NARAIN SINGH AND ANR. A

v.

STATE OF HARYANA

FEBRUARY 5, 2004

[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.] B

Penal Code, 1860—Sections 302, 323 and 364—Evidence Act, 1872—Section 32—Deceased was abducted and was seriously injured by four accused—Death of the deceased on way to hospital—Dying declaration of the deceased—Trial Court acquitted two accused and convicted the other two on the basis of motive—High Court confirming the conviction—Validity of—Held, on facts and evidence, conviction on the basis of motive without proving the dying declaration by the prosecution is not proper—Hence conviction set aside. C

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The deceased and appellants A-1 and A-3 had a series of litigations between them in respect of some properties. The deceased and his lawyer PW-15 went to Tehsildar's office to take possession of a piece of land over which the title to the deceased was declared. On their way, the appellants with A-2 and A-4 came in a Maruti Van and forcibly dragged and abducted the deceased in the van. PW-7, who tried to save the deceased E **from the appellants, suffered injuries. PW-15 lodged first information report with the police. The Police found the deceased severely injured. The statement of deceased was recorded under Section 161 CrPC. The deceased died on the way to hospital. The statement of the deceased was subsequently treated as a dying declaration by the prosecution.** F

During the trial, none of the eyewitnesses supported the prosecution version. The Trial Court, however, convicted the accused A-1 to A-4, on the basis of the dying declaration of the deceased, under Sections 364, 302, 323 read with Section 34 IPC and sentenced them to life imprisonment, rigorous imprisonment for 10 years and two months imprisonment G **respectively. In appeal, the High Court acquitted A-2 and A-4 since the dying declaration was not sufficient to hold them guilty and confirmed the conviction of appellants A-1 and A-3 on the basis of motive.**

In appeal to this Court, the appellants contended that the

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A eyewitnesses PW-7 and PW-15 did not support the prosecution version; that the dying declaration of the deceased is not believable; that the medical evidence clearly rules out the manner of assault as claimed by the prosecution; and that the logic applied for disbelieving the involvement of A-2 and A-4 is equally applicable to the appellants also.

B The respondent, on the other hand, contended that the appellants had motive to kill the deceased due to property disputes; that mere disbelief of the dying declaration in part in favour of A-2 and A-4 cannot be the basis of their acquittal.

C Allowing the appeal, the Court

HELD: 1.1. Though in law there is no bar in acting on a part of the dying declaration, it has to pass the test of reliability. Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-
D examination, it is not creditworthy. A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death, is by itself, guarantee of the truth of the statement of the deceased regarding circumstances leading to his death. But at the same time, the dying declaration, like any other evidence, has to be tested on
E the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by examination. [120-D-E-F]

1.2. In the dying declaration, specific roles were attributed to all the accused persons A-1 to A-4. The High Court found the roles attributed to
F the accused A-4 to be unacceptable as he was not found present when the police arrived at the house from where the deceased was supposedly recovered. Similar is the situation so far as accused-appellant A-3 is concerned. In the dying declaration, the deceased had said that it was A-2 and the appellant A-1 who were trying to kill him. The High Court found
G that since A-2 would not have benefited from the death, he cannot be convicted. The reasoning is fallacious. A definite role was attributed to A-2 and it was stated that he wanted to kill the deceased. On mere surmise that there was no motive, a different approach was adopted. Added to this, there are other suspicious circumstances. According to the prosecution, the statements of two witnesses were immediately recorded at the spot by
H the police. This is unusual because the first effort should have been in the

normal course to send that deceased to the nearest hospital for treatment. Doctor (PW-12) examined the deceased at about 12.00 noon after the deceased was brought there after covering at least ten kilometres. The dying declaration is supposed to have been taken after recording the evidence of the witnesses. It is more baffling that the investigating officer did not accompany the deceased to the hospital and claimed to have sent him along with a constable who was not examined. The High Court has erroneously observed that the first effort of the police was to save the life of the deceased and, therefore, the statements were not recorded immediately. This is contrary to what the investigating officer (PW-16) himself stated. Strangely, the original statement stated to be dying declaration, has not been brought on record and what was purpoted to be exhibited document was a carbon copy, Doctor (PW-19) in his evidence also stated that the injuries found on the deceased were of such nature that he would not be in a position to give any statement without getting medical aid from a specialist and that too after two to three hours. Doctors (PWs 12 and 19) have also stated that the deceased would not have been in a position to give a detailed statement like the one produced by the prosecution as a dying declaration. The time period between the recording of F.I.R., examination of the witnesses and recording statement of deceased, that too after travelling 8 kms. and again bringing the deceased to hospital to be examined by PW-12 was much more than one hour and ten minutes as stated by the prosecution. The alleged dying declaration runs to several pages being a very detailed and elaborate one, the recording of which itself would take considerable time. [120-H; 121-A-H]

1.3. In the circumstances of the case, merely because the accused and the deceased were claimed to be inimical towards each other, that would not be sufficient to adopt a different method of analysing or appreciating the evidence which was common for all the four persons without any distinct or reasonably distinguishable features. The Trial Court and the High Court having accepted this position, on the hypothetical distinction of a supposed motive could not have adopted a different yardstick. When the so-called dying declaration was itself not proved, the question of acting on it did not arise. There is no evidence to establish kidnapping and/or murder to attract Section 364 IPC and Section 302 IPC. PW-7 allegedly suffered injuries at the hands of the appellants for which they were convicted in terms of Section 323/34 IPC. PW-7 himself did not support the prosecution version in this regard. [122-B, C, D]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 323 of 2003.

From the Judgment and Order dated 19.8.2002 of the Punjab and Haryana High Court in Crl. A. No. 92-DB of 1999.

B U.R. Lalit, Manish Misra, S.K. Yadav and Sanjay R. Hegde for the Appellants.

D.P. Singh, Ms. Avneet Toor and Vinay Kumar Garg for the Respondent.

R.C. Kohli for Impleadment.

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The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Appellants call in question legality of the judgment rendered by a Division Bench of the Punjab and Haryana High Court whereby the conviction made and sentence imposed by the Trial Court D was affirmed so far as the appellants are concerned. Four persons faced trial for allegedly causing homicidal death of one Kaushal Singh (hereinafter referred to as 'the deceased') after abducting him. All the four accused persons faced trial for the offences punishable under Sections 364, 302, 323 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC'). They were found guilty of the charged offences. Sentences of life imprisonment, rigorous E imprisonment for 10 years and two months respectively were imposed for three offences, and fine with default stipulation in case of non-payment of fine. The High Court in appeal held accused Mahabir Singh and Rakesh (A-2 and A-4 respectively) to be not guilty and directed their acquittal, but maintained the conviction and sentence so far as appellants are concerned.

F The prosecution version as unfolded during trial is essentially as follows:

Deceased and appellant no.1 (Narain Singh) were brothers. Appellant Hamir Singh is the son of appellant Narain. There was series of litigations between them in respect of some properties. On 4.5.1994, the deceased and his lawyer Mal Chand Sharma (PW-15) had gone to Rewari to take possession G of land over which deceased's title was declared in village Bharawas and they stayed at a hotel. At about 9.30 a.m. they went to the Tehsil office, by a hired Jeep. Tehsildar asked them to come at 1.00 p.m. While the informant and the deceased were going on foot towards Jeep which was parked across road at about 10.30 a.m., all the four accused persons came in a Maruti Van H and forcibly put deceased in the car and took him away. Though one Khushi

Ram (PW-7) tried to save the deceased from the accused persons, he was assaulted by accused Hamir Singh (A-3). The accused persons took away the deceased. PW-15 immediately reported the matter to police. On the basis of his report, first information report was registered at about 10.50 a.m. and the investigation was undertaken. Police officials went in search of the deceased who was found in old house in village Bharawas. The statement of deceased was recorded under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Cr.P.C.') which was treated subsequently to be the dying declaration. He was brought to Rewari for treatment. Dr. Vinod Kumar (PW-12) examined him at 12.00 noon. The deceased was taken to the Jeypore hospital but on the way he breathed his last in the afternoon. On examination, PW-12 had found 21 injuries on the body of the deceased. Subsequently when the deceased breathed his last post-mortem was conducted by PW-14 on 15.5.1995 and the injuries noticed by him were more or less the same as were noticed by PW-12. During the course of investigation, recoveries were made of the lathi and the Khukri which were allegedly used by the accused persons for assaulting the deceased. On completion of investigation charge sheet was placed.

Twenty witnesses were examined to further the prosecution version and PWs 7 and 8 were stated to be eyewitnesses. Apart from PW-15, PW-8 was driver of the Jeep in which the deceased and PW-15 had travelled. PW-7 was claimed to be the eyewitness who tried to save the deceased when he was forcibly taken in the car and sustained injuries and PW-15 his advocate gave the first report to the police. During trial none of the alleged eyewitnesses supported the prosecution version. Therefore, prosecution relied on the dying declaration purported to have been made by the deceased. The Trial Court found that the dying declaration was acceptable to fasten the guilt of the accused and, therefore, convicted and sentenced them as indicated above. All the four accused persons preferred appeal before the High Court which came to hold that the dying declaration was not sufficient to hold the accused Mahabir and Rakesh (A-2 and A-4 respectively) to be guilty. However, since the present appellant had a motive to murder the deceased and the dying declaration was acceptable, so far as they are concerned. Accordingly while acquitting accused Mahabir and Rakesh (A-2 and A-4 respectively), present appellants were convicted.

In support of the appeal, learned counsel for the appellant submitted that this is a case where the informant who was an advocate did not support the prosecution version. According to him, the assaults were made by some persons on the deceased near the Tehsil office and not at the place claimed

A by the prosecution. PW-7 who is supposed to have sustained injuries while trying to save the deceased also did not support the prosecution version. Similar was the position of driver PW-8. It was submitted that the medical evidence clearly rules out the manner of assault as claimed by the prosecution. The logic applied for disbelieving the involvement of Mahabir and Rakesh is equally applicable so far as the appellants are concerned. The so-called B dying declaration itself is not believable.

Learned counsel for the State, on the other hand, submitted that merely because the dying declaration was disbelieved in part, that cannot be ground to acquit present appellants. Undisputedly, the deceased had sustained injuries C and merely because the hypothetical answers given by the doctor (PW-19) show that the injuries were not possible by the weapon claimed to have been used by the appellants, that cannot be a ground to discard the evidence. The appellants had the motive to kill the deceased and that is the distinctive feature between the acquitted A-2 and A-4 and the appellants.

D Learned counsel for the informant who has filed/applied for impleadment adopted stand of the State.

Though in law there is no bar in acting on a part of the dying declaration, it has to pass the test of reliability. Section 32(1) of the Indian Evidence Act, 1872 (in short 'the Evidence Act') is an exception to the general rule that E hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination it is not creditworthy. A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding circumstances leading to his death. But at the same time F the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by cross-examination. The dying declaration if found reliable can form the base of conviction.

G It is, however, seen that there are some circumstances which assume importance in view of the fact that the informant (PW-15) who was advocate of the deceased has departed from the statement supposed to have given during investigation, and in the first information report. Similar is the position of the witness who is supposed to have received injuries. In the dying declaration, specific roles were attributed to all the accused persons. The H High Court found the roles attributed to the accused Rakesh to be unacceptable,

as he was not found present when the police arrived at the house from where the deceased was supposedly recovered. Similar is the situation so far as accused-appellant Hamir is concerned. In the dying declaration the deceased had said that it was Mahabir and appellant Narain who were trying to kill him. The High Court found that since Mahabir would not have benefited from the death; he cannot be convicted. The reasoning is fallacious. A definite role was attributed to Mahabir and it was stated that he wanted to kill the deceased. On mere surmise that there was no motive, a different approach was adopted. Added to this, there are other suspicious circumstances. Firstly, the incident is supposed to have taken place at 10.30 a.m. and the report was lodged with the police at 10.50 a.m. The distance of police station from the house from where the deceased was allegedly recovered, is about 8 kms. It would have certainly taken some time to reach that place. According to the prosecution, the statements of two witnesses were immediately recorded at the spot by the police. This is unusual because the first effort should have been in the normal course to send the deceased to the nearest hospital for treatment. Doctor (PW-12) examined the deceased at about 12.00 noon after the deceased was brought there after covering at least ten kilometers. The dying declaration is supposed to have been taken after recording the evidence of the witnesses. It is more baffling, that the investigating officer did not accompany the deceased to the hospital and claimed to have sent him along with the constable who was not examined. The High Court has erroneously observed that the first effort of the police was to save the life of the deceased and, therefore, the statements were not recorded immediately. This is contrary to what the investigating officer (PW-16) himself stated. Strangely, the original statement stated to be dying declaration has not been brought on record and what was purported to be exhibited document was a carbon copy. Doctor (PW-19) in his evidence also stated that the injuries found on the deceased were of such nature that he would not be in a position to give any statement without getting medical aid from a specialist and that too after two to three hours. Doctors (PWs 12 and 19) have also stated that the deceased would not have been in a position to give a detailed statement like the one produced by the prosecution as a dying declaration. The time period between the recording of F.I.R., examination of the witnesses and recording statement of deceased, that too after traveling 8 kms. and again bringing deceased to hospital to be examined by PW-12 has to much more than one hour and ten minutes as stated by the prosecution. The alleged dying declaration runs to several pages being a very detailed and elaborate one, and the recording of which itself would take considerable time.

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A Significantly, in his cross-examination (PW-16) says that he does not remember recording the statement of the deceased. Doctor (PW-19) has also stated as to the injuries found on the body of the deceased by PW-12 and as indicated in the injury report and in the post-mortem report were not such as could be possible by the Khukri which was shown to him in Court and purported to have been recovered on the basis of information given by accused B Hamir. Adding to that, the number of the car which was supposed to have been used for taking away the deceased from the road near the Tehsil office was differently described during trial. In the circumstances of the case, merely because the accused and the deceased were claimed to be inimical towards each other, that would not be sufficient to adopt a different method of analyzing C or appreciating the evidence which was common for all the four persons without any distinct or reasonably distinguishable features. The Trial Court and the High Court having accepted this position, on the hypothetical distinction of a supposed motive could not have adopted different yardstick. When the so-called dying declaration was itself not proved, as noted above, the question of acting on it did not arise. There is no evidence to establish D kidnapping and/or murder to attract Section 364 IPC and Section 302 IPC. PW-7 allegedly suffered injuries at the hands of the appellants for which they were convicted in terms of Section 323/34 IPC. PW-7 himself did not support prosecution version in this regard.

E Judged in the aforesaid background, the only inevitable conclusion permissible on the nebulous and suspect nature of the evidence let in would be that the prosecution has not established accusations so far as appellants are concerned. Their conviction is set aside and the appeal is allowed. The prayer for impleadment is disposed of. Accused-appellant Hamir be set at liberty forthwith unless required in any other case. The bail bonds of accused Narain F Singh who is on bail shall stand cancelled.

B.S. Appeal allowed.