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STATE OF RAJASTHAN

v.

WAKTENG

JUNE 7, 2007

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[DR. ARIJIT PASAYAT AND D.K. JAIN. JJ.]

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*Penal Code, 1860—ss. 302 r/w 34, 324 r/w 34 and 326 r/w 34—Murder—Conviction by trial court on the basis of dying declaration and recovery of weapon u/s 27—Acquittal by High Court—On appeal, held: Acquittal justified as the dying declaration and the recovery suffered from infirmity—Evidence Act, 1872—ss. 32 and 27.*

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*Evidence Act, 1872—s.32—Dying declaration—Evidentiary value of—Though conviction can be recorded solely on the dying declaration without any corroboration—But the same should not suffer from any infirmity—While relying on the same, court has to be careful that the statement was not the result of tutoring, prompting or a product of imagination.*

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**Respondent - accused along with others was prosecuted for causing injuries and murder of a person. As per the prosecution FIR was lodged by PW-4 on the basis of injuries seen on the person of deceased, who was unconscious at that time. An offence under s. 307 IPC was registered. He was taken to hospital. Two days thereafter statement of the deceased (Exb. P-10) was recorded by SHO (PW 7) in the hospital. In the statement the deceased narrated as to how he was assaulted by the accused persons. The statement was signed by the deceased. The statement was taken without finding out whether the deceased was in a fit state of health and mind to give the dying declaration. On the basis of the statement, accused persons were arrested. At the instance of one of the accused, weapon used in the incident was recovered. After some days the deceased died and the offence was converted to one u/s. 302 IPC. The trial court relying on the statement of the deceased as dying declaration and on the recovery of the weapon convicted all the accused u/s. 302 r/w s.34, s.326 r/w s.34 and s. 324 r/w s. 34 IPC. Only respondent - accused preferred appeal, wherein High Court held that Exbt P. 10 could not be a dying declaration and that recovery of the weapon was also doubtful. Accused was therefore acquitted. Hence the present appeal.**

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### Dismissing the appeal, the Court

**HELD : 1.** Merely because a statement is recorded by a police personnel and the thumb impression of the deceased was affixed it cannot straightaway be rejected. Such statement 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. In the instant case Exbt P-10 was recorded by PW 7 without finding out whether the deceased was in a fit state of mind and health to give dying declaration. Significantly, the doctor 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.

[Paras 11, 12 and 13] [1996-E, F, G ; 997-A]

*Paras Yadav and Ors. v. State of Bihar*, [1999] 2SCC 126, distinguished.

*State of Rajasthan v. Teja Ram*, [1999] 3 SCC 507; *Rajik Ram v. Jaswant Singh Chauhan*, AIR (1975) SC 667 and *Tahsildar Singh v. State of U.P.*, AIR (1959) SC 1012, referred to.

**2.** Though conviction can be raised solely on the dying declaration without any corroboration the same should not be suffering from any infirmity. 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. [Paras 14 and 15] [1997-B, C, D]

**3.** The occurrence took place on 8.6.1988 and 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. [Para 16] [1997-D, E]

**4.** 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

**A** was not exhibited and even no question in that regard was put to the accused while he was examined under Section 313 Cr. P.C. [Para 17] [1997-E, F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 677 of 2002.

**B** From the Judgment and Order dated 04.05.2001 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. CrI. Appeal No. 526 of 1993.

Naveen Kumar Singh, Mukul Sood and Aruneshwar Gupta for the Appellant.

**C** The Judgment of the Court was delivered by

**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.

**E** 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.

**F** 3. Background facts in a nutshell are as follows:

**G** 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.

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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. A

5. The FIR Ex.P-11 was lodged by Naveneet 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. B

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. C D E

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. F

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 G H

A 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.

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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.

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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.

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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)

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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.

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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

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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. A

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

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. C D

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. E

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. F

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. G

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Appeal dismissed.