A STATE OF U.P.

v.

VEER SINGH AND ORS.

APRIL 28, 2004

B [DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Penal Code, 1860 :

Ss. 302/149, 307/149—Accused killing members of two families—
C *Evidence of surviving victim—Her statement recorded as dying declaration—Trial Court relying on her evidence, convicting 5 accused and acquitting 3—High Court acquitting the said five accused also holding that their names were not mentioned in the dying declaration—Held, judgment of High Court indefensible as it did not consider other evidence on record—Matter remitted*
D *back to High Court for decision afresh.*

Evidence Act, 1872 :

Ss. 32, 155 and 157—Statement recorded as dying declaration—Maker of statement survives—Nature and evidentiary value of the statement—Held,
E *it is not a statement under s.32 of the Act but a statement in terms of s.164 Cr.P.C.—It can be used for purposes of corroboration u/s 157 and for purpose of contradiction u/s 155 of the Act—Code of Criminal Procedure, 1973—s.164.*

On the information given by PW 4 that all the members of her family
F **and another family were killed by the accused persons, the complainant got registered an FIR. The trial court relying on the evidence of PW 4 and her statement purported to be the dying declaration, acquitted three and convicted five of the accused *inter alia* under ss. 302/149 and 307/149 IPC. The convicted accused, namely, the respondents, filed appeal before the High Court, which acquitted them holding that though in the FIR their names were**
G **mentioned, but in the dying declaration they were not named. Aggrieved, the State filed the present appeal.**

Allowing the appeal, the Court

HELD: 1. When maker of purported dying declaration survives, the same
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is not statement under s. 32 of the Indian Evidence Act, 1872 but is a statement in terms of s. 164 of the Code of Criminal Procedure, 1973. It can be used under s. 157 of the Evidence Act for the purpose of corroboration and under s. 155 thereof for the purpose of contradiction. [794-A-B] A

Ramprasad **v.** *State of Maharashtra,* **[1999] 5 SCC 30;** *Sunil Kumar and Ors.* **v.** *State of Madhya Pradesh,* **JT (1997) 2 SC 1 and** *Gentela Vijayavardhan Rao* **v.** *State of A.P.,* **(1996) 6 Supreme 356, referred to.** B

2. A bare reading of the statement of PW-4 shows that the same did not relate to the entire incident. Only one question was asked as to who had caused injury to her. There was no occasion for the High Court to hold that because respondents were not named in the so-called dying declaration, accusation against them has not been established. PW-4 in her evidence in Court has clearly stated as to why she had given a limited answer. The High Court has not even considered the effect thereof. There was no proper analysis of the evidence on record and the decision was rendered on misreading of the evidence. The matter is remitted back to the High Court for decision afresh in accordance with law. [794-C-E] C D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 727-729 of 1998.

From the Judgment and Order dated 4.12.97 of the Allahabad High Court in Crl. A. Nos. 749 and 751 of 1996 and Govt. Appeal No. 1341 of 1996. E

N.S. GAHLOT for Kamlendra Mishra for the Appellant.

Lokesh Kumar for M.K. Garg for the Respondent.

The Judgment of the Court was delivered by F

ARIJIT PASAYAT, J. The State of Uttar Pradesh questions legality of the judgment rendered by a Division Bench of the Allahabad High Court directing acquittal of the respondents (hereinafter referred to as 'the accused'). 13 persons were claimed to be responsible for the death of large number of persons including small children. Of them, one, namely, Mahendra died during trial. After commitment, they faced trial in the Court of Third Additional Sessions Judge, Muzaffarnagar. While the trial was in progress, 4 of them absconded and 8 persons have been tried. Three of them, namely, Hardeep, Sinder Singh and Nishan Singh were acquitted by the Trial Court, while the rest five who are respondents herein were convicted for the offences G H

A punishable under Section 302 read with Section 149 of the Indian Penal Code 1860 (in short 'IPC). They were also found guilty under Section 307 read with Section 149 IPC, and under Section 452 IPC. For the offence relatable to Section 307 read with Section 149 IPC they were sentenced five years riforous imprisonment and for the offence relatable to Section 452 they were sentenced four years riforous imprisonment. Respondents Veer Singh, Tahal Singh and B Balkar Singh were also found guilty of offences punishable under Section 148 IPC and sentenced to three years riforous imprisonment while Kameer Singh and Amreek Singh were found guilty of offence punishable under Section 147 IPC and were sentenced to one year riforous imprisonment. In appeal by the convicted accused persons, the conviction has been set aside by the impugned C judgment.

Prosecution version in essential is as follows:

Information was lodged by Sardar Gurdip Singh at about 4.00 a.m. on 14.7.1984 at P.S. Chhinjhava, District Muzzaffarnagar, stating that he heard D shots and cries coming from the deras of Sardar and Mohan Singh in village Dompura near village Barnan. He took his licensed gun and came secretly with Jassa Singh S/o Harbans Singh and Huzoor Singh (PW-5) towards the dera of Gopa Singh. They saw in the moonlight and torch light that Kartar Singh, standing on his roof, was loudly calling out his son Sinder Singh, Ginder Singh, Mahendra and Lakkha asking them to wipe out the whole family E and Mohar Singh, leaving none of them alive, and also felling that the account has to settled that day. When the complainant and his companion challenged them, many shots were fired immediately. The complainant retreated out of fear. At the same time Harbhajan Kaur (PW-4) wife of Sheesa Singh came towards him and told him that Kartar Singh and his four sons and 10-F 12 more men with them, including Amrik Singh, Tahal Singh, Kamir Singh, Veer Singh sons of Sampurna Singh, Balkar Singh of Usarpur hade killed all the members of her family and all the members of Mahar Singh's family. The complainant said that he came to give this information to the police station after hiding Harbhajan Kaur, and requested the police to go immediately to the site to help her because shots were being fired when he left the site. His G above statement was recorded and chic report was prepared and he signed the report to confirm that it was read over to him and was written correctly as dictated by him. A case was registered on the basis of the said report and Mod. Akhtar, who was present at the police station when report was written, took up the case and went immediately to the site with the complainant. After H reaching the site, he sent injured Harbans Kaur and her child Bachu by jeep

with a constable to Shanti for medical examination. Thereafter, the investigating officer started investigation. On completion of investigation, charge sheet was placed. The Trial Court placed reliance on the evidence of PW-4 and the statement purported to be the dying declaration. As noted above, the Trial Court acquitted some and convicted the present respondents. The High Court was of the view that though in the FIR names of present respondents were indicated, in the dying declaration they were not named and, therefore, they were to be acquitted. That is how the present judgment of acquittal is recorded.

Mr. N.S. Gahlot, learned counsel, appearing for the appellant-State submitted that the approach of the High Court is clearly erroneous. The so-called dying declaration which was recorded with the belief that there was no chance of survival of PW-4, is in essence a statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short 'the Code') having been recorded by the Executive Magistrate, since Harbhayan Kaur has survived. It related to a part of the incident so far as the assailants on her are concerned and did not in any way relate to the rest of the occurrence. Therefore, the High Court was not justified in directing acquittal of respondents.

Learned counsel for the respondents-accused submitted that there are four sets of accused persons. The first set comprises of accused Kartar and his four sons who had absconded during trial. The second consists of the present respondents, the third of Hardeep and Sinder and the last of Nishan and Balbir. So far as the first three sets of accused are concerned, they have some relations with each other, but not related to each other. But Nishan and Balbir are not related to each other. As in the FIR the names of Hardeep, Sinder and Nishan were not mentioned, they have been acquitted. They were also not named in the dying declaration which was treated as the statement under Section 164 of the Code. It was urged that informant Gurdeep was not examined at the time of trial as he died during trial. An FIR was registered on the basis of PW-4's version in the presence of PW-5, who made departure from the statement given during investigation. Similarly, PW-7 who was stated to have significant role for the prosecution, did not support the prosecution version. The evidence of PW-4 is also not reliable as lot of material improvements were introduced. No motive for the alleged crime was attributed so far as present respondents are concerned. Dying declaration is not reliable as it only stated that she was conscious when the statement was recorded. Since the High Court considered the relevant material on record and the view taken by the High Court is a possible view, no interference is called for. We find that the High Court has not really applied its mind to the evidence on

A record objectively.

It is trite law that when maker of purported dying declaration survives the same is not statement under Section 32 of the Indian Evidence Act, 1872, (for short the 'Evidence Act') but is a statement in terms of Section 164 of the Code. It can be used under Section 157 of the Evidence Act for the B purpose of corroboration and under Section 155 for the purpose of contradiction. This position was highlighted in *Ramprasad* v. *State of Maharashtra,* [1999] 5 SCC 30, *Sunil Kumar and Ors.* v. *State of Madhya Pradesh,* JT (1997) 2 SC 1, and *Gentela Vijayavardhan Rao* v. *State of A.P.,* (1996) 6 Supreme 356.

C A bare reading of the statement of PW-4 shows that the same did not relate to the entire incident. Only one question was asked about who had caused injury to the maker of the statement i.e. PW-4. There was no occasion for the High Court to hold that because respondents were not named in the so-called dying declaration, accusation against them has not been established. D PW-4 in her evidence in Court has clearly stated as to why she had given a limited answer. The High Court has not even considered the effect thereof. It has disposed of the appeals so far as present respondents are concerned only on that ground, which as noticed above was not a correct analysis of the evidence and was rendered on misreading of the evidence. The conclusion is, therefore, indefensible. Since the High Court has disposed of the appeal E only on the basis of the aforesaid erroneous conclusion and has not considered other evidence on record, we consider it appropriate to direct re-hearing by the High Court. We, therefore, remit the matter back to the High Court to hear the matter afresh and decide in accordance with law. Any observation made by us, except to the extent it relates to the erroneous conclusion of the High F Court regarding purported dying declaration which has to be treated under Section 164 of the Code, shall not be considered to be expression of opinion on the merits of the case.

The appeals are allowed to the aforesaid observations.

G R.P. Appeals allowed.