

CASE NO.:
Appeal (crl.) 677 of 2002

PETITIONER:
State of Rajasthan

RESPONDENT:
Wakteng

DATE OF JUDGMENT: 07/06/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Rajasthan High Court directing acquittal of the respondent. Respondent alongwith two others faced trial for alleged commission of offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). The respondent in addition was also convicted for offence punishable under Section 326 read with Section 34 IPC and Section 324 read with Section 34 IPC. Life sentence of two years rigorous imprisonment and six months rigorous imprisonment were respectively imposed alongwith fine with default stipulation.

2. The learned Additional Sessions Judge, Bansabara convicted all the three accused persons but two other accused did not prefer any appeal while the respondent preferred an appeal against his conviction and sentence imposed. In appeal, High Court set aside conviction and directed acquittal.

3. Background facts in a nutshell are as follows:

On 8.6.1988 Thanu (hereinafter referred to as 'deceased') along with three accused persons in the night, went to well of accused-respondent Wakteng in order to capture tribals stealing away forest wood. They also drank 'mahudi', a local wine, and thereafter, accused Wakteng stated to deceased that he used to frighten village people, and therefore, he shall be taught a lesson today and brought a sword, concealed in the well and inflicted a blow on his neck. When deceased Thanu started running, he was chased by Dhuliya and Lalu and thereafter, Dhuliya took sword from Wakteng and inflicted second blow on neck of the deceased, upon which he fell down unconscious.

4. This factual narration is found in Ex.P-10, alleged dying declaration, recorded by Abhey Singh Bhati, SHO, (PW-7) in Surgical Ward of Government Hospital, Banswara on 10th June, 1988 two days after the occurrence.

5. The FIR Ex.P-11 was lodged by Navaneet Lal (PW-4) on the basis of injuries seen on the person of Thanu, who was unconscious till then and was not able to speak and therefore, neither any narration of the crime is mentioned in it nor name of assailants. An offence under Sec.307, IPC was registered on the basis of Ex.P-11 and the deceased was admitted in the

hospital where his injuries were examined and he was given treatment and his dying declaration (Ex.P-10) was recorded, as stated above.

6. Subsequently, Thanu died on 25.6.1988 and, therefore, offence was converted to one under Section 302 IPC. On the basis of Ex.P-10, all the accused persons were put under arrest on 11th June, 1988 vide memos Ex.P-12 to P-14. A discloser statement Ex.P-15 under Section 27 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') as given by Dhuliya at 08:00 AM on 2nd June, 1988 by which he wanted to recover 'myan' and 'sword' used in the crime and on the same day, in the presence of attesting witnesses, Bhika (PW5) and Chamna, vide Ex.P-7 Dhuliya made 'sword' along with 'myan' recovered from his residential house, which was seized and sealed then and there. A site plan Ex P-8 was also prepared of the place of recovery. On completion of investigation charge sheet was filed and charges were framed.

7. Accused persons denied accusations and claimed trial. Seven witnesses were examined to further the prosecution version. The trial Court relied on two circumstances to convict the accused persons; (i) the dying declaration purported to have been made and (ii) the recovery of the sword. Because of the conviction and sentence imposed by the trial Court, an appeal had been filed as noted above.

8. Before the High Court it was submitted that the dying declaration Exb.P-10 was open to grave doubt. It cannot be treated as a dying declaration as the same was neither in question answer form nor was there any endorsement of fitness of the deceased given. On the other hand, the State supported the order of conviction. The High Court noticed that the dying declaration was not recorded in question answer form and it was not written as a dying declaration. Further, the trial Court held that Exb.P-10 was neither dying declaration nor a statement under Section 161 of the Code of Criminal Procedure, 1973 (in short the 'Code') because the thumb impression of the deceased was affixed on it. The trial Court held that it has been recorded in course of investigation and therefore it was admissible in evidence. The High Court found that Exb.P-10 cannot be called to be a dying declaration and cannot be made the basis of conviction. It also doubted the recovery of the sword as claimed. Accordingly, evidence of the prosecution witnesses was held to be unworthy of credence and therefore acquittal is directed.

9. In support of the appeal, learned counsel for the appellant submitted that the dying declaration is a vital piece of evidence and the High Court should not have lightly brushed it aside. It was stated that merely because condition of the deceased to make a statement was not noted in the dying declaration that cannot be a ground to outright reject the same.

10. If Exb.P-10 does not come in the category of dying declaration it cannot be made the basis of conviction. There is no other provision under which a signed statement before the police can be admissible into evidence even if it discloses in detail the prosecution story.

11. Merely because a statement is recorded by a police personnel and the thumb impression of the deceased was affixed it cannot straightaway be rejected. (See State of Rajasthan v. Teja Ram (1999 (3) SCC 507), Rajik Ram v. Jaswant Singh Chauhan (AIR 1975 SC 667) and famous

Tahsildar's case, Tahsildar Singh v. State of U.P. (AIR 1959 SC 1012)

12. In Paras Yadav and Ors. v. State of Bihar (1999 (2) SCC 126) it was held that the statement of a deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can be taken as a dying declaration after the death of the injured if he was found to be in a fit state of health to make a statement. If the dying declaration is recorded by an investigating officer the same can be relied upon if the evidence of the prosecution witness is clearly established beyond reasonable doubt that the deceased was conscious and he was removed to the hospital and he was in a fit state of health to make the statement. In the instant case, the position appears to be different.

13. Navneet Lal (PW-4) claimed to have gone to the site where the deceased was lying injured and unable to speak. He was sent to the hospital for treatment, Banswara and simultaneously Exb.P-11 was lodged. Two days thereafter in the surgical ward of the government hospital, Banswara Exb.P-10 was purportedly recorded by Abhey Singh Bhati (PW-7) without finding out whether the deceased was in a fit state of mind and health to give dying declaration. Significantly, the doctor Bajrang Singh (PW-3) stated that he does not remember at what time Exb.P-10 was recorded and he does not know whether the deceased was in a fit condition to give a statement and he also did not know in which language the deceased replied to the questions put to him.

14. Though conviction can be raised solely on the dying declaration without any corroboration the same should not be suffering from any infirmity.

15. While great solemnity and sanctity is attached to the words of dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the Court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the Court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once the Court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction.

16. One other factor is of great importance. The occurrence took place on 8.6.1988 and the deceased breathed his last on 25.6.1988. Exb.P-10 was recorded on 10.6.1988. No evidence was forthcoming as to why the Magistrate could not be called to state why certificate of his fitness and state of health and condition of the deceased could not be procured at the time of recording Exb.P-10.

17. So far as recovery of the sword is concerned, the same was not sent for any examination by the Forensic Science Laboratory and the report if any was not exhibited and even no question in that regard was put to the accused while he was examined under Section 313 of the Code.

18. Above being the position, the High Court has rightly held that the prosecution has failed to establish the accusations against the respondent. The appeal sans merit and is dismissed.