

PETITIONER:
RAJINDER SINGH & KADA

Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT 21/04/1992

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
JEEVAN REDDY, B.P. (J)

CITATION:
1992 AIR 1433 1992 SCR (2) 574
1992 SCC Supl. (3) 13 JT 1992 (2) 575
1992 SCALE (1) 822

ACT:

: Criminal Law

: Indian Penal Code, 1860-Section 302-Offence of Murder-
Presence of eye witnesses at the scene of occurrence not
free from doubt-Investigation in doubt as to culprit-
Introduction of second dying declaration with names of eye
witnesses-Despatch of FIR after recording of second dying
declaration-Contradictions in two dying declarations-Inves-
tigation not free from taint-Material witnesses-Not exam-
ined-Whether High Court justified in reversing trial court's
decision acquitting the accused-Absconding of accused-Wheth-
er per se establishes guilt-Whether accused entitled to
benefit of doubt.

HEADNOTE:

: The appellant was alleged to have fired a
shot from his pistol hitting the left flank of one 'C' who
rushed inside PW.3's house and hid himself by chaining the
door from inside. PW.3 and another person raised alarm, but
the appellant escaped from the place of occurrence with his
pistol. PW.4 who had also arrived at the spot saw the occur-
rence. While PW.3 went to the village Police Station and
lodged the First Information Report, two other persons took
the injured person to the City Civil Hospital, where PW.2
the doctor, attended on the injured person, who remained in
the hospital for about 13 days, and ultimately succumbed to
the injury. PW.2, who performed the autopsy of the deceased,
opined that the death was due to toxemia and shock resulting
from peritonitis, as a consequence of fire arm injury in
which the small gut was injured, and that the injury was
sufficient to cause death in the ordinary course of nature.

The appellant was charged under Section 302 IPC and
Section 27 of the Arms Act, 1959, for the murder and for
making use of a pistol for an unlawful purpose. The
appellant was declared absconder. He was arrested when in
possession of a pistol 40 months after the incident.

The prosecution supported its case by production of two
eye wit-

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nesses, PWs 3 and 4. It also introduced two dying declara-
tions, one recorded by PW.14, the then Executive Magistrate,

and the second recorded by PW.15 the S.I. of Police Station of the village in which the incident took place. Besides, the fact of accused's absconding after the incident was also pressed into service. The Sessions Judge, placed no reliance either of the ocular version or the dying declarations and acquitted the appellant. However, on appeal, by the State, the High Court set aside the acquittal and convicted the appellant under Section 302 IPC and Section 27 of the Arms Act, and sentenced him to life imprisonment and a fine of Rs.2,000 and, in default, a further period of one year's rigorous imprisonment and also one year's rigorous imprisonment respectively.

Allowing the appeal of the accused, by giving benefit of doubt, this court,

HELD: 1.1 The presence of the two witnesses, PWs.3 and 4, at the scene of occurrence is not free from doubt. The investigation was in doubt as to who was the culprit. As a first step, the theory of the first dying declaration was introduced without taking somebody independent, like the doctor, into confidence. The investigation later introduced the story of another dying declaration. This one was with the aid of the doctor, but this brought in the names of the two eye-witnesses to figure at a time when everything was manageable from the official point of view in reporting the matter to the Magistrate. The investigation also, in the instant case, therefore, is not free from taint. The High Court, therefore, was not right in setting aside the trial court's decision and conviction the appellant.

[584 F-H, 585 A]

1.2 There are contrasting features in the two dying declarations. The presence of PW.3 and PW.4 at the scene of occurrence had not been mentioned specifically in the first dying declaration. However, their names got introduced in the second dying declaration. Besides, the brother of the appellant had been introduced in the second dying declaration as a coculprit. Though the City Police was present in attendance at the hospital, after it had been informed of the arrival of the injured there, it was not prepared to carry the burden of getting recorded a dying declaration. In this situation, it is rather dramatic that PW.14 should jump into the fray without having been asked by anyone officially, under proper documents, to record the statement of the injured at 6.45 p.m. and without complying with the

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essential formalities of making an application to the doctor, disclosing his identity, seeking his opinion as to the fitness of the injured to make a statement, and if permitted, having recorded the statement, the injured in the presence of the doctor. The role of PW.14, even if the suspicion entertained by the Sessions Judge on his veracity on the basis of his judicial career is left aside, is suggestive of an overdoing, shared by the police to not let go a crime against their fellow policeman unpunished. It is also plain that while introducing the expression "other persons" to be present in the first dying declaration it was like drawing a blank cheque to be filled in at a later stage conveniently, in order to plug in convenient witnesses, if the ones mentioned already were not prepared to support the prosecution. The effort in that regard was to say the least naive, if not clumsy. [582 F-G;583 A-D]

The dying declaration recorded by PW.15, S.I. of the village Police Station on the following morning also demonstrates that by that time PWs.3 and 4 had been tied up as willing witnesses.[583 D]

1.3 PW.3, one of the two eye-witnesses has said that

the reason for his being at the spot was that he had gone to the house of his friend for taking a plough. He lives in the east of the village whereas the house of the friend is towards the west of the village. He appears to be a chance witness altogether. There could be plenty of ploughs to be borrowed in his own neighbourhood. So far as the second eye-witness, PW.4 is concerned his house is towards the south of the place of occurrence and there intervened about 150 houses between the two places. He too is a chance witness.

[584 B-C]

1.4 Nobody from the locality was examined by the prosecution. Material witnesses, who were claimed to have seen the occurrence and removed the injured to the hospital in their jeep, were not examined by the prosecution. It is due to the second dying declaration recorded by PW.15 the S.I. of the Village Police Station that the names of these two i.e. PWs.3 and 4 came in the forefront, and on accomplishing such a fiat, the F.I.R. was written thereafter and the report despatched the next day at 8.00 p.m. to the Magistrate afterwards. There was, in the interval, plenty of time to withhold the despatch of F.I.R. till the story could be woven, concerning as it was, a fellow policeman.[584 D-E]

1.5 The First Information Report was shown to have recorded on the day of the incident at 6.15 p.m. under section 307/34 IPC and under

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section 25/27/54/59 of the Arms Act, 1959 and despatched to the Magistrate the following day at 8.00 p.m., much after recording of the second dying declaration, and received by the Magistrate still two days later at 10.05 a.m. The investigation stretched its timings. The version was improved. It was said that after the occurrence when the appellant ran away with his pistol, he was joined near the Kikar trees by his brother, who too is a Constable in the police. He is suggested to have been waiting for the appellant as an aide. Then both of them are said to have fled away. Since the appellant was shown to have been absconding, the brother of the appellant was hurriedly put up for trial for offence under section 302/34 IPC. The Sessions Judge, however, discharged the brother of the appellant. This apparently was an attempt to try the appellant in absentia, but the effort failed. [583 E-H]

1.6 The abscondence of the accused is not a determining factor, and not one which could outweigh the other material appearing on the record. It by itself does not establish the guilt of the appellant beyond reasonable doubt. [585 B]

1.7 In the circumstances, the appellant is extended the benefit of doubt and acquitted. [585 C]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 531 of 1981.

From the judgment and Order dated 11.3.1981 of the Punjab and Haryana High Court in Criminal Appeal No. 1044 of 1979.

A.N. Mulla, T.L. Garg and N.D. Garg for the Appellant.
Ranbir Singh Yadav and R.S. Suri(N.P.) for the Respondent.

The judgment of the Court was delivered by PUNCHHI, J. This appeal under section 379 of the Criminal Procedure Code is directed against the judgement and order dated March 11, 1981 of the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No.1044 of 1979.

The appellant herein, Rajinder Singh, was charged under section 302 IPC and under section 27 of the Arms Act for causing the murder of Chamkaur Singh and for making use of a pistol for an unlawful purpose,

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before the Sessions Judge, Ferozepur. He was acquitted by the learned Sessions Judge on February 9, 1979. On State appeal to the High Court the acquittal was set aside and the appellant was convicted under section 302 IPC and was sentenced to life imprisonment as also to pay a fine of Rs.2000 or in default further rigorous imprisonment for one year. The fine, if realised, was ordered to be paid to the heirs of Chamkaur Singh deceased. He was also convicted under section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for one year.

The prosecution case is that Chamkaur Singh, since deceased, and the appellant herein belonged to village Ghall Khurd. The deceased had four brothers. One of them, namely, Thana Singh, had died 20 days before the occurrence on account of taking liquor. The deceased suspected that the appellant has administered poison to Thana Singh in liquor. On December 20, 1974, just before sunset, the deceased came from the side of the bus stand to his village. Harbans Singh P.W.3 was standing in front of the house of one Jagtar Singh for taking a plough and he beckoned the deceased to come to him. At the moment, the appellant is stated to have come from the side of the lane and made Chamkaur Singh deceased stop, accusing him that he had talked ill to him to some shopkeeper but Chamkaur Singh denied having done so. Thereupon Chamkaur Singh moved forward towards his house accompanied by one Darbara Singh. The appellant at the juncture took out his pistol from underneath the blanket, with which he had wrapped himself, and fired a shot hitting the left flank of Chamkaur Singh. After receiving the shot Chamkaur Singh rushed inside the house of Harbans Singh Sansi and hid himself by chaining the door from inside. Harbans Singh P.W.3 and Darbara Singh raised alarm saying "do not kill" "do not kill" but the appellant escaped from the place of occurrence with his pistol. Hakam Singh, P.W.4 had also arrived at the spot from the side of his fields and saw the occurrence. Two others, Mohinder Singh and Gura Singh, took Chamkaur Singh to the Civil Hospital Ferozepur while Harbans Singh to P.W.3 went to the Police Station Ghall Khurd, in the same village, and lodged the First Information Report. On arrival at the hospital Dr. S.I.S. Sandhu P.W.2 attended to him. Chamkaur Singh remained in the hospital for about 13 days till January 2, 1975 when he died. It fell to the lot of Dr. Sandhu again to perform the autopsy of the deceased. In the opinion of Dr. Sandhu the death of Chamkaur Singh was due to toxemia and shock as a result of peritonitis as a consequence of fire arm injury in which the small gut was injured. According to the

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doctor the injury was sufficient to cause death in the ordinary course of nature.

The prosecution further alleges that the appellant could not be arrested and was declared an absconder. It is only on April 12, 1978, about 40 months later, that he was arrested at a check-post in another part of district Ferozepur and at that time he was holding a pistol. It was taken into possession as well as the ammunition found on his person.

When the case we sent up for trial after completion of investigation, the prosecution supported its case by production of two eye witnesses, Harbans Singh P.W.3 and

Hakam Singh P.W.4 to give the ocular version. It also introduced in evidence two dying declarations of the deceased. One was said to have been made on December 20, 1974 to Shamsher Singh, P.W.14 who then posted as Judicial Magistrate, First Class, Ferozepur. He was no more a Magistrate when his statement was recorded at the trial. The other one was of December 21, 1975 recorded by S.I. Vasdev P.W.15. Besides, the abscondence of the accused was pressed into service. The learned Sessions Judge however placed no reliance on either the ocular version or the dying declaration and acquitted the appellant, but he was reversed by the High Court. The exercise in the instant appeal is to examine whether the High Court was justified in interfering in the acquittal of the appellant.

As said before, Chamkaur Singh had been taken to the Civil Hospital, Ferozepur the same day, i.e., December 20, 1974. On his arrival, Dr. S.I.S. Sandhu, Surgical Specialist, Civil Hospital, Ferozepur sent message Ex.P.B. at 6.00 p.m. to the S.H.O. police Station Ferozepur city, intimating the arrival of the injured. The Hospital and the Police Station are opposite each other. Another message Ex. P.C. was sent likewise at 6.20 p.m. suggesting recording of dying declaration of Chamkaur Singh since his condition was serious. At 10.30 p.m. vide application Ex.PD S.I. Vasdev asked the opinion of Dr. Sandhu whether Chamkaur Singh was fit to make statement, but the doctor opined that the injured was not fit to make a statement. Then on the next day on 21.12.1974, again opinion was sought by the Police to that effect at 11.00 a.m. and then the doctor declared Chamkaur Singh fit to make a statement. Dr. Sandhu claimed to have ordered giving pethedin injection to the injured by way of sedation on the arrival of the injured in the Hospital, and another injection on 21-12-74 at

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4.00 p.m. That was the reason that on the earlier day, i.e. on 20-12-1974, when his opinion was sought about the ability of the injured to make a statement, he had opined that he was unfit to make a statement due to sedation. It is worthy of notice at this stage that it was Vasdev S.I. attached to Police Station Ghall Khurd who responded to the need of recording a dying declaration and not the police of Police Station Ferozepur City. It is also worthy to note that Chamkaur Singh himself was a constable serving in the office of S.P. Ferozepur City. From the medical report Ex.P.J., Dr. Sandhu, when called again as a court witness, explained that Chamkaur Singh was conscious when he was brought for examination at 6.15 p.m. and at that time he was fit to make a statement although his condition was serious. He however went on to say that he had ordered a pethedin injection to be given to the patient so that he goes to sleep, which injection should have had its effect after half an hour.

The first dying declaration of the deceased, as said before, was recorded by Shamsher Singh P.W.14. According to Shamsher Singh P.W.14 he received a police application on the basis of which he went to the Hospital in order to record the dying declaration of the deceased at 6.45 p.m. Having reached there he obtained the opinion of Dr. Sandhu regarding fitness of Chamkaur Singh to be fit to make a statement. Noticeably no document was prepared by P.W.14 in that regard. He claimed to have prepared his own proceedings in the form of a memorandum Ex.P.N. and noted therein that Dr. Sandhu had certified Chamkaur Singh to be fit to make a statement and that on his pointing out Chamkaur Singh he had recorded the dying declaration of the deceased. The memorandum Ex.P.N. itself contains the dying declaration of Cham-

kaur Singh which is pointed as Ex.P.N.2 P.W.14 claims that it was recorded on the dictation of the injured, which was read out to him after recording and to which injured put his signatures. This dying declaration is to the following effect:

"My brother Thana Singh had died earlier. He was poisoned in liquor. Now I have come to know as to who had done it. Earlier I did not know. I wanted to go from my headquarters after taking leave but could not get an opportunity. Today, I got down at Ghall Khurd Bus Stop. Darbara Singh member Panchayat was with me. Rajinder Singh accused came there. He said that I had talked something about him to some shopkeeper. I replied in the negative. I proceeded and then saw

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back that the accused took out a pistol from underneath his blanket. He fired, which hit me on the left side of my flank. I entered some one's house but the accused ran away. Jagat Singh, Jagtar Singh, Darbara Singh and many other people had come there".

P.W.14 further stated that the dying declaration was sent by him to the Area Magistrate but corrected himself that Police Station Ghall Khurd fell within his jurisdiction and stood shifted to another Magistrate. He also stated that he had resigned from the post of Judicial Magistrate, First Class, Ferozepur. He while giving his evidence described himself as a practising advocate at Kharar, a tehsil town. In his memorandum Ex. P.N. besides his version and narration, there is no signature of Dr. Sandhu even though his name prominently figures in it. Even after recording it Dr. Sandhu was not asked to certify the recording of it. According to P.W.14 there was no necessity for it because he was himself satisfied that Chamkaur Singh was fit to make a statement all through. Memorandum Ex. P.N. was not put to Dr. Sandhu or he even apprised to know its contents. The prosecution dare not risk it. Dr. Sandhu may have totally denied his involvement in the recording of the first dying declaration. Another significant factor emerging from the first dying declaration is that the names of the two eye-witnesses Harbans Singh P.W..3 and Hakam Singh P.W.4 do not find mentioned as persons who had seen the occurrence. Other were so named.

The second dying declaration is claimed to have been recorded by S.I. Vasdev, P.W.15 of Police Station Ghall Khurd. As he says, on 20-12-1974 at 6.15 p.m. he recorded the First Information report at the instance of Harbans Singh P.W.3. After recording it he went to the spot and recovered therefrom an empty cartridge. He recorded the statements of Hakam Singh P.W. 4 at that time. He then went to Civil Hospital, Ferozepur reaching there at 9.30P.M. He then made application Ex. P.D. at 10.30 P.M. enquiring from the doctor about the fitness of Chamkaur Singh to make a statement. The opinion being negative, he ventured again on the next day at 11.00 a.m. This time the doctor's opinion was positive and then he recorded the dying declaration Ex. P.O. The dying declaration recorded by P.W.15 reads like thus:

"I am a constable in the police, on 20-12-1974 I came on leave

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to Ghall Khurd. I came by bus, Darbara Singh was with me. He and I came in front of the house of Harbans Singh. Accused Rajinder Singh came from the front side. he was having a blanket around. He said that I had talked to a shop keeper about him. I told him that some-one had misled him. I

Proceeded forward and looked backwards. The accused took out his pistol and fired towards me. After that I started raising raula. The shot fired by accused hit me on my left flank and I got injured. Out of fear I entered the house of Harbans Singh Sansi. I bolted the door from inside. Jagtar Singh son of Joginder Singh, Harbans Singh son of Sawan Singh Jats, Hakam Singh son of Isher Singh had seen the occurrence. Rajinder Singh fled away with the pistol from the spot. He ran towards Kikar trees. Where Kewal Singh brother, was waiting for him. They both ran away. They had both connived to kill me. The cause of enmity is that on 21-12-1974 my brother Thana Singh died by taking liquor. I later on came to know that Rajinder Singh had poisoned him in liquor due to which the death occurred. As I could not know earlier. I could not proceed further. On Diwali night my brother Balam Singh and Rajinder Singh gambled. Rajinder Singh won some money. I had got that amount returned from Rajinder Singh. While I was injured state, Gurnam Singh son of Hari Singh and Mohinder Singh son of Arjan Singh of Ghall Khurd took me in a jeep and got me admitted in the hospital".

As is evident there are contrasting features in the two dying declarations. The presence of Harbans Singh P.W.3 and Hakam Singh P.W.4, as said before, had not been mentioned specifically in the first dying declaration. In the second dying declaration, the names of those two witnesses got introduced. It is yet to be seen whether Harbans Singh and Hakam Singh, P.W.s can be said to be reliable witnesses whose presence at the spot could be taken as established. Besides in the second dying declaration the brother of the appellant, by the name of Kewal Singh, had been introduced as a co-culprit. Though it is the admitted case of the prosecution that Police Station city stood informed of the arrival of the injured at the Hospital, and that ASI Rajinder Kumar of City Police Station had come there with constable Ashok Kumar to be given the bag of clothes of the injured on 20-12-1974, it indicates that even though the Fer-
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police was there in attendance, it was not prepared to carry the burden of getting recorded a dying declaration. In this situation, it is rather dramatic that Shamsher Singh, P.W.14 should jump into the fray without having been asked by anyone officially, under proper documents, to record the statement of the injured at 6.45 p.m. and without complying with the essential formalities of making an application to the doctor, disclosing his identity, seeking his opinion as to the fitness of the injured to make a statement, and if permitted having recorded the statement of the injured in the presence of the doctor. The role of Shamsher Singh P.W.14, even if we leave aside the suspicion entertained by the Sessions Judge on his veracity on the basis of his judicial career, seems to us suggestive of an overdoing, shared by the police to not let go a crime against their fellow policeman unpunished. It is also plain that while introducing the expression "other Persons" to be present in the first dying declaration it was like drawing a blank cheque to be filled in at a later stage conveniently, in order to plug in convenient witnesses, if the ones mentioned already were not Prepared to support the Prosecution. The effort in that regard was to say the least naive, if not clumsy. The dying declaration recorded by SI Vasdev on the following morning also demonstrates that by that time Harbans Singh and Hakam Singh had been tied up as willing witnesses.

The first Information Report was shown to have been recorded on 20-12-1974 at 6.15 p.m. under section 307/34 IPC and under section 25/27/54/59 of the Arms Act. It is shown to have been despatched to the magistrate the following day on 21.12-1974 at 8.00 p.m. much after the recording of the second dying declaration. It is shown to have been received by the Magistrate still two days later on 23-12-1974 at 10.05 a.m. The investigation stretched its timings. The version was improved. It was said that after the occurrence when the appellant ran away with his pistol, he was joined near the kikar trees by his brother Kewal Singh, who too is a constable in the Police. He is suggested to have been waiting for the appellant as an aide. Then both of them are said to have fled away. Since the appellant was shown to have been absconding, Kewal Singh brother of the appellant was hurriedly put up for trial for offence under section 302/34 IPC. The learned Sessions Judge, Ferozepur, however, discharged the accused Kewal Singh on 9-9-1975 vide his decision in Sessions Case No.66 of 1975. This apparently was an attempt to try the appellant in absentia, but the effort failed.

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We have also gone through the evidence of the two eye witnesses. Harbans Singh P.W.3 when detailing the version said that after talking to the appellant, Chamkaur Singh along with Darbara Singh moved forward towards their house and when Chamkaur Singh turned back he was hit by pistol shot fired by the appellant. His reason for being at the spot was that he had gone to the house of one Jagir Singh for taking a plough. He lives in the east of the village where as the house of Jagir Singh is towards the west of the village. Though he says that his house and that of Jagir Singh was about 20 houses apart, the defence suggestion was that about 200 houses intervene. He appears to be a chance witness altogether. There could be plenty of ploughs to be borrowed in his own neighbourhood. So far as Hakam Singh P.W.4 is concerned, his house is towards the south of the place of occurrence and there intervened about 150 houses between his house and the place of occurrence. He too is a chance witness. Nobody from the locality was examined by the prosecution. Material witnesses like Darbara Singh, Jagat Singh and Jagtar Singh, as well as Guna Singh and Mohinder Singh, who were claimed to have seen the occurrence and removed the injured to the hospital in their jeep, were not examined by the prosecution. It is due to the second dying declaration recorded by SI Vasdev P.W.15, that the names of these two i.e., Harbans Singh and Hakam Singh came in the forefront, and on accomplishing such a fiat, the F.I.R. seems to have been written thereafter and the report despatched on 21-12-1974 at 8.00 p.m. to the Magistrate afterwards. There was in the interval plenty of time to withhold the despatch of F.I.R. till the story could be woven, concerning as it was, to a fellow policeman.

Thus it appears to us that the presence of these two witnesses Harbans Singh and Hakam Singh at the scene of occurrence is not free from doubt. The investigation was in doubt as who was the culprit. As a first step, the theory of the first dying declaration was introduced without taking somebody independent, like Dr. Sandhu, into confidence. The investigation later introduced the story of another dying declaration. This one was with the aid of Dr. Sandhu, but this brought in the names of the two eye witnesses to figure at a time when everything was manageable from the official point of view in reporting the matter to the Magistrate. The investigation also in the instance case therefore appears to

us to be not free from taint. The views of the learned Sessions Judge, Ferozepur in acquitting the appellant as compared to those expressed by the High Court have been weighed again by us with the evidence on record, and we tend to

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agree with the learned Session judge, disagreeing with the views expressed by the High Court, so as to acquit the appellant.

The abscondence of the accused relied upon by the High Court remains of no consequence. In the first place it is not a determining factor and not one which could outweigh the other material appearing on the record. It by itself does not establish the guilt of the appellant beyond reasonable doubt.

For the views afore-expressed, we find it difficult to sustain the conviction of the appellant. Accordingly he is extended the benefit of doubt and acquitted. The appeal is accordingly allowed.

N.P.V.

Appeal Allowed.

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