

RAM PRASAD  
v.  
STATE OF MAHARASHTRA

MAY 12, 1999

[K.T. THOMAS AND D.P. MOHAPATRA, JJ.]

*Indian Evidence Act, 1872—Section 32—Statement made to Magistrate under expectation of death but the maker survived—Held, not admissible, expectation of death not sufficient to wiggle it into the cassette of Section 32.*

*Section 157—Statement made under—Could be used only to corroborate the testimony of witness.*

*Section 155—Statement made under—Could be used to contradict testimony of witness.*

*Accomplice evidence—Confessional statement given by approver—Importance to be attached for conviction—Held, it is imprudent to base conviction on it unless corroborated and it must pass test of reliability.*

*Criminal Procedure Code, 1973—Section 164—Statement made to Magistrate is not limited to corroboration of testimony of witness—May be elevated to status of Section 32 if maker dies subsequently.*

The deceased was the brother of PW-1 and was murdered in an act of mercenary killing. The contemplated victim was PW-1. However he escaped death sustaining severe injuries. The plan was allegedly made by A-1 in connivance with A-2 and A-4 to get PW-1 murdered. The actual act was done by A-5, A-6, A-7, A-10 and PW-2, along with few others who had been acquitted.

The prosecution heavily relied upon the statement given by PW-1 when he was injured, by interpreting it as a dying declaration notwithstanding the fact that he did not die. Even greater reliance was placed upon the statement made by PW-2, who had turned an approver. He had stated that he was witness to the conversations between A-1 and A-4 and also disclosed the complete plan for the said murder in detail.

A The High Court convicted A-1 and A-4 under Section 302 read with Sections 109 and 150 of the Indian Penal Code. The conviction of A-5, A-6, A-7 and A-10 was also confirmed. Hence these appeals.

B Dismissing the appeals filed by accused Nos. 4, 5, 6, 7 and 10, and allowing the appeal of A-1 and setting aside his conviction and sentence this Court.

C HELD : 1. The Statement made by PW-1 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. The fact when this statement was given, he would have been under expectation of death is not sufficient to wiggle it into the cassette of Section 32. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation.

[523-H; 524-A-B]

D 2. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the Fact" but its use is limited to corroboration of the testimony of such witness. But a statement made to a Magistrate is not affected by the prohibition as he can record the statement of a person as provided in Section 164 of the Code. Such a statement would either be elevated to the status of Section 32 if the maker subsequently dies or it would remain within the realm or what it was originally. This statement becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof. [524-B-E]

*Maqsoodan & Ors. v. State of U.P.*, A.I.R. (1983) SC 216, relied on.

F 3. There is no legal hurdle against acting on the testimony of an accomplice. It would be imprudent to base a conviction on such testimony unless it is corroborated in material particulars. The evidence has to pass the test of reliability and must secure adequate corroboration before the same can be acted upon. [525-C-D]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 592 of 1994 Etc.

From the Judgment and Order dated 3.3.93 of the Bombay High Court in CrI. A.No. 218 of 1989.

H R.S. Lambat for the Appellant in CrI. A.No. 592/94, 1187/95 and 335/99.

R.S. Sodhi, for the Appellant in Crl. A. No. 507/93, V.B. Joshi and D.M. Nargolkar for the Respondent. A

The Judgment of the Court was delivered by

**THOMAS, J.** These appeals relate to a case of mercenary killing. Though the principal target of the killers was one Ram Kishore Somani @ Ramu they could kill only his younger brother Ashok Somani, who, per chance was with his elder brother then, due to his jinxed destiny. Nevertheless they succeeded in brutally mangling the targeted person inflicting a lot of injuries on him, some of them near fatal. As he survived such injuries he appeared in the trial court to tell the tale. B

If the story is true, the intrigue was hatched, ironically, at the precincts of a court of law and its finale was staged on a public road near the Employment Exchange Office at Amravati (Maharashtra). Ten persons, in all, were charge-sheeted by the police in connection with the said case, out of which one Anil Chaudhary (PW.2) was granted pardon as he turned an approver. Four of the remaining alone were convicted and all the rest were acquitted by the trial court. The State appealed against the acquittal and the convicted accused appealed against their conviction and sentence. During the pendency of the appeal A.2 Ram Kishore Yadao—the kingpin - died and the appeal as against him got abated. C

A Division Bench of the High Court of Bombay (Nagpur Bench) confirmed the acquittal of A.9-Rajendra and also the conviction and sentence passed on the four accused. But the High Court reversed the acquittal of A.1-Gopal Maharaj and A.4-Ram Prasad Yadao and they too were convicted under Section 302 IPC read with Sections 109 and 150 IPC and also to a few other lesser offences. They were sentenced to imprisonment for life on the main offence, and to lesser terms of imprisonment for the lesser offences. D

A synopsis of the case is this: Ram Kishore Somani @ Ramu Somani (PW.1) and his brother Ashok Somani (deceased) were doing cloth business at Amravati. A.1-Gopal Maharaj contested as a candidate for the Municipal election in 1986 from the same Ward in which PW.1-Ramu Somani also contested as a candidate. The contest burgeoned ill-feeling which, by course of time, snowballed into deep-rooted rancour and it escalated to its zenith when he decided to go forward for the liquidation of his rival Ramu Somani. He sought the assistance of A.2- Ram Kishore Yadao who was leader of a gangster-gang. As A.2-Ram Kishore Yadao was already in jail in connection with a criminal E

A case, A.1-Gopal Maharaj went to the court of the Judicial Magistrate of First Class (Amravati) where A.2-Ram Kishore Yadao was expected to be produced from jail in connection with that criminal case. A.1-Gopal Maharaj impressed upon A.2-Ram Kishore Yadao that it was PW.1 who made all efforts to see that A.2 was not enlarged on bail. He then requested A.2 to liquidate PW.1-Ramu Somani. However, he cautioned PW.1 that it was not easy to finish him off since he was always guarded and was constantly moving around escorted by bodyguards. A.1-Gopal Maharaj suggested to liquidate the bodyguards also so that there would be no eye-witness to speak about the murder.

The above talk was again repeated on 10.12.1987 at the same place. The only addition then was the presence of A.4-Ram Prasad Yadao who is the brother of A.2-Ram Kishore Yadao. A.4-Ram Prasad Yadao told his henchmen-gangsters to do the needful and offered himself to be arrested in the meanwhile in connection with some petty case, so that no penumbra of suspicion would fall on A.2 and A.4. It was thought that, as the mercenaries are unacquainted to the targeted persons, the operation of killing can be carried out without much risk.

A.2 and A.4 wanted their henchmen to liquidate Ramu Somani. On 12.12.1986, A.4-Ram Prasad Yadao managed to get himself arrested on some petty case concocted at his instance. But A.4-Ram Prasad Yadao exhibited his anxiety as to why Ramu Somani was not killed even after A.4 got himself behind the bar. He threatened his henchmen with another murder, should the assignment for Ramu Somani's liquidation was not implemented without any further delay.

Six accused persons (A.5-Baba Swami @ Vinit, A.6Anil Motiram Dhote, A.7-Raju @ Mitun Galhot and Pramod Ingale) along with Anil Chaudhary (PW.2) went on a prowl for the target. Though Ramu Somani was spotted by them around 3 P.M. on 15.12.1987 they could not reach him as he got perched in his house in the meantime. But it was only a short-lived safety.

Around 4 P.M. on 15.12.1987, Ramu Somani went out of the house without having any foreboding of the slinking marauders, he was on the pillion seat of a scooter ridden by his younger brother Ashok Somani. As they reached near the office of Employment Exchange, all the assailants waylaid them and a massive onslaught was launched on them with deadly weapons. When the gangsters saw that their victim was very grievously mauled they fled from the place.

Both the injured were removed to the hospital as both sustained many serious injuries. Dying Declarations of both were recorded by a Judicial Magistrate (PW.16). On the same night Ashok Somani succumbed to the injuries, but Ramu Somani registered progress in the healing process and eventually he was discharged from the hospital. A

All the accused were arrested, different accused on different dates, and some weapons were recovered from a well situated near the house of PW.2-Anil Chaudhary. He was arrayed as accused No.8. He gave a confessional statement to the Chief Judicial Magistrate and on 11.3.1988 pardon was tendered to him and he was made an approver. B

The roles ascribed to A.5-Baba Swami, A.6-Anil Dhote, A.7-Raju Galhot and A.10-Pramod Ingale besides PW.2-Anil Chaudhary as assailants in the occurrence, were spoken to by PW.1-Ramu Somani and PW.2-Anil Chaudhary in full measure. The trial court and the Division Bench of the High Court have chosen to act on their evidence and found them guilty of the offences. C

There is no dispute now that PW.1-Ramu Somani and deceased Ashok Somani sustained very serious injuries at the place and at the time mentioned by the prosecution. The only point of dispute, on that aspect, was regarding the identity of the assailants. PW.2-Anil Chaudhary has narrated the story, including the incident on 15.12.1986 with all vivid details. PW.1-Ramu Somani also narrated the incident with full particulars, though he could identify only A.5, A.6, A.7, and PW.2 among the assailants. It is no matter that PW.1 could not identify A.10 as his participation in the occurrence was effectively vouchsafed by the evidence of PW.5-Avinash. Testimony of PW.4-Balaji Bobde affords additional evidence regarding the participation of A.5-Baba Swami and A.7-Raju Galhot. D E F

Ext. 52 is the Dying Declaration made by PW.1-Ramu Somani, which was recorded by a Judicial Magistrate (PW.16). Both the trial court and the High Court counted Ext.52 as a piece of evidence. Shri R.S. Lambat, learned counsel contended that both courts have gone wrong in treating Ext.52 as evidence because the person who gave that statement is not dead and hence it could not fall under Section 32 of the Evidence Act. Counsel further contended that even otherwise Ext.52 could only have been used to contradict PW.1 as provided in Section 162 of the Code of Criminal Procedure (for short "the Code") as it was a statement recorded during investigation. G

We are in full agreement with the contention of the learned counsel that H

A Ext.52 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. At the time when PW.1 gave the statement he would have been under expectation of death but that is not sufficient to wiggle it into the cassette of Section 32. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation.

B  
C Be that as it may, the question is whether the court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such witness. Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a magistrate is not affected by the prohibition contained in the said Section. A magistrate can record the statement of a person as provided in Section 164 of the Code and such statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof.

D  
E In *Maqsoodan and Ors. v. State of U.P.*, AIR (1983) SC 126 a three-Judge Bench of this Court has stated the legal position thus:

F "When a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of Evidence Act. In the instant case, the makers of the statements Exts.Ka-22 and Ka-23, are not only alive but they deposed in the case. Their statements, therefore, are not admissible under Section 157 of the Evidence Act as former statements made by them in order to corroborate their testimony in Court."

G So we repel the contention of the learned counsel that Ext. 52 cannot be used for corroborating the testimony of PW.1. Nothing could be shown to discredit his testimony. He, being the injured, seems to be the most natural witness to speak to the occurrence. When PW.1 pointed out PW.2 as one of the assailants, we have no difficulty in believing that PW.2-Anil Chaudhary  
H had witnessed everything which occurred when the victims were showered

with lethal blows, besides himself also participating along with other assailants. A

We, therefore, find no reason to interfere with the concurrent finding that A.5-Baba Swami, A.6-Anil Motiram Dhote, A.7-Raju Galhot and A.10 Pramod Motiram Ingale were active participants in the occurrence in which deceased and PW.1 Ramu Somani were violently attacked. B

While dealing with the appeals concerning A.1-Gopal Maharaj and A.4-Ram Prasad Yadao we are to point out that their conviction depends entirely on the testimony PW.2-Anil Chaudhary. The Division Bench of the High Court placed full reliance on his evidence. Though there is no legal hurdle against acting on the testimony of an accomplice it is well-nigh settled that it would be imprudent to base a conviction on such testimony unless it is corroborated in material particulars. Hence PW.2's evidence has to pass the test of reliability and must secure adequate corroboration before the same can be acted upon, in so far as A.1-Gopal Maharaj and A.4-Ram Prasad Yadao are concerned. C

PW.2-Anil Chaudhary said that on 4.12.1987 he too was present at the court premises when A.1-Gopal Maharaj conversed with A.2-Ram Kishore Yadao regarding the necessity to exterminate Ramu Somani. PW.2-Anil Chaudhary also said in his evidence that on 10.12.1987, A.1-Gopal Maharaj repeated the same conversation to A.2-Ram Kishore Yadao. To corroborate the aforesaid version prosecution examined PW.11Yusufkhan and PW.17-Kishan Jamu Goyal. The former has stated that he was present at the court premises on 4.12.1987 and saw A.1-Gopal Maharaj, A.2-Ram Kishore Yadao and others were talking with each other. The other witness said that on 10.12.1987 he saw those persons conversing together. But neither of them could hear what they were talking about. Criminal liability can be fastened with A.1-Gopal Maharaj only if the words attributed to him by PW.2 have assurance from other sources. The mere fact that A.1-Gopal Maharaj was found talking with A.2 is hardly sufficient to elicit such an assurance. D E F

Shri V.B. Joshi, learned counsel for the State candidly admitted before us that there is no other evidence or material to corroborate the testimony of PW.2 regarding the involvement of A.1-Gopal Maharaj in the crime. No other circumstance has been brought to our notice. Nor is there any material to show that A.1-Gopal Maharaj did anything for bailing out any of the assailants, nor that he expended any money for the defence of the said persons at any stage. G H

A Thus we are unable to uphold the conviction of A.1-Gopal Maharaj as the testimony of PW.2-Anil Chaudhary against him remained uncorroborated.

B But the position regarding A.4-Ram Prasad Yadao is different. The role attributed to him by PW.2-Anil Chaudhary is that on 10.12.1987 A.4-Ram Prasad Yadao told the assailants to go ahead with the operation for annihilation of Ramu Somani and that himself would, in the meantime, go behind bars so that no suspicion would arise against him also. PW.2-Anil Chaudhary said that it was A.4-Ram Prasad Yadao who supplied all the weapons to the assailants for carrying out the operation for annihilation of Ramu Somani. PW.2-Anil Chaudhary further said that true to his statement A.4-Ram Prasad Yadao got himself arrested on the succeeding day and when the witness visited A.4 at the Executive Magistrate Court premises he was abused by A.4 for the delay in carrying out the operation. According to PW.2-Anil Chaudhary he complained to A.2-Ram Kishore Yadao regarding the aforesaid conduct of A.4-Ram Prasad Yadao and then A.2 warned him that A.4-Ram Prasad might even go to the extent of slaying the assailants after coming out of jail if they fail to carry out the operation.

E Learned counsel for the appellant pointed out that PW.2 in cross-examination has said that he did not disclose to any body earlier that A.4 supplied the weapons of offence. So we are not inclined to accept that part of his testimony, whether it is true or not. That apart, how far the said testimony of PW.2-Anil Chaudhary regarding the other part of the involvement of A.4-Ram Prasad be acted on as true?

F The confessional statement given by PW.2 to the Magistrate before pardon was tendered to him, is projected as a material for corroboration. Though legally it can be used as a corroborative material we are not disposed to attach great weight to it since it is only the former statement of an accomplice.

G Learned counsel for A.4 Ram Prasad pointed out that PW.2 himself admitted that when he was questioned by the police he did not speak anything about A.4. But that is not of much use now because PW.2 was questioned by the police as an accused, and then he would not have divulged the truth. It was later that he changed his mind and offered to confess the entire truth. In the confession he implicated himself and others. So the fact that he did not divulge the whole truth at the outset when he was questioned by the police is not of much consequence. That aspect only goes along with the inherent weakness of the testimony of any approver.

H

PW.17-Kishan Jamu Goyal was a detenu during December 1987. He said in his evidence that he was on the court verandah on 10-12-1987 along with A.2-Ram Kishore Yadao and then he saw A.2 talking with the assailants. As we have pointed out, while dealing with the case of A.1-Gopal Maharaj, corroboration provided by the evidence PW.17-Kishan Jamu Goyal is not sufficient to ensure confidence in judicial mind about the truth of PW.2's testimony. It may be one circumstance, but we require more circumstances to assure that PW.2 spoke the truth in the court.

There is one circumstance which is reasonably sturdy to corroborate the evidence of PW.2-Anil Chaudhary regarding his accusation against A.4-Ram Prasad Yadao. Ext.170 is a police report showing that a petty case was registered by the police against A.4-Ram Prasad Yadao and he was taken into custody by the police on 12.12.1987. PW.29 Head Constable testified that a person by name Vilas Mulatkar went to the police station with a complaint that A.4-Ram Prasad Yadao created unruly scene under the influence of alcohol in a public place, and that a case was registered against him under Section 151 of the Code and he was interned in the lock-up on 12.12.1987.

The fact that A.4 was so arrested on 12.12.1987 is not disputed. The contention is that A.4 was released on bail even prior to the incident in the case and hence his arrest is of no use in this case. That might be so, and we are not at the question whether he should have continued in jail till the occurrence was over. We are scrutinizing the evidence of PW.2, and ascertain the extent it has been corroborated by other evidence. In that scrutiny we notice that the arrest of A.4 on 12.12.1987 is a circumstance which corroborates the testimony of PW.2.

Another item of evidence noticed as of corroborative value is the testimony of PW.3. He was a boy aged 17, who was then a student. He deposed that he too had connections with A.2-Ram Kishore Yadao. On 15.12.1987, at about 1.30 P.M. while he was standing at Duffarin bus stop along with A.5 and A.10, some others including A.4 and A.6 and then A.7 joined them and PW.2 also came later. A.4 was heard saying to them "you carry out the work assigned and do not bother about consequences", and A.4 assured them that he would bear all the expenses. Next day of the occurrence, A.6-Anil Dhote sent PW.3-Sudir Pohokar to the house of A.4-Ram Prasad Yadao to collect some money. PW.3 went to A.4 and collected some money from him and then A.4 told him that the police was suspecting him and hence he would be able to supply further fund only later. This is the substance of

A what PW.3 said regarding the role of A.4-Ram Prasad.

The aforesaid evidence of PW.3 is a further item to lend assurance regarding the involvement of A.4-Ram Prasad in the murder case. Of course, this was not counted by the High Court but that does not matter much. We are now at the question as to what extent the evidence of PW.2-Anil Chaudhary can be acted on. We feel assured from the circumstances enumerated above that the evidence of PW.2 in so far as he implicated A.4-Ram Prasad with this murder can be accepted as true.

C When we record our finding against A.4-Ram Prasad we are also obliged to record our gratitude to Shri R.S. Lambat (learned counsel who argued for A.4) for the able assistance he provided to the accused with the thorough and deep study he made with the facts and evidence in this case.

D In the result the appeals filed by A.5-Baba Swami, A.6-Anil Motiram Dhote, A.7-Raju Galhot and A.10-Pramod Motiram Ingale are dismissed. But we allow the appeal filed by A.1-Gopal Maharaj, and set aside the conviction and sentence passed on him by the High Court. His bail bond will stand discharged. However, we confirm the conviction and sentence passed by the High Court on A. 4-Ram Prasad Yadao and dismiss his appeal. We direct the Sessions Judge, Amaravati to take prompt and necessary steps to put him in jail for undergoing the remaining portion of the sentence.

E A.Q. Appeals filed by Accused No. 4, 5, 6, 7 and 10 dismissed.  
Appeals filed by Accused No. A-1 allowed.