State vs Kanchan Singh And Anr. on 25 September, 1953

Equivalent citations: 1954CRILJ264

JUDGMENT

Desai, J.

1. This is an appeal by the State against a Judgment of the Sessions Judge of Banda acquitting the respondents of the offence of Section 396, I. P. C. It was alleged that they in the company of six or seven others committed a dacoity on the evening of 10-7-1950 on the road from Baberu to Kamasin at a place about two miles from Baberu and robbed police constable Phool Singh of police station Baberu of the Government gun and cartridges which he was carrying and murdered him.

2. On 10-7-1950 the chaukidar of village Satniyaon made a report at police station Babera that there was a likelihood of a breach of the peace in his village. So the head constable deputed P. Cs. Phool Singh deceased and Hanif to so to Satniyaon at once. The deceased was given a Government gun and cartridges while Hanif carried his own gun. They went on cycles. They stayed in Satniyaon for some hours, found that everything was peaceful and at 4 or 4.15 P. M. left for Baberu. In order to go to Baberu one has to go from Satniyaon to village Gurauli Saphai, which is about two miles from Satniyaon and about five and a half miles from Baberu, on Babera-Kamasin road. There is no road of any kind between Satniyaon and Gurauli Saphai; the map of the district does not show even a cart track or footpath between the two villages and apparently one has to go through fields.

The two constables reached Gurauli Saphai and as they were going along the road towards Baberu they met P. O. Chandra Bhan who was going with a message to Kamasin. The deceased asked Hanif to proceed and stopped to talk with P. C. Chandra Bhan. After talking with him for 5-10 minutes he proceeded on the cycle towards Baberu. He was not thereafter Been alive by Hanif. As he was cycling along he met Kanchan Singh, respondent 1 who was walking along in the same direction. He knew him from before and got down to talk to him. That place would be three and a half or four miles from Baberu. Kanchan Singh asked him how the gun could be handled and how much it cost.

The deceased after talking to him mounted the cycle and rode on towards Baberu. After he had covered a distance of less than two miles his cycle failed and he had to get down. By that time it had become a little dark. At that place Brij Bhushan Singh, Indra Pal Singh and the chaukidar of Birraon passed him. They were presumably going to Birraon which, is seven miles from Baberu on the road to Kamasin. He started walking towards Baberu when he was attacked by the two respondents and sis or seven others whom he did not know, Kanchan Singh hit him first with a lathi and he fell down. A number of injuries with lathis and spears were inflicted upon him and his gun and cartridges were snatched away from him. The miscreants left him wounded on the road and went away. They left his cycle also on the road. The place was surrounded by jungle and nobody saw the occurrence. The deceased became unconscious on account of the injuries received by him.

3. P. C. Hanif arrived at Baberu at 7 P. M. When he woke up at 4.30 A. M. next morning and found that the deceased had not arrived, he became anxious and went in search of him. He found him lying unconscious near the second milestone. He saw his cycle but not the gun and cartridges. He spoke to the deceased several times, but the latter could not respond and kept on groaning. After a short time Hanif saw Sheo Bodhan Sadhu walking along the road and asking him to look after the deceased, returned to the police station where at about 6 A. M. he made a written report to the effect that he had found the deceased lying wounded and unconscious on the road about two miles from Baberu, that his cycle was there but not the gun and the cartridges and that he was unable to speak.

Thereupon the station officer, the second officer and constables including Hanif went to the spot. They found the deceased still unconscious. They also found Sheo Bodhan and Teg Ali there. Teg Ali was at that time going from Baberu to Satniyaon. He also had found the deceased groaning with pain but unable to speak. With the assistance of Sheo Bodhan he had laid him on a 'dari' which he had spread and had kept his canvas bag and cap near him. The station officer started investigation at once. He sent the deceased in a bullock cart with Hanif to Baberu. After preparing the site plan he went in search of the gun and the cartridges in the vicinity,

4. Hanif brought the deceased to Babera hospital at about 9 A. M. When he was admitted in the hospital the deceased continued to be unconscious. The medical officer gave him an injection and within 20-25 minutes he regained consciousness. As his condition was serious, the medical officer at once sent for the Tahsildar from Baberu to record his statement. The Tahsildar reached there within twenty minutes and found the deceased fully conscious and able to speak. The Tahsildar recorded his dying declaration at 10-15 A. M. and after getting it verified and signed by him sent it to the Sub-divisional Magistrate at Banda.

In the dying declaration the deceased said that he had met Kanchan Singh 3 1/2 or 4 miles from Baberu, that Kanchan Singh had enquired of him about the price of the gun and the manner in which it could be handled, that his cycle failed when it had become a little dark, that he met Brij Bhushan, Indra Pal and the chaukidar of Birraon going towards Birraon, that subsequently, Kanchan Singh and Phool Singh, a bad character of Kuchendu, along with six or seven others reached there, that first of all Kanchan Singh struck him on the head, felling him down, that he did not know who took away his gun and cartridges and that he did not know the other miscreants but could identify them if he saw them. Hanif heard the dying declaration and also got information about it from the medical officer. He returned to the spot reaching there at about 1.30 P. M. and informed the station officer that the deceased had named Phool Singh and Kanchan Singh as two of the miscreants. Thereupon the station officer sent the second officer to Kuchendu, which is at a distance of one and a Half miles from the spot. The road from Baberu to Kamasin goes from west to east and Kuchendu is to the south of it. The second officer could not find Phool Singh in Kuchendu and returned to the spot and thence to the police station. The station officers went to Kamasin in search of Kanchan Singh who resides in village Narainpur. He searched for him in villages, Narainpur and Sandasani, but not finding him anywhere returned to Baberu on the morning of 12th July.

5. In the meanwhile the injuries of the deceased were examined by the medical officer at Baberu. There were more than twenty injuries. There were more than six contused wounds on the head. There were multiple contused wounds in an area of 8" x 5" on the top of the head back-wards : a considerable portion of skin was missing. The wounds were causing severe pain and the deceased was vomiting and bleeding from ears. There were nine contusions and contused wounds on both hands. Two contusions, 7" x 3" and 9" x 1 1/4" were on the upper part of the back.

The medical officer treated the injuries and sent him to Banda hospital, where better treatment was available. On 12th July at 3 or 4 A. M. the deceased died at Banda on that day at 12.35 P. M. On post mortem examination the Civil Surgeon found twenty-five injuries. He found nine incised wounds, five of which were on the head and the rest on the hands. There were five fractures, all being of bones of the two hands. The scalp was absent from the top of the head. The skull bones were in tact. There was congestion and haemorrhage over the surface of the brain. In the opinion of the Civil Surgeon the death resulted from shock and haemorrhage on account of multiple injuries.

6. When the station officer returned to Baberu from Kamasin on 12th July, he learnt that the deceased had been taken to Banda and followed torn. There he received a copy of the dying declaration. On return to the police station on the same day he got the first information report prepared on the basis of the dying declaration.

7. On 12-7-1950 at 9 A. M. the second officer arrested Phool Singh respondent 2 in the bazar of Baberu and put him in the lock-up. On the same day at 2.30 P. M. he arrested Harpal Singh in Kuchendu on the basis of the information received from some witnesses there that he was seen in the company of the respondents after the occurrence. Kanchan Singh could not be arrested and steps under Sections 87 and 88, Criminal P. C. bad to be taken against him. He surrendered himself in Court on 7-11-50 after he had been sent up for trial as an absconder.

In the morning of 13-7-50 Harpal and Phool Singh were sent in a lorry to Banda District Jail. When Phool Singh's clothes were examined on his admission in the District Jail, his dhoti was found to have blood stains. The Jailor removed the dhoti from his possession, made a bundle of it and sealed it. Later it was sent to the Chemical Examiner who reported that it had three minute Wood stains. The Imperial Serologist reported that the blood was human. As the stains were minute no grouping test could be performed.

8. The respondents pleaded not guilty and denied having attacked, robbed and killed the deceased. Phool Singh stated that he was falsely implicated on account of enmity with Jagmohan Singh, that he was arrested in the bazar of Baberu on 11-7-50 at 8 or 9 P. M. by a constable who locked him up in the police station, that Jagmohan Singh was present there at that time, that he was severely beaten by a Sub-Inspector, that when he reached the jail he was bleeding from the anus, but there was no external mark of injury, that his dhoti had blood stains when it was examined in the jail, that it had got stains when it was worn by his wife who was suffering from small pox and that there might have been some fresh blood stains on account of the beating that he had received at the police station.

Kanchan Singh said that he had been falsely accused because of enmity with the police and Jagmohar, Singh, that he had not absconded but had gone away to his brother in Indore and that he had surrendered himself on receiving information from his father about the attachment of his property.

9. This prosecution relies upon the evidence of P. Cs Hanif, Jamna Prasad and Chandra Bhan, the station and second officers of police station Baberu, the Civil Surgeon, the medical officer and the Tahsildar of Baberu, the jailor and the Assistant Jailor of District Jail Banda, Ram Dhani chaukidar of Satniyaon, the Sub-divisional Magistrate, Baberu, the station officer of Kamasin and Teg Ali. It is proved that Teg Ali became traceless after his examination in the Committing Magistrate's Court; so his statement recorded there was treated as evidence under Section 33, Evidence Act. The medical officer of Baberu was examined in the Sessions Court also. These witnesses supported the prosecution case set out above.

10. Kanchan Singh did not examine defence evidence, but Phool Singh examined three witnesses, namely Chunubaddi Singh of Baberu, Ananta. chowkidar of Kuchendu and Harpal. Chunubaddi Singh said that Phool Singh was arrested by two constables in the bazar of Baberu on 11-7-50 at about 8 A.M. The chaukidar stated that he was taken to the spot with a cot by another chaukidar on 11-7-50 at about 8-30 A.M., that when he reached the spot he was informed that the deceased had already been sent to the hospital in a bullock cart because he had delayed bringing the cot, that he was taken back to Kuchendu by the second officer who arrested Harpal Singh there, that he escorted Harpal Singh to police station Baberu where they reached at noon and that he found Phool Singh already detained in the lock-up.

Harpal is the man who was; arrested but was not prosecuted. He stated that he was arrested on 11-7-50 at about noon in Kuchendu, that he was taken to police station Baberu by Ananta at 3 P. M., that Phool Singh had already been arrested by them, that he and Phool Singh were sent on 13th July at 10 A. M. from Baberu to the district jail at Banda, that Jagmohan Singh had reached the police station on 11th July at 4 or 4-30 P. M. and that he and Phool Singh were beaten by the police in the lock-up. He admitted having met the Sub-divisional Magistrate of Baberu on 12th July and having a talk with him.

11. The evidence against the respondents is of the dying declaration supported by circumstances. Nobody saw the occurrence. The gun and the cartridges have not been recovered. The learned Sessions Judge held that the dying declaration was genuine, that it was not the result of any tutoring and that the deceased had no reason to name the respondents falsely. But by resorting to unjustified assumptions he thought that the deceased was attacked at about 9 P. M., that it was a dark and cloudy night, that it was drizzling that there was no certainty that the deceased could identify the respondents among the assailants and that the possibility of an honest mistake of identity by the deceased was not excluded. He did not attach any importance to the bloodstains found on Phool Singh's dhoti. He thought there was force in his explanation that he was given a beating at the police station.

He further thought that the stains did not exist before his arrest and had no connection with the crime. As regards the other respondent, he said that the dying declaration did not mention the parentage, or even residence, of Kanchan Singh, that there was no evidence to prove that in the police circle of Kamasin there is no Kanchan Singh other than the respondent and that there was no certainty that the Kanchan Singh referred to in the dying declaration is the respondent Kanchan Singh. He did not think much of the evidence that Kanchan Singh had absconded after the occurrence.

12. The learned Sessions Judge was as right in dealing with the case against Kanchan Singh as he was wrong in dealing with the case against Phool Singh. The only description of Kanchan Singh given in the dying declaration is that he is a resident of police circle Kamasin. That description was quite insufficient to fix the identity of the culprit. The station officer had to admit that he did not know how many Kanchan Singh live within the limits of police circle Kamasin. There is evidence to prove that Kanchan Singh respondent was found absconding after the occurrence. That may connect him with the crime and may lend some support to his identity with the Kanchan Singh mentioned in the dying declaration. Still the matter cannot be said to be free from doubt. It is rather unfortunate that the Tahsildar did not care to enquire of the deceased what was the parentage, caste and residence of Kanchan Singh.

The station officer immediately went after the respondent Kanchan Singh because he had received some information from Brij Bhushan and Indra Pal. The information is not available to the Court. Brij Bhushan and Indra Pal had turned hostile to the prosecution and were not examined as witnesses. The chaukidar of Baberu also was not examined as a witness for the same reason. As the description - residence within the limits of police station Kamasin - is too slender to connect the respondent Kanchan Singh with the Kanchan Singh meant by the deceased, it cannot be said that the respondent was one of the miscreants. The appeal against him must, therefore, be dismissed.

13. The case against Phool Singh stands on a different footing. Shri Shri Rama was not right in contending that either both the respondents should be convicted or neither. He contended that the dying declaration should be accepted in toto and that if it is accepted as against Phool Singh it must be accepted as against the other respondent also Without meaning to lay down that a dying declaration must be accepted or rejected in toto, I do not think that accepting it against Phool Singh and not against the other respondent amount to accepting it in part and rejecting it in part.

The dying declaration itself makes a distinction between the two respondents; it describes one sufficiently but not the other. I am only having regard to this distinction made in the dying declaration itself; I am accepting the dying declaration wholly and not in part. I accept that one Kanchan Singh was among the assailants of the deceased. Had the deceased said that Kanchan Singh is son of Bhagwan Singh, Thakur, resident of village Narainpur, I would have had no hesitation at all in holding the respondent Kanchan Singh, also guilty. Had there been any circumstance to connect the respondent Kanchan Singh with the Kanchan Singh mentioned in the dying declaration then also I might have held that he was one of the assailants.

The identity of Phool Singh is not in dispute at all. He is described as "a bad character of village Kunchendu". The second officer, who arrested Phool Singh, and also the station officer, who had directed him to do so, were not cross-examined with a view to show that they were wrong in thinking that "Phool Singh a bad character of Kuchendu", is the respondent Phool Singh and none other. No attempt was made by the respondent to show that there were several Phool Singhs residing in Kuchendu or that he is not a bad character. On the other hand it was tacitly conceded that the respondent was the Phool Singh meant by the deceased.

14. There is clear. & unimpeachable evidence to prove that the deceased was conscious, in full possession of his senses and in a fit state to make a dying declaration on 11-7-1950 at 10-15 A. M. (His Lordship considered the dying declaration and the evidence and proceeded). No inference of his mental condition not being perfect can possibly be drawn from the fact that he had forgotten to mention this detail at the proper stage in the dying declaration.

15. The deceased knew the respondents but had no enmity of any kind with them. The respondents themselves did not suggest any possible motive for his involving them in a false case of dacoity and murder. He had taken charge of this police circle only five or six months before the occurrence. He belonged to Hamirpur district. It is impossible to say that he named the respondents not because they were among his assailants but for some other reason, when there is no suggestion of any other reason. Admittedly Phool Singh is on inimical terms with Jagmohan Singh Mukhia of his village. But there was no connection between Jagmohan Singh and the deceased. Kuchendu was not in the beat of the deceased. (His Lordship considered the defence evidence and proceeded). Therefore the evidence of all the three defence witnesses is worthless and not fit for reliance.

16. The dying declaration contains intrinsic evidence that it is an untutored and spontaneous statement made by the deceased. At one place it mentions that the evening had well advanced and at another place that it had become a little dark when the cycle of the deceased failed. If the deceased had been tutored to make the statement he would have been tutored to say that there was plenty of light when the occurrence took place. Further fuller description of the respondents would have been given. It would not have served the purpose of the person or persons tutoring Him to say that the assailants included "Kanchan Singh of P. S. Kamasin. and Phool Singh, a bad character of Kuchendu". The natural tendency would have been to give their parentage, caste and residence so that there could not possibly arise any question of, identity. It cannot be supposed that the persons who tutored him had no enemies other than Phool Singh and Kanchan Singh; some more names would have been suggested to the deceased. Then the deceased would not have been made to say himself that at the time of the assault there was nobody present because it was jungle. Such a damaging statement would not have been put into the mouth of the deceased; on the other hand, the presence of some witnesses would have been suggested. Then the last statement about his meeting Brij Bhushan Singh, Indra Pal Singh and the chaukidar of Birraon leaves no room for doubt that it was a true statement made by the deceased without any tutoring from outside. These persons were not under the thumb of the police or the deceased. As a matter of fact the evidence is that they have been -won over by the respondents and therefore could not be examined as witnesses. The names of such witnesses who could be won over by the persons named in the dying declaration and were not amenable to the influence of the police or those tutoring the deceased would not have been

suggested to the deceased by those tutoring him.

17. In the result, I find that there was no opportunity for anybody to tutor the deceased to name anybody falsely in the dying declaration, that one respondent has failed to explain who could have a motive to tutor him, that there is no evidence of tutoring and that the statement appears to have been made spontaneously without outside assistance. Since the deceased had no reason to implicate the respondents falsely, it must be taken to be a genuine or true statement.

18. There was no justification at all for the learned Sessions Judge's feeling doubtful if there was sufficient light at the time of the occurrence. There is no evidence, direct or indirect, to show that the occurrence took place when it was too dark to see the assailants. There is nothing in the circumstances to suggest that it was too dark. The dying declaration itself mentions that the faces of all the assailants were seen, that two of them were actually recognized and that the rest could be identified if the deceased met them face to face. In the face of this statement in the dying declaration, I do not understand how it can be said by anyone that it was too dark to see the faces. The deceased himself said that evening had set in and that it had become a little dark but it is quite different from saying that it was so dark that the faces of the assailants could not be seen. No court would be justified in reading in the dying declaration something which not only does not find place there, but also would be inconsistent with what finds place there. The learned Sessions Judge was wrong in inferring the time of the occurrence from certain data only, ignoring the other data, He mixed up relevant data with irrelevant data. He started a series of arithmetical calculations as if the times given by the witnesses and the deceased were exact times ascertained from watches. There is no evidence that Hanif and Chandra Bhan carried watches. (After considering the appreciation made by the Sessions Judge, His Lordship proceeded :) Naturally one cannot decide a case on the basis of bare possibilities because there, are innumerable bare possibilities and one cannot decide a case in innumerable ways. When there was clear evidence, the learned Sessions Judge was still less justified in ignoring it and acting upon bare possibilities. He ought to have acted upon the evidence. He had no justification for disregarding that evidence, even, though it was probable, merely because something else was possible. The whole approach of the learned Sessions Judge was wrong. I and that the deceased's recognising the respondents was not improbable, that there was no reason whatsoever for entertaining a doubt about it and for thinking that the deceased might have made a bona fide mistake of identity and that the deceased really saw and recognised the respondents among his assailants.

19. The above findings are sufficient for finding Phool Singh guilty. When the deceased said that Phool Singh was one of his assailants and there was no reason to disbelieve him and Phool Singh produced no evidence in rebuttal, I do not, know what else is required to find him guilty. To find him guilty all that is required is that he must be one of the assailants. And when there is evidence to this effect and there exists no reason for disbelieving that evidence the conviction of Phoolsingh is a foregone conclusion.

20. The fact that Phool Singh's dhoti had. bloodstains, even though minute, supports the dying declaration. Phool Singh himself admitted their presence and therefore it is absolutely irrelevant to consider that they were not detected,, at the police station. The learned Sessions Judge ignored the

admission of the respondent himself and without any evidence said that the bloodstains did not exist at the time of his being, detained in the lock up. The head moharrir of police station Baberu failed to detect the blood stains, but it is not surprising when one bears in mind the fact that they were minute and only three. His failure to detect them is not the same thing as their not existing at the time. The respondent admitted that the bloodstains were there and gave an explanation and yet the learned Sessions Judge held that they did not exist. It was not open to him to do so. The explanation does not bear scrutiny. There is no bleeding from small pox. Then it is not easy to believe that his wife used his dhoti when she was suffering from small pox. Then he said that he had got the dhoti washed by a washerman. If so, the stains must have been completely washed off and could not have remained and that too so clearly as to be visible to a naked eye. Phool Singh said not a word about the small pox and the stains being of the blood of his wife in the Magistrate's Court. There he had said that the stains were of his own blood and that the blooct had come out of injuries inflicted upon him at the police station. Now the fact is that he was, found to have no injuries at the time of his admission in the jail; he himself admits this. Ho said that though there was bleeding there was no external mark of injury. He says that he bled from the anus; evidently he took this plea because he could, not explain the stains otherwise. (After considering the evidence His Lordship continued). I am satisfied that the respondent's dhoti had bloodstains at the time of his admission in the lock-up and that the respondent has not given any reasonable explanation for their existence. Though it is not proved that the stains are of blood of the deceased, their existence does lend some support to the evidence that the respondent was one of the assailants. If he had received the stains, otherwise than while committing the crime, he would have offered an explanation which could bear scrutiny. The learned Sessions Judge referred to some authorities laying down that slight blood stains may result from scratching & it is not possible to draw any very damning conclusion against a man from their mere existence, Here the bloodstains are not sought to prove that the respondent committed the crime; they are simply sought to support or corroborate the dying declaration. Standing alone they may not suffice for finding the respondent guilty, but it cannot be gain said that they support the dying declaration that the respondent was one of the assailants.

21. 'It was contended that no conviction can rest only upon a dying declaration'. An examination of the relevant provisions of the Evidence Act fails to support the contention. The law is contained in the Evidence Act, and there is no provision which lends support to the contention. A dying declaration is, under Section 32, a relevant fact. This itself means that it can be used for proving the fact in issue. If the dying declaration of A that he was assaulted by B is admitted in evidence it can be only for the purpose of proving that B assaulted him. No other purpose is to be served by admitting it in evidence It does not matter if the dying declaration is treated only as a relevant fact in India, and not as direct evidence, as in America.

Motive, subsequent conduct of the accused, etc. also are relevant facts but a dying declaration stands on a different footing from them. One may infer the commission of an offence from the existence of a motive or from the subsequent conduct of the accused but one is not bound to do so. Even if the Court believes that the accused exhibited the subsequent conduct, it may not presume from that that the accused committed the offence. But if the evidence that the dying declaration was made is believed and the dying declaration itself is accepted as genuine, it is bound to hold that the person named in the dying declaration committed the murder (save in case of 'bona fide' mistake of identity

of the murderer).

When the deceased said that he was attacked by the respondent and that statement is believed, it follows that the respondent is guilty (in the absence of any mistake of identity); nothing remains to be done to find him guilty. If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the respondent's guilt. There is no presumption that a dying declaration is false or that it is unworthy of belief. There is no justification for treating it as a piece of tainted evidence as if it were a confession of a co-accused or evidence of an accomplice. 'So it cannot be laid down as a matter of law that no dying declaration should be believed unless it is corroborated'. The law contemplates its being believed and some dying declarations may be believed even though not corroborated. Whether a dying declaration should be believed or not would depend upon the circumstances of the case. It is essentially a question of fact to be determined by the Court on the basis of the circumstances of each case. As far as the credibility is concerned, it is just like the evidence given by a witness. It is for the Court to decide whether to believe it or not and no rule can toe laid down either that it should be believed or that it should not be believed. Once it is believed, it is irrelevant and illogical to consider that it is not made on oath and that the maker has not been subjected to cross-examination. The oath is administered simply with the object of making the witness speak the truth so that what he deposes may be believed. The object of cross-examination is to test the veracity of the witness.

But once the dying declaration is held to be believable, the questions that no oath was administered and that the dying declaration was not tested by cross-examination cannot arise. The questions would have to be considered before holding the dying declaration to be believable. When the law has made it a "relevant fact" notwithstanding the absence of oath and cross-examination, it means that it will not be held to be unbelievable merely on account of the absence of these matters. If it is held to be unbelievable, it must be done on the basis of other circumstances. Therefore it would be illegal to say that a dying declaration cannot be acted upon Without corroboration; if it is believed, it requires no corroboration.

22. English law admits as dying declarations only such statements of material facts concerning the cause and circumstances of homicide, as are made by the victim under the fixed and solemn belief that his death is inevitable and near at hand. The solemnity of the occasion on which the statements are made is deemed to supply the sanction of oath. The approach of death is deemed to produce a state of mind in which the statements of the dying person are to be taken as free from all ordinary motives to misstate.

23. The law in India does not make the admissibility of a dying declaration dependent upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under Section 32, Evidence Act. It may, therefore, be argued that the same sanctity that, attaches to a dying declaration admissible under the English law should not be attached to a dying declaration admissible under our law. I consider that it is not necessary to deal with this argument in the present case because I am satisfied that the deceased must have had the consciousness of approaching death. I gather this not only from the fact that he died soon after twenty-four hours had

elapsed, but also from the nature of the injuries and his condition.

It is pointed out by Wigmore on Evidence, Vol. 5, para 1442, (Edn. 3) that recourse should naturally be had to all the attending circumstances in order to ascertain the consciousness of approaching death, that it is not correct to say that the nature of the injuries alone cannot be sufficient and that if in a given case the nature of the injuries is such that the declarant must have realised his situation, our object is sufficiently attained. The injuries were so severe that I do not think the deceased could have expected to live. He knew that he had been unconscious for a long time. The severe pain, vomiting and the bleeding from the ears must have made him lose all hope of surviving the injuries. Therefore, in the present case, the deceased was anticipating speedy death when he made the dying declaration & one should consider it as if it were made on oath.

24. The fact that the declarant was not subjected to cross-examination remains. It was pointed out by Alderson B. in 'Ashton's case' (1837) 2 Lewin 147 (A) that though a dying declaration made 'in extremis' is considered as one made on oath, it is nevertheless open to observation because though the sanction is the same the opportunity of investigating the truth is very different. This only means that the dying declaration must be subjected to careful scrutiny; it does not mean that it should be considered as sufficient for founding a verdict of guilt. So many statements are believed by Courts even though the makers have been subjected to cross-examination; therefore so long as it cannot be predicted in respect of a dying declaration that had its maker been subjected to cross-examination his credibility would have been shaken, it cannot be said that the dying declaration should not be acted upon because there has been no cross-examination. For all one knows, the cross-examination might have failed to elicit anything shaking the credit of the maker.

25. One often comes across the statement that a dying declaration should be received with caution in American cases; see Corpus Juris Secundum, Vol. 40, page 287 (a) and - 'Clyde Mattox v. United States' (1892) 146 US 140 (B). But this refers to the admissibility of the evidence and not to the weight to be given to it after admission. The rule of admissibility in evidence of a dying declaration is different in England and America from what is contained in Section 32, Indian Evidence Act. All that is required under Section 32, Indian Evidence Act, is that the man must have died and there arises no question at all of exercising any caution in admitting in evidence a dying declaration. It has been pointed out that the admonition that a dying declaration is to be admitted with great caution is addressed to the Court in ruling on the admissibility of an alleged dying declaration, a question with which the jury has no concern; see 'Corpus Juris Secundum, Vol. 40 p. 1284, footnote 72'.

It is stated in the same volume, page 1283:

> The credibility of dying, declarations is to be determined largely by the same rules as are applied in weighing other testimony. Their value depends on their intrinsic probability, and the candor and truthfulness of the person who made them... In weighing dying declarations the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased

> has not appeared and accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled.
>
> The dying declaration made by the deceased sounds quite probable. There is nothing on the record to show that the deceased was not a truthful man. The dying declaration has been found not to be due to outside influence. It has not been made in a spirit of revenge or when the deceased was unable or unwilling to state the facts. There is nothing inconsistent or contradictory in the dying declaration, it is, therefore, entitled to all the credit and weight to which the testimony of the deceased would have been entitled if he had appeared in Court as a witness,

26. In - 'Provincial Govt, C. P. & Berar v. Jagan Bhat' AIR 1946 Nag 301 (C), the Court refused to lay down a general rule that a partly untrue dying declaration must necessarily be rejected and held that it is always a question of fact whether a dying declaration should be relied upon and that if a part of it is found to be untrue owing to short memory or lack of observation, that is no reason, for debarring the jury from accepting the rest.

In - 'Kunwar Pal Singh v. Emperor' AIR 1948 All 170 (D), it was held that a dying declaration made soon after the occurrence or at the time of expected death or at the time when the maker could not consult others or receive hints from others ordinarily deserves great weight. In the "Leader" of 31-1-1953 was published a report of a case, -'Ram Nath v. State' . It was held in that case that it is not safe to convict an accused merely on the evidence furnished by a dying declaration without further corroboration. There the facts were different. The deceased was the leader of one of the two parties existing in the village and the dying declaration was not only vague, but also did not admittedly represent the whole truth. In the circumstances it was held to be unsafe to rely upon the dying declaration.

There is no reason for thinking that it would be unsafe to rely upon the dying declaration in the instant case. Further, there is some corroboration, What is stated in it about the visit to village Satniyaon, stopping near village Gurauli Saphai to talk to P. C. Chandra Bhan and Mohammad Hanif's proceeding on the cycle in advance is corroborated by the evidence of Mohammad Hanif and Chandra Bhan. The blood stains on the dhoti of Phool Singh respondent corroborate the accusation made against him in the dying declaration.

27. I have considered the question of genuineness of the dying declaration with great care and am convinced that the dying declaration is genuine and contains the truth. Therefore Phool Singh respondent was one of the assailants of the deceased. There can be no doubt that the assailants were guilty of dacoity punishable under Section 396, I. P. C. They wanted to rob the deceased of the Government gun and the cartridges and killed him while committing the robbery.

28. The proper sentence to be inflicted for the offence is of transportation for life. Though the deceased was murdered, I do not think that the respondent deserves the death sentence because he is not said to have taken any leading part. There is no evidence that he inflicted any injury even on

the deceased. At the same time he must be held responsible for the murder of the deceased along with the others.

29. I think the appeal should be dismissed as against Kanchan Singh and should be allowed as against Phool Singh and he should be convicted under Section 396 I. P. C, and sentence to transportation for life.

Beg, J.

30. I agree.

31. We allow the appeal as against Phool Singh, respondent 2, set aside the order of acquittal and convict him under Section 398, I. P. C. and, sentence him to transportation for life. We dismiss the appeal as against Kanchan Singh, respondent 1; his bail bonds are discharged.

Leave to appeal to Supreme Court refused.