guilt recorded against the accused-appellants by the learned Addl. Sessions Judge,'

25. It is important to mention that the Additional Sessions Judge, in our opinion, rightly disbelieved the eye-witness accounts given by the eye-witnesses and other documentary evidence produced by the prosecution but he fell into an error because paragraph 11 of the decision given by their Lordships of the Supreme Court in Munnu Raja's case (supra) had escaped his notice although the aforesaid decision was cited before him at the bar and he made reference of the said decision in his judgment. At the risk of repetition a portion of aforesaid paragraph 11 of the decision is being reproduced which would be sufficient to set aside the finding of guilt recorded by the learned Sessions Judge against the present appellants :-

'Investigating officers are naturally interested in the success of the investigation and practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.'

26. The aforesaid observations of the Hon'ble Supreme Court are the ratio of the aforesaid decision, which is binding to all courts in India as contemplated under Article 141 of the [Constitution of India](#). In the present case, although in the aforesaid case, the Supreme Court held that the investigating officers are naturally interested in the success of investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation, are not to be encouraged but the learned Addl. Sessions Judge recorded a finding of guilt against the present appellants holding in his judgment that PW-11 Manikant Head-constable is a policeman and he should not be believed to have any grudge against the present appellants, therefore, he is an independent witness and his testimony should be treated as of an independent witness without any bias and ill-

will. In fact, the judgment of the learned Addl. Sessions Judge recording conviction and sentence, which is being impugned before us, if allowed to stand, it will encourage recording of dying declaration by the investigating officers. From the judgment cited before us of our own High Court, we found as a matter of fact, that invariably the investigating officers had, recorded a dying declaration, upon which, the judgment of the learned Sessions Judges were passed and after challenged before this Court, all such dying declarations were put to strict scrutiny of this Court and after analytical discussion, almost the conviction solely based on the dying declaration recorded by the investigating officer were set aside except in two cases. There are catena of judgments of this Court reported and unreported, where the veracity of such dying declaration recorded by the investigating officer, are brought to the notice of this Court in order to check such practice of recording the dying declaration by the investigating officer against the mandatory provisions as contemplated under Rule 6.22 of Chapter VI of the Rajasthan Police Rules, 1965 (for short 'the Rules of 1965') we are formulating the test of reliability, which will guide the investigating officers and subordinate courts to take care of such kind of dispute, which are often raised regarding dying declaration recorded by the investigating officers as to when and how the dying declaration can be made the sole basis of conviction and sentence without corroboration and when and how it should be recorded either by a Magistrate or by a doctor or by an investigating officer. In our humble opinion, the following should be test of reliability of the dying declaration by courts of law:-

A. Ordinarily, whenever an injured is in a precarious condition, the investigating officer should requisition the services of a Magistrate for recording the dying declaration. In fact, the investigating officers are naturally interested in the success of investigation and practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.

AIR 1976 SC 2199 : (1976 Cri LJ 1718)

B. There is neither rule of law nor a prudence that the dying declaration cannot be acted upon without corroboration.

AIR 1976 SC 2199 : (1976 Cri LJ 1718)

C. If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration.

(V S Mour v. State of Maharashtra, : 1978 CriLJ644 .)

D. For this purpose, the court has to apply strictest scrutiny and has to be on guard to ensure that the declaration is not the result of tutoring, prompting or imagination and that the deceased had opportunity to observe and identify the assailants and was in fit state of mind to make declaration.

AIR 1976 SC 2194 (sic).

E. Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

: 1974 CriLJ361 .

F. In a criminal case, muchless a murder case, the investigation should be conducted in such a manner that there is no room for entertaining a doubt about a fair investigation. The fair investigation is a fundamental principle which may enhance the reliability of a dying declaration and may reduce its reliability if court is not satisfied about its fairness.

G. Suspicion about truthfulness should never be substituted as evidence in case of dying declaration keeping in view the fact that the statement of the deceased made in the precarious condition of his health, is made in the absence of the accused-appellants, who had no opportunity of testing the veracity of the statement called in legal terminology as 'dying declaration by cross-examination'.

H. While making the dying declaration, the sole basis of conviction and sentence by the courts of law, it must be kept in view that the prosecution story may not only be true but it must be true and between may be true and must be true, there is a large gap, which is to be travelled by the prosecution agency by adducing unimpeachable and reliable evidence.

I. The Rajasthan Police Rules, 1965 are quite elaborate in laying down the procedure for recording the FIR and consequent investigation. Under these Rules,

Chapter V of the Rules of 1965 prescribes for recording of the FIR. Chapter VI deals with investigation. Chapter VII deals with arrest, escape and custody. Chapter VIII deals with prosecution and court duties. Similarly, in Chapter VI of the Rules of 1965, a complete procedure is given as to how the dying declaration is to be recorded. The relevant Rules regarding dying declaration find place in Chapter VI of the Rules of 1965, which are being reproduced below:-

'Rule 6.22 - Dying Declaration : -

- (1) A dying declaration shall, whenever possible be recorded by a Magistrate.
- (2) The person making the declaration shall, if possible be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.
- (3) If no Magistrate can be obtained the declaration shall, when a Gazetted Police Officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.
- (4) If no such witnesses can be obtained without risk of the injured-person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.
- (5) A dying declaration made to police officer should, under Section 162, Code of Criminal Procedure, be signed by the person making it.'

27. We have given our anxious thought-full consideration to the aforesaid Rules of 1965 and we are fully satisfied that these Rules are self-contained procedure, which is to be followed by all investigating officers while recording the dying declaration. In our humble opinion, these Rules are just, fair and reasonable,'therefore, its strict compliance in letter and spirit must be ensured wherever the dying declaration is taken to be sole basis of conviction and sentence.

28. Now keeping in view the aforesaid test of reliability enumerated by us, we have to examine the testimonial value of the statement of PW-11 Manikant Head-constable and Ex. P. 20, which is alleged to be dying declaration and on the basis of which the finding of guilt against the present accused-appellants is recorded by the learned Addl. Sessions Judge. It is pertinent to mention here that the learned Addl. Sessions Judge held in his judgment that PW-11 Manikant Head-constable is an independent witness having no grudge to falsely implicate the present accused-appellants, therefore, his statement should be believed. In this regard, we do not agree with the finding recorded by the learned Addl. Sessions Judge, inasmuch as, the aforesaid appreciation of oral and documentary evidence has been assessed by the learned Addl. Sessions Judge against the preposition of law laid down by their Lordships of the Supreme Court in para 11 of the case of Munnu Raja (supra), wherein, it is clearly held that the investigating officers are always interested in the success of the investigation, hence, they cannot be said to be independent witnesses and the dying declaration recorded by them should always be discouraged. According to their Lordships view, held in Munnu Raja's case (supra), the investigating officer is required to requisition the services of a Magistrate for recording the dying declaration. Since in the instant case, no effort was made to requisition the services of a Magistrate to record the dying declaration of deceased Najaru Shah, therefore, the veracity of the statement of PW-11 Manikant and so-called dying declaration (Ex. P. 20) becomes suspicious.

29. The statement of PW-24 Dr. Rajendra Gupta, according to us, can be taken to be last nail in the coffin of the prosecution case. The statement of Dr. Rajendra Gupta goes a long way to prove that he was acquainted with the deceased Najaru Shah and his family members prior to the date of occurrence. Therefore, it would have been natural and probable that if the deceased Najaru Shah when he was brought to hospital for treatment under him; had he would have been physically and mentally fit and would have been in possession of reason to make a lucid statement then he would have asked from him as who were the assailants and who had given him such a brutal beating. Some of the decisions mentioned above, cited at the bar go a long way to prove that especially in burn cases, if a patient is brought for treatment in precarious condition, the doctor's invariably asked the question how he or she received the burn injuries on his/her person. Similarly, in

the instant case also, if deceased Najaru Shah would have been mentally and physically fit the doctor, who had prior intimacy with him, naturally, would have asked him as to, who assaulted him. But the doctor has not asked any question about the assailants of the deceased and reason for not asking the name of the assailants, is not very far to seek, inasmuch as, in our opinion, the deceased was not in a fit condition to speak because he was brought in the hospital in shock and he was profusely bleeding and due to excessive bleeding when he was brought to hospital at 1.15 p.m. his nerves were not traceable. According to the doctor, the patient was brought in shock condition which means temporary paralytic attack and his central nervous, respiratory and circulatory systems were not functioning properly. In such circumstances, according to the Medical Jurisprudence, adrenaline hormones are controlled by hypothalamus (present in fore-brain) will increase the heart-beat will activate the respiratory system is affected hence, brain will not get adequate blood circulation.

30. We have also examined Post-mortem Report Ex. P. 38 and after its perusal, we come to this conclusion that deceased Najaru Shah was an old man of 60 years and he had received as many as 24 grievous injuries on his person which further lead to an irresistible conclusion that after receiving such number; of serious injuries, he cannot be said to be capable physically and mentally to make a statement as stated by PW-11 Manikant. In view of the aforesaid facts and circumstances of the case, the dying declaration Ex. P. 20 and statement of PW-11 Manikant do not inspire confidence and those are hereby disbelieved and excluded from consideration. In fact, Ex. P. 20 cannot be sole basis for conviction and it requires corroboration, which is lacking in the instant case. The condition of Najaru Shah was serious and he was not in a position to make the statement. PW-24 Dr. Rajendra Gupta, Medical Jurist has further stated that when the patient was under his treatment, his condition was deteriorating very fast. In order to maintain the brevity, the relevant portion of the statement of Dr. Rajendra Gupta (PW-24) is reproduced below:-

e`rd e`R;q ls igys tc vLirky esa Hkkh fd;k;k rks mldh uCt iyiscy ugha Fkh ;kus ukMhdh xkfr eglwl ugha gks jgh FkhA blsv; vUnktk fudkyk tk ldrk gS fd pkVksa ds QyLo:i vR;kf/kd LDrL=ko gks x;k FkkA

--- iqfyl us ut:'kkg dk e`R;q iqoZc;ku esjs ekStwnxh esa ugh dj;k vkSj ugha eq>ls iwNk A --- eSusa tc ut:'kkg dks vVsaM fd;k rc mldk yM+dk ekStqn ugha FkkA --- ut:'kkg pwadh 'kkd esa Fkk] blfy, eSusa dksbZ c;ku ugh fy;s] u mlls ?kVuk dsckjs esa iwNrkn dh A

31. In our considered opinion, PW-24 Dr. Rajendra Gupta is a truthful witness. The deceased Najaru Shah and his family members were not inimical to him nor he had any ill-will towards the deceased and his family members rather it has come on record from his statement that he knew them much before from the occurrence. The statement of PW-24 Dr. Rajendra Gupta, Medical Jurist, leads towards an irresistible conclusion that when the deceased was brought in the hospital at 1.15 p.m. he was in shock and his nerves were not palpable and also not traceable. Therefore, the doctor did not ask any question about the occurrence from the deceased. We believe that the aforesaid witness did not ask any question from the deceased, inasmuch as, he was fully satisfied that he was not in a position to give any statement. Learned Public Prosecutor also invited our attention to the statement of Dr. Rajendra Gupta where at a place, he has stated that when the deceased was admitted in the hospital, he was in a position for 15 to 30 minutes to speak. According to us, this statement of PW-24 Dr. Rajendra Gupta is not in favour of the prosecution, inasmuch as, it is one thing that the deceased Najaru Shah may be able to speak something incoherently but such incoherent speech does not fall within the definition of physical and mental fitness of a person to give lucid statement as contemplated under the Rajasthan Police Rules, 1965 which has been quoted in our judgment in the preceding paras. Once we are satisfied that the deceased Najaru Shah was not physically and mentally fit to give statement from time, he was admitted in the hospital till his death, no question of recording dying declaration by PW-11 Manikant arises and as such, the so-called dying declaration Ex. P. 20 cannot be said to be a genuine dying declaration. Therefore, the statement of PW-11 Manikant Head-constable and so-called dying declaration Ex. P. 20 are not reliable piece of evidence and their reliability cannot be said to/have passed through the test of reliability, enumerated ad ultra. Since the finding of guilt recorded by the learned Addl. Sessions Judge is based solely on the so-called dying declaration (Ex. P. 20) and statement of PW-11 Manikant Head-constable, if those are excluded being unreliable, the accused-appellants

are entitled to be acquitted.

32. Although, the aforesaid discussion is sufficient to hold that the prosecution miserably failed to establish its case and 'the accused-appellants are entitled to be acquitted, yet we propose to discuss and analyse the merit of the case, which has been put-forth by the prosecution. It is not disputed by the prosecution that it was PW-3 Kamal Prakash, who saw the entire occurrence and actual assailants, who had assaulted the deceased Najaru Shah. It was PW-3 Kamal Prakash, who undisputedly after seeing 'Maar-Peet', ran to telephone booth to inform the police about the occurrence and on his information, a report was registered in Rojanamcha at Section No. 643. Upon this telephonic information, ASI Laxmilal and Head-constable Manikant along with police force proceeded towards the place of occurrence in jeep. It is apparent from Ex. P. 20 that ASI Laxmilal along with police force proceeded to village Ranikhera in search of accused-persons and PW-11 Mani-kant Head-constable after information, he proceeded there to enquire from the deceased.

33. According to us, PW 3 Kamal Prakash was the real person, who had seen real assailants. He had stated on oath before the Court that he was sent by the police to indentify the accused-persons in Nimbahera Jail where he was not able to identify any of the accused-persons. In the trial Court, when he was asked to identify the accused-persons, he put his hand only on one accused Shamsu, as one of the assailants but the latter has already been acquitted by the trial Court, holding that the prosecution has miserably failed to establish the guilt of accused Shamsu and Mustaq Khan. This circumstance alone is sufficient to hold that the prosecution has miserably failed to prove its case beyond reasonable doubt against the present accused-appellants.

34. There is one more material circumstance, which is fatal for the prosecution case. The Investigating Officer prepared the site-plan Ex. P-26. A bare perusal of the site-plan Ex. P-26 indicates that the Investigating Officer has not shown the place from where the eye-witnesses alleged to have seen the assailants assaulting deceased Najaru Shah. This omission creates a doubt in our mind that no eye-witnesses as alleged by the prosecution had seen the occurrence

muchless the present accused-persons assaulting the deceased. It seems to us to be probable that deceased Najaru Shah might have been assaulted at some other place and no one had seen the occurrence but when the assault was made known, then, some persons of the vicinity came there and took him to the hospital and later on, thought it proper to conceal their identity in order to keep them free from harassment by becoming a witnesses in the case. In fact, PW 7 Babu Shah son of deceased Najaru Shah, who is said to be an eye-witness of the occurrence was not present at the scene of occurrence nor he helped in taking the injured from the place of occurrence to the hospital in a 'Thela', inasmuch as, had he been present at the place of occurrence. Dr. Rajendra Gupta (PW 24) would not have attempted to make contact with him on telephone informing the injuries received by his father. We have already held PW 24 Dr. Rajendra Gupta to be a truthful witness. Therefore, we are not prepared to believe the statement of PW 11 Manikant Head-constable that PW 7 Babu Shah was present in the hospital. There is one more reason to disbelieve the testimony of PW 11 Manikant Head-constable, inasmuch as, if two eye-witnesses as alleged by the prosecution namely; Babu Shah S/o Najaru Shah (deceased) and Mansingh (PW 6), if they were present in the hospital, then why their statements were not recorded under Sec. 161, Cr. P. C. on the same day.

35. There is one more circumstance, which is also fatal for the prosecution. In the so-called dying declaration (Ex. P-20), it is alleged that when PW 7 Babu Shah S/o deceased Najaru Shah tried to save his father, accused Bashir pointed his gun towards him, due to which, he was terrorised, although it is stated by him that he did not run away from the place of occurrence. We are surprised to note with constraint and anguish that although in Ex. P-20 the so-called dying declaration, accused Bashir was alleged to have been armed with gun and who alleged to have pointed the gun towards the persons who made attempt to save the life of the deceased but instead of making recovery of gun, a 'Tamancha' was recovered. A man can speak lie but circumstances never speak lie. In the present case, it remains unexplained by the prosecution as to how if accused Bashir was alleged to be armed with a gun, the prosecution agency has recovered 'Taman-cha'. The present circumstance also indicates the hollowness of the prosecution story. This inconsistency is difficult to reconcile. In the present case, two eye-witnesses have

been disbelieved by the learned Addl. Sessions Judge and almost all the witnesses of recoveries have been declared hostile.

36. As a result of the aforementioned discussion, the appeal is allowed and conviction and sentence passed by the learned Additional Sessions Judge, Chittorgarh under Section 302, IPC vide its judgment dated 27-11-1991 are hereby set aside. The accused-appellants are acquitted for the offence under Section 302, IPC. They are in Jail and they be set at liberty forthwith, if not required in any other case.

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