

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.569 of 2019**

Arising Out of PS. Case No.-304 Year-2010 Thana- SARAIYA District- Muzaffarpur

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Jiya Lal Mahato, aged about 38 years, Male, Son Of Late Dahaur Mahato, Resident Of
Village - Mahmadpur Via - Chakia, P.S.- Saraiya, District -Muzaffarpur

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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*Code of Criminal Procedure, 1973-- Section 374(2)---Indian Penal Code---
section 302, 341, 504, 34---Appeal against conviction---Evidentiary value of
Dying Declaration---allegation against Appellant is that he, along with other
co-accused persons, stabbed the deceased with knife due to which the deceased
fell down and later on during treatment succumbed to his injuries---argument
on behalf of appellant that there is no eye witness to the occurrence and that he
was not even present at the place of occurrence---further argument that dying
declaration of the deceased is not acceptable as it is not proved or verified by
any person or staff or even a doctor who was either present or working in the
hospital---Respondent countered by stating that fardbeyan given by the
deceased is to be treated as dying declaration and it is clear and direct
evidence against the present appellant.*

*Held: dying declaration of the deceased was made in general course of nature
and there was no apprehension or expectation of death as it was not made at
the earliest opportunity (“Rule of First Opportunity”), but was made after
about three to four days from the date of occurrence---dying declaration given
by the victim/deceased is not absolute and the instances in which the dying
declaration was recorded creates a reasonable suspicion--- family members of
the deceased did not file any written statement or a formal complaint before any
police officer until the doctor sent a requisition for recording of fardbeyan of*

the victim/deceased, but the said requisition was not produced on record ultimately creating a serious doubt on the occurrence of the incident--- no doctor, who treated the deceased before death, was examined--- major and substantive inconsistencies in the deposition of the prosecution witnesses--- prosecution failed to prove the case against the appellant beyond all reasonable doubt---the impugned judgment of conviction and order of sentence quashed and set aside---Appeal allowed. (Para- 6, 8, 36-40)

2023 INSC 758

.....**Relied Upon.**

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Jiya Lal Mahato, aged about 38 years, Male, Son Of Late Dahaur Mahato,
Resident Of Village - Mahmadvpur Via - Chakia, P.S.- Saraiya, District -
Muzaffarpur

... .. Appellant/s

Versus

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Appearance :

For the Appellant/s : Mr. Birendra Nath Mishra, Advocate
For the Respondent/s : Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)

Date : 26-07-2024

The present appeal has been filed under
Section 374(2) of the Code of Criminal Procedure,
1973 (hereinafter referred as 'Cr.P.C.') challenging
the judgment of conviction dated 12.04.2019 and
order of sentence dated 16.04.2019 passed in
Sessions Trial No. 468 of 2013 (arising out of
Saraiya P.S. Case No. 304 of 2010, by learned
Additional Sessions Judge-I, Muzaffarpur by which
the appellant/convict has been convicted for the
offences punishable under Sections-302/34, 341
and 504/34 of I.P.C. and sentenced to undergo life



imprisonment with rigorous imprisonment and a fine of Rs. 10,000/- under Section-302/34 of Indian Penal Code and in default of payment of fine, further rigorous imprisonment for one year, further one-month simple imprisonment for the offence under Section-341/34 of Indian Penal Code and for the offence under Section-504/34 one-year rigorous imprisonment and the sentences have been ordered to run concurrently.

2. Heard Mr. Birendra Nath Mishra, learned counsel for the appellant and Mr. Sujit Kumar Singh, learned APP for the respondent-State.

3. The brief facts leading to the filing of the present appeal are that as per *fardbeyan* of the informant (deceased) recorded by the Saraiya Police at 9:15 PM on 25.11.2010 that, informant was celebrating the victory of Janta Dal(U) candidate Sri Ashok Singh in 2010 Vidhan Sabha Election, at his gate, at about 5:00 PM on 24.11.2010 and was also burning crackers. It is further stated that Ram Sagar Mahato, Jiya Lal Mahato, Jadu Mahato, Sarjug Mahato, Siya Lal



Mahato and Sunil Mahato reached there and started hurling filthy abuses, when informant objected, Ram Sagar Mahato and Jiya Lal Mahato (the Appellant) caught hold the informant's hands, and Sunil Mahato pierced the knife below the left chest (Stomach) resulted in profusing of blood and he fell on the ground. After falling on earth, all the assailants fled away and thereafter on commotion the villagers namely (1) Pappu Singh, (2) Santosh Singh, (3) Rakesh Mahato, (4) Raghu Nath Mahato came there, and took the informant to Sadar Hospital, Muzaffarpur on Jeep, where primary treatment was provided, but for the purpose of better treatment of the informant, he was referred to the Maa Janki Hospital, Muzaffarpur, where he was admitted in I.C.U. It is also stated that this occurrence took place due to land dispute, for which Saraiyan P.S. Case No. 304/2010 was registered on 27.11.2010 for the alleged offences under sections 341, 323, 324, 307/341.P.C.

4. On the basis of the *fardbeyan* of informant, Saraiya P.S. case No. 304 of 2010 dated



27.11.2010 was lodged. In course of investigation, Investigating Officer has recorded the statement of the witnesses and collected the relevant documents. Thereafter submitted 2nd Charge sheet of appellant and proceeded separately, bifurcating the case from other accused.

5. During the course of trial, the prosecution examined altogether 10 (Ten) witnesses, namely, PW-1 Raghunath Mahto, PW-2 Rakesh Mahto, PW-3 Sita Ram Mahto, PW-4 Dr. Rama Nand Chaudhary, PW-5 Mohan Mahto, PW-6 Lal Babu Mahto (son of deceased), PW-7 Shyam Sundar Singh (ASI), PW-8 Satrugan Mahto (son of deceased), PW-9 Sumitra Devi (wife of deceased), PW-10 Harendra Kumar Singh (Investigating Officer) have been examined.

6. Learned counsel for the appellant Mr. Birendra Nath Mishra, at the outset, submits that there is no eye witness to the occurrence and deposition of all the witnesses states that they have seen the deceased fallen to the ground either with stab injury or with blood. PW-7, who has



recorded the fardbeyan of the deceased, has stated that there was no one present in the ICU wherein the deceased was being treated, further, on the formal requisition of the doctor, PW-7 reached the hospital, but he did not meet the doctor, who made the requisition or even any attendant or staff of the hospital. He further submits that the appellant has been falsely implicated and the appellant was not even present at the place of occurrence, but he was with Raghunath Rai at his field sowing potato in the morning and was present there till evening. The dying declaration of the deceased is not acceptable as it is not proved or verified by any person or staff or even a doctor who was either present or working in the hospital.

7. The learned counsel for the appellant further submitted that there is absence of any link or basis in furtherance of common intention and the appellant has been convicted, on the basis of conjecture and surmises which is not supported by the oral or material evidences indicating guilty



beyond reasonable doubt.

8. On the other hand, learned Additional Public Prosecutor Mr. Sujit Kumar Singh has vehemently opposed the appeal. He has submitted that there is direct allegation against the present appellant, namely, Jiya Lal Mahto. The deceased was supporter of MLA Ashok Singh, whereas the appellant and other co-accused persons were supporters of RJD and in furtherance of personal enmity and political rivalry between the appellant and the deceased, the appellant and other co-accused persons started the altercation and the present incident occurred. The appellant and another co-accused Ramsagar Mahto held the hand of the deceased, where Sunil Mahto stabbed the deceased with knife due to which the deceased fell down and later on during treatment succumbed to his injuries on 04.12.2010. The fardbeyan given by the deceased is to be treated as dying declaration and it is clear and direct evidence against the present appellant and, as such, the appeal should not be allowed.



9. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

10. At this stage, we would like to appreciate the relevant extract of entire evidence led by the prosecution as well as defence before the Trial Court.

11. Before the Trial Court, prosecution examined 10 witnesses.

12. PW-1 in his examination-in-chief has stated that, he knows both the parties and the said case has been filed against total five persons including Jiya Lal Mahto, Ram Sagar Mahto, Sunil Mahto. The incident occurred on 24.11.2010 at 5.00 PM, when PW-1 was standing at his door. The deceased was lighting fire crackers at his door on the occasion of victory of M.L.A. Ashok Kumar Singh. In the meantime, the accused persons came and started abusing the deceased. Thereafter, they started abusing, shouting at the deceased and also



started physically assaulting him. Further, Sunil Mahto took out a knife and stabbed the deceased and ran away. Thereafter, PW-1 has stated that he took him to Saraiya hospital where from he was referred to Maa Janki hospital, Muzaffarpur and was treated there for four days and then he was referred to Patna. The deceased died in Patna on 04.12.2010. Sitaram Mahto, Rakesh Mahto, Pappu Singh, Santosh Kumar Singh, Chalia Devi, Sumitra Devi, Bachhi Devi and many more persons in the village saw the injured/deceased and tried to save him. He further stated that he identified Jiya Lal Mahto, who is the present appellant. The deceased is his cousin and he had no information with regard to the Title case, which was between the deceased and the appellant.

13. In his cross-examination, PW-1 has stated about his house and where it is situated as well as the division of property between the deceased and him. He has further stated about the relationship between the deceased and him and further stated about the property dispute which is



pending between the appellant and the deceased. The incident occurred in *Maagh* and he stated that he does not know whether it was dusk or dawn. His family members present in his house when the incident occurred and after hearing the noise and commotion, he went there and saw that the deceased was lying unconscious on the ground and few people went there and took the deceased to the hospital by van. They first took the deceased to Saraiya hospital at 6 o' clock. The doctor nursed him and the deceased was unconscious, later on, they took the deceased to Maa Janki Hospital, Muzaffarpur where the deceased stayed for four days. He further stated that the deceased ran away from the hospital and people protested as to where the patient had gone. He did not know if there was any attendant present there or not. He was then referred to Patna and he was getting treated in some private hospital in Patna and after four days, PW-1 was informed that the deceased has succumbed to his injuries. He further stated that it is not a false case to implicate the appellant



due to on going case of partition of property. The deceased was a regular drinker, but he was not intoxicated on the day of the occurrence and he also stated that the deceased did not stab himself to falsely implicate the appellant and the appellant is guilty.

14. PW-2, in his examination-in-chief, has stated that the incident had occurred three and half years ago at around 5.30 PM. The PW-2 was standing at a shop, when he saw the deceased bursting fire crackers at his door and the deceased was 10 to 15 feet away from the place where the PW-2 was standing. Jiya Lal Mahto (appellant), Siya Lal Mahto, Ram Sagar Mahto and Sunil Mahto, a total of four to five persons started abusing the deceased and further started beating him. Sunil Mahto stabbed the deceased, the deceased fell down and became unconscious. Several people of the village took him to the doctor at Saraiya hospital, where he was treated and was referred to Maa Janki Hospital in Muzaffarpur. He was later on taken to Patna, where he died. Many people saw



the occurrence and PW-2 has stated that the appellant was present and he recognize him and other accused persons.

15. In his cross-examination, PW-2 has stated that the appellant is also a resident of the same village and he recognizes the appellant. He further stated about the distance between the house of the deceased and the appellant and on the day of the incident, PW-2 was coming from another village. He was standing at the shop of Raushan and the shop was 50 meters away from the deceased's house. On commotion, he did not go near the place of the occurrence, but saw it from a distance that the deceased was stabbed with a knife and there was blood on his clothes. The statement of PW-2 was given to the police. PW-2 stated that the appellant was a regular drinker and further stated that he was not giving a false testimony and he did not know about the land dispute between the appellant and the deceased.

16. PW-3 in his examination-in-chief has stated that the occurrence took place on



24.11.2010 at 5 PM and PW-3 was there at his door. In celebration of the victory of MLA Ashok Singh, the deceased was bursting fire crackers at his door. Ramsagar Mahto, Jiya Lal Mahto (appellant), Sunil Mahto, Saryu Mahto and Jadu Mahto came and started abusing the deceased and further started beating the deceased. Ram Sagar Mahto and Jiya Lal Mahto (appellant) caught hold of the deceased and Sunil Mahto stabbed the deceased with knife on his left color bone, to which he fell unconscious. He was taken to Saraiya hospital, where the deceased was nursed and referred to Muzaffarpur. The deceased was taken to Maa Janki Hospital, Muzaffarpur, where he was treated for four days and he was then referred to Patna for better treatment and was treated for four days. He passed away on 4th December. PW-3 recognizes all the accused persons.

17. In his cross-examination, PW-3 has stated that deceased is his cousin from the village. At the time of the occurrence, PW-3 was sitting alone at his door and his family members were



doing their work. The deceased was not working in MLA Ashok Singh's election, but had voted in his favour. There was no procession in the village. PW-3 heard some noise and the commotion, he came and saw blood stains on deceased's body. The deceased was wearing vest (lungi) and pants underneath which were covered in blood stains. The deceased is facing a title dispute with the appellant in which PW-3 is also a party. Again, PW-3 stated that he is not a party in that title suit. PW-3 don't know whether he was drunk on the day of incident or not. PW-3 is also not aware that deceased had ran away from Maa Janki Hospital, Muzaffarpur.

18. PW-4 in his examination-in-chief stated that on 04.12.2010 he was posted as Lecturer in the Department of Forensic Medicine, Patna, and on the same day, he conducted postmortem of the deceased. The following antemortem, external and internal injuries were seen on the body of the deceased-

(i) one stabbed wound with clean cut margin



measuring size 1''X1/4'' cavity deep on lower part of left chest.

(ii) 4-1/4'' below the left nipple and

(iii) 5'' left to the mid line of epigastric region.

Opinion- Death of the deceased caused due to haemorrhage and shock due to aforementioned injuries caused by sharp cutting pointed weapon. The time elapsed since death was 6 to 12 hours from time of postmortem.

19. In his cross-examination, PW-4 has stated that he was posted in P.M.C.H., Patna from July, 2010 to May, 2012 and the postmortem of the deceased was conducted by him only. The injury found on body of the deceased was un-stitched and it was only bandaged with adhesive tapes and surgical drainage was given and there was blood clotted inside the wounds. PW-4 has also given the quantity of clotted blood found in stomach and quantity of fluid present in the abdominal cavity without weighing the same. PW-4 has measured the size and dimension of the stabbed wound, but have not mentioned about the same and further stated that such wound may be possible by sharp pointed cutting edge weapon.



20. PW-5 in his examination-in-chief stated that his father died during treatment at Ashutosh Nursing Home, Patna on 10.00 AM on 04.12.2010 and he along with his brothers signed the inquest report as witness. He further identifies signature on fardbeyan is of his father (deceased). He further stated that he has given his statement thrice, first statement on 26.11.2010, second statement on 04.12.2010 and he has no knowledge about the date of third statement.

21. In his cross-examination, PW-5 has stated that his father was referred from Maa Janaki Hospital to Patna and his father did not ran away from Maa Janaki Hospital during his treatment. He also do not remember the name of doctor at Ashutosh Nursing Home, who treated his father which was at Rajendra Nagar, Patna. He further stated that fardbeyan was not written before him and have read whatever was written in it and signed the inquest report later. His grandmother Jhaliya Devi has also filed a title suit against the appellant.



22. PW-6 in his examination-in-chief, has stated that the incident took place at 5.00 PM on 24.11.10. When he was at his home at that time, Jiya Lal Mahato, Siyalal Mahato, Ram Sagar Mahato, Jadu Mahato, Saryug Mahato and Ram Sagar Mahato of the village came and started abusing the deceased when he was bursting crackers at his door on the occasion of Ashok Singh winning the MLA elections. Regarding this, the appellant and other co-accused persons, who were the supporters of RJD asked why did you burst the firecracker and on this there was a scuffle at the door and they came with sticks and spears and when his sister-in-law, daughter-in-law and he himself went to save themselves, the appellant and co-accused persons started punching and beating everyone. While beating Shivdutt Mahato, Ram Sagar Mahato and Jiya Lal Mahato held his arm and Sunil Mahato stabbed him in his left rib-cage, due to which he fell down. He was in his senses and started muttering that the knife had been inserted. That apart from these, Pappu Singh,



Santosh Singh, Vinod Singh, Rajesh Mahato, Rakesh Mahato etc. saw the incident and when the family members and other people present there, tried to save them, the appellant and co-accused persons pushed them and threatened to kill them, if they tried to stop them. The deceased was taken to Saraiya Hospital, where he was treated and then referred to Sadar Hospital, Muzaffarpur, for better treatment and also advised by Sadar Hospital to take him to Maa Janki hospital and as there was no good treatment in Maa Janaki Hospital, he was referred to Patna. He was then taken to Patna in Ashutosh Nursing Home, Rajendra Nagar, where he died during treatment on 04.12.2010. He was admitted in Maa Janaki Hospital for five days. He further stated that he recognised the accused persons and stated that earlier two cases of murder and kidnapping are pending against them.

23. In his cross-examination, PW-6 has stated that he has given his statement to the police 15 days after the incident. He further stated that it is not true that he was not an eyewitness,



but had said that he runs a tea leaf business in Dhanbad and had informed about the incident to his wife over phone. The land dispute between the deceased and the appellant was going on since a year before the incident. PW-6 has said that in the north of the place of occurrence is Jiya Lal Mahato's house, to the south is his own house, to the east is vacant land and to the west is Saryug Mahato's house. He further stated that at the time of sunset, he heard some commotion when he was at his house and saw that the deceased had fallen down while the blood was there and the deceased was unconscious. He further stated that it is not true that PW-6 has not given false statement on the pretext that deceased is his brother.

24. PW-7 in his examination-in-chief has stated that on 25.11.2010 at 21: 15 hours, he recorded the fardbeyan (Ext-3) of the deceased, admitted in the ICU of Maa Janki Hospital, Muzaffarpur and the same was narrated to him and signed by him. On the basis of said statement, the endorsement of registering the case was made by



the police station I/c which is marked as Ext-4.

25. In his cross-examination, PW-7 has stated that since the deceased was in ICU, there was no one else there at the time of recording the statement, but he was conscious and could speak. He remained in the ICU for half an hour and no doctor was present there at that time.

26. PW-8 in his examination-in-chief has stated that his statement was made at home and was recorded after the deceased died. The incident took place at 5 PM on 24.11.2010 and at that time in celebration of the victory of Ashok Singh, MLA, his father was bursting crackers at his door and in the meantime, appellant along with other co-accused came and started abusing the deceased. The appellant and other co-accused caught hold of the deceased's arm and Sunil Mahto took out a sharp knife and stabbed his father in the stomach below the left side of the chest with an intention to kill him. The deceased was taken to Saraiya hospital, where treatment could not be done and he was further referred to Muzaffarpur



Sadar Hospital and from there, he was referred to Maa Janaki Hospital, Muzaffarpur.

27. In his cross-examination, PW-8 has stated that the incident occurred within the boundaries of the appellant house. PW-8 went on to give details about where his house situated and the place of occurrence. On the date of occurrence, PW-8 along with other co-villagers took his father to Saraiya hospital which was near the house of the deceased. He did not remember the name of the doctors and also does not remember whether the doctor had given him referral paper or not. The Sadar Hospital, Muzaffarpur is about 40 kilometers away from the Saraiya hospital where he was admitted overnight and further he went to Maa Janaki Hospital, Muzaffarpur without any referral. When the deceased was admitted in saraiya hospital, the doctor requested the family members and the co-villagers to inform the police with regard to the incident. After being admitted in sadar hospital, PW-8 has stated that the wound of his father was stitched, but he does not remember



as to how many stitches were given to his father. He further stated that his father died in Patna while getting treatment. PW-8 stated that it is not true that his father ran away from Maa Janki Hospital, Muzaffarpur and many people vandalized the hospital. There was a case, T.S. No. 402/07 between the appellant and his father.

28. PW-9 (wife of the deceased) in her examination-in-chief has stated that the occurrence took place on 24th of *Agahan* month and at that time, she was at the door. At that very moment, six persons came and started abusing her husband and co-accused Sunil Mahto stabbed sharp knife in her husband's rib- cage. After that, her husband fell down and villagers carried her husband and took him to Saraiya hospital, then to Sadar hospital and from there to Maa Janaki Hospital, Muzaffarpur, where he stayed for four days and further referred to Patna.

29. In her cross-examination, PW-9 stated that she does not know whether Ashok Singh had contested the election from any party,



but his result was declared on the same day. There was pus in her husband's wound. PW-9's mother-in-law was involved in Title Suit against the father of the appellant.

30. PW-10 in his examination-in-chief stated that he was posted at Saraiya police station as Assistant Sub-Inspector. During the investigation, he took the statement of the informant and inspected the place of occurrence, which is near the Kadamba tree adjacent to the informant's house. The statement of the witnesses, who supported the incident, were taken and he also took the statement of independent witness, namely, Harendra Rai and submitted the chargesheet after finding the statements and the incident to be true.

31. In his cross-examination, PW-10 has stated that appellant had surrendered in the court on 16.03.2011 and appellant's defence statement was also not taken as he directly surrendered in the court. The statement of the doctor at Maa Janaki Hospital, Muzaffarpur, who had treated the



deceased, was not taken and he did not take the blood stained clothes of the deceased and it is also not written in the case diary that for how many days deceased was admitted in Patna.

32. It would emerge from the evidence that out of all the witnesses, who had given deposition, no one is an eye witness of the alleged occurrence. The witnesses have clearly stated that they have only seen the deceased lying on the ground. PW-2 has also stated that he has not seen the appellant holding the deceased, or other co-accused persons stabbing the deceased.

33. It is further relevant to note here that a dying declaration was recorded by ASI Shyamsunder Singh, at Maa Janaki Hospital, Muzaffarpur on the basis of which, the FIR was registered. The fardbeyan/dying declaration names six accused persons in sequence and after that the fardbeyan mentions one more name of Jiya Lal Mahto (appellant), who held the deceased, while other co-accused persons stabbed the deceased. The fardbeyan was recorded by the ASI, who has



stated in his cross-examination that the fardbeyan was not signed by any witness and he stayed for half an hour in the ICU and during that period, no one was present or no one came to the ICU, where the deceased was present. He has further stated that after recording the fardbeyan, the ASI did not talk to any doctor or any of the relatives of the deceased present in the hospital. He also did not talk to the doctor of Maa Janaki Hospital, Muzaffarpur from whom he received the requisition and on the basis of which the ASI had gone to the said hospital.

34. This creates a serious doubt on the fardbeyan/dying declaration as there are discrepancies and contradictions in the fardbeyan as well as the materials on record and cross-examination of the ASI. ASI has stated that he has not met anyone or there was no witness to the fardbeyan recorded by him.

35. The Hon'ble Apex Court, in **Irfan @ Naka Versus The State Of Uttar Pradesh (2023 INSC 758)** has held that-



“There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? “Rule of First Opportunity”

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?



- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
- (v) Whether the statement was not recorded properly?*
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
- (vii) Whether, the dying declaration has been consistent throughout?*
- (viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?*
- (ix) Whether, the dying declaration was itself voluntary?*
- (x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
- (xi) Whether, as per the injuries,*



it would have been impossible for the deceased to make a dying declaration?

It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant."

The Court further reiterated that -

"The juristic theory regarding the 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 the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The



court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination."

36. As per the judgment of the Hon'ble Apex Court, in this present case, taking the test of weight of the dying declaration of the deceased, the first instance is that the statement of the deceased was not made in the expectation of death, the statement was made in general course of nature and there was no apprehension or expectation of death. On the second instance, the dying declaration was not made at the earliest opportunity ("Rule of First Opportunity"), dying declaration was made after about three to four days from the date of occurrence. In the third instance the dying declaration given by the victim/deceased is not absolute and the instances in which the dying declaration was recorded creates a reasonable suspicion. The dying declarant, whose fardbeyan was recorded by the



ASI, had clear opportunity to observe the incident and he was clearly in a right state and in a conscious mindset to give statement which was later taken in evidence as dying declaration. These all instances create doubt upon the dying declaration given by the deceased and the prosecution has thereby failed to establish the dying declaration and the prosecution story beyond all reasonable doubts.

37. The family members of the deceased as well as the neighbors of the deceased, who took the deceased to the hospital by van, or the people, present at the place of incident, did not file any written statement or a formal complaint before any police officer until the doctor sent a requisition for recording of fardbeyan of the victim/deceased, but the said requisition was not produced on record. The normal course of action of any family members or neighbor or any prudent person after occurrence of any such incident like this is to inform the police officials and recording statement or filing a fardbeyan before



the police. The same has not been done in the present matter, ultimately creating a serious doubt on the occurrence of the incident and the manner in which the prosecution story has been made out by the witnesses as well as the fardbeyan given by the deceased.

38. The doctor, Dr. Ramanand Chaudhary, who conducted the postmortem examination, has stated in his deposition that the postmortem was conducted in the evening at 5:00 PM on 04.12.2010 and there was one stab injury on the lower part of the left chest. The opinion of the doctor for the cause of the death of the deceased is due to haemorrhage and shock due to injuries caused by sharp cutting edged weapon. The deceased was first treated at Sadar hospital and it has been clearly stated by the witnesses that the deceased was nursed by the doctor and then referred to Muzaffarpur, where the deceased was treated for four days and later on he was referred to Patna and there also the deceased was admitted for three to four days. The deceased then died on



04.12.2010 and the doctor, who conducted the postmortem examination, has stated that the stab injury was un-stitched and the wound was only bandaged with adhesive tapes and surgical drainage was given. PW-8, who is the son of the deceased, has stated in his cross-examination, that, his father was given first aid and the wound was stitched at Sadar hospital, but from the postmortem report, it is clear that no stitch were made to the wound by any doctor in any of the hospitals. It is surprising to note here that even after so many days of treatment in various hospitals, not one doctor has stitched the stab wound of the deceased, further creating doubt in the prosecution case. Any doctor giving a first-aid treatment to any person, firstly cleans the wound, stitches the wound to stop the flow of blood to control the loss of blood of the patients. In the present case, the deceased was taken to three hospitals and even he was admitted in the ICU, but not one doctor nursed the wound of the deceased and only taped the wound of the deceased with



surgical bandage and further it is evident from the record that no doctor was examined, who treated the deceased before death.

39. Thus, from the aforesaid deposition of the prosecution-witnesses, we are of the view that there are major and substantive inconsistencies in the deposition of the prosecution witnesses examined. Further, the *fardbeyan* is also doubtful.

40. In view of the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has failed to prove the case against the appellant beyond all reasonable doubt, despite which the trial Court has recorded the impugned judgment of conviction and the order of sentence. As such, the same are required to be quashed and set aside.

41. Accordingly, the impugned judgment of conviction dated 12.04.2019 and order of sentence dated 16.04.2019 passed by the learned Additional Sessions Judge-I, Muzaffarpur, in connection with Sessions Trial No. 468 of 2013



(arising out of Saraiya P.S. Case No. 304 of 2010) are quashed and set aside. The appellant namely Jiya Lal Mahto is acquitted of the charges levelled against him by the learned Trial Court.

42. Since, the appellant of Cr. Appeal (DB) No. 569 of 2019, Jiya Lal Mahto is in custody, hence he is directed to be released from custody forthwith, if his custody is not required in any other case.

43. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Brajesh Kumar/-
Anand Kumar/-

AFR/NAFR	AFR
CAV DATE	N/A.
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