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S.P. DEVARAJU

V.

STATE OF KARNATAKA

Criminal Appeal No.180 of 2002

FEBRUARY 12, 2009

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[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 :

s.304, Part II – Death caused due to assault by knife – C *High Court set aside acquittal of accused-appellant as recorded by trial court and convicted him under s.304, Part-II – Conviction on basis of dying declaration – Justification of – Held: Justified – The dying declaration was trustworthy, credible and referred to a part of the incident as described by PW1 –* D *Even otherwise it clearly implicated the appellant – There was no discussion by trial court to discard the dying declaration – Trial court also did not discuss evidence relating to recovery of the weapon of assault – Conviction maintained.*

Evidence Act, 1872 – s.32 – Dying declaration – E *Admissibility and appreciation of – Principles governing dying declaration summed up and re-iterated.*

According to the prosecution, the deceased was stabbed to death on account of a land dispute. The deceased had knife injuries on his person. The trial court F **acquitted the accused, but on appeal, the High Court convicted the accused-appellant under s.304 Part II, IPC on the basis of dying declaration. Hence the present appeal.**

Dismissing the appeal, the Court

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HELD:1.1.The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this

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reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence. [Para 6] [316-B, C]

1.2. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction on the same without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. [Para 7] [318-E, F, G]

1.3. The principles governing dying declaration can be summed up as under. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (iv) Where a dying

A declaration is suspicious, it should not be acted upon without corroborative evidence. (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (vi) A dying declaration which suffers from infirmity cannot B form the basis of conviction; (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (ix) Normally, the court in order to satisfy C whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (x) Where D the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality E of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [Para 7] [316-G, H; 317-A, B, C, D, E, F, G, H; 318-A]

1.4. The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the F court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal G impediment to make it the basis of conviction, even if there is no corroboration. [Para 8] [318-E]

Paniben v. State of Gujarat (1992) 2 SCC 474; Munnu Raja v. State of M.P.(1976) (3) SCC 104; State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552; Ramawati Devi v. State of H *Bihar (1983) 1 SCC 211; K. Ramachandra Reddy v. Public*

Prosecutor(1976) 3 SCC 618; Rasheed Beg v. State of M.P. (1974) 4 SCC 264; Kake Singh v. State of M.P.(1981) Supp. SCC 25; Mohanlal Gangaram Ram Manorath v. State of U.P. (1981) 2 SCC 654; State of Maharashtra v. Krishnamurti Laxmipati Naidu (1980) Supp. SCC 455; Surajdeo Ojha v. State of Bihar (1980) Supp.SCC 769; Nanhau Ram v. State of M.P.(1988) Supp. SCC 152; State of U.P. v. Madan Mohan (1989) 3 SCC 390; Mohanlal Gangaram Gehani v. State of Maharashtra (1982) 1 SCC 700 and Gangotri Singh v. State of U.P. (1993) Supp 1 SCC 327 – relied on.

2. In the present case, there is no material to show that the dying declaration was the result or product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility. It is not correct as contended by the appellant that the evidence of PW 1 is at variance with the dying declaration. As a matter of fact, the dying declaration refers to one of the parts of the incident as described by PW1. Even otherwise the dying declaration clearly implicates the accused appellant. To add to that is the recovery of the weapon of assault. The trial court did not discuss the evidence relating to recovery and discarded the same without indicating any reason. There was no discussion by the trial court to discard the dying declaration. [Paras 9, 10] [318-F, G, H; 319-A, B]

Case Law Reference

(1992) 2 SCC 474	relied on	Para 7
(1976) (3) SCC 104	relied on	Para 7
(1985) 1 SCC 552	relied on	Para 7
(1983) 1 SCC 211	relied on	Para 7
(1976) 3 SCC 618	relied on	Para 7
(1974) 4 SCC 264	relied on	Para 7

A	**(1981) Supp. SCC 25**	**relied on**	**Para 7**
	(1981) 2 SCC 654	**relied on**	**Para 7**
	(1980) Supp. SCC 455	**relied on**	**Para 7**
B	**(1980) Supp. SCC 769**	**relied on**	**Para 7**
	(1988) Supp. SCC 152	**relied on**	**Para 7**
	(1989) 3 SCC 390	**relied on**	**Para 7**
	(1982) 1 SCC 700	**relied on**	**Para 7**
C	**(1993) Supp 1 SCC 327**	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 180 of 2002

D From the final Judgement and Order dated 12.06.2001 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 165 of 1996

NDB Raju (for Guntur Prabhakar), for the Appellant.

E Anil Kr. Mishra, Amit Kr. Chawla and A. Rohan Singh (for Sanjay R. Hegde), for the Respondent.

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

F 1. Challenge in this appeal is to the judgment of a Division Bench of the Karnataka High Court allowing the State's appeal and setting aside the judgment of acquittal passed by learned Additional Sessions Judge, Hassan, in ASE No. 54 of 1988. The High Court held the appellant guilty and convicted him for G offence punishable under Section 304 part II of the Indian Penal code, 1860 (for short IPC.

2. Two persons faced trial in the aforesaid sessions case; one of them Dasegowda A2 died during the pendency of the trial.

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3. Prosecution version in a nutshell is as follows: A

A-1 and A-2 were close friends. A-2 and one Channegowda (PW5) of A. Guduganahally had land disputes. A2 belongs to Dasarakoppalu, Hassan taluk and A-1 is from Salagame, Hassan Taluk. Panchayat was held in the house of M.Raju (CW-17) S/o M.L. Annappa, a cloth merchant, New line road, Hassan, in respect of the said land dispute. But there was still ill-will between them in spite of the settlement in the panchayat. C.B. Nagendra (PW1) who was a member of the mandal panchayat and residing at Hassan is a friend of A-1 as well as deceased Puttaraju. On 1.2.1988 the deceased Puttaraju went to the house of PW1 at about 7 p.m. He asked PW1 to accompany him to Bazar, Hassan. Both of them went towards Hassan bus stand. A1 was present there. A1 told to PW1 that persons belonging to Sachin Liquor shop had made a mistake and asked them to accompany them. PW1, A-1 and the deceased went to Sachin Liquor shop and there they were told that A-1 demanded free liquor and had created nuisance. Then PW1 scolded A-1 himself and then all of them were returning from the said shop. Then they came near 'Shobha Liquors'. A-1 told PW1 and deceased that he would give a party to them. They went to 'Shobha Liquors'. PW-2 was a vendor in Shobha Liquors. PW3 Puttaraju was working as cashier. Then A-1 ordered for one bottle of rum. 180 ML of rum was supplied and all the three consumed it. Further, A1 ordered for 90 ML of Rum and again for 60 ML of rum and he consumed it. The deceased Puttaraju who belonged to A. Guduganahalli said that he had to go to the village as it was late. A-1 told him that he would take him to his village even at 1 a.m. and not to worry. Then the deceased Puttaraju said that he had a room at Hassan and they could go there. A-1 paid the bill of Rs.39.75 and they went to that room in the Housing Board colony. The other portion of the building was let out to a tenant. After reaching the room at about 10 pm. A-1 removed his shoes and he invited the deceased to come along with him as he wanted to ease himself. PW-1 remained in that room and A-1 and the deceased went

B C D E F G H

A out and within 5 minutes, the deceased Puttaraju came to the room holding his stomach and he had two knife injuries one on the right side of the stomach and the other on the right nipple. Then the deceased said that A1 told him Dasegowda (A2) had sent him to finish him. The deceased was immediately taken in
B a rickshaw by PW-1 to S.C. Hospital, Hassan. While he was bringing him in the auto, the deceased pointed out a drainage situated near the house of one Advocate stating, that, that was the place of occurrence. At the S.C. Hospital, Dr.N.L. Viswanatha (PW11) who was working as medical officer at Hassan,
C examined and treated the deceased and he found two injuries. He issued the wound certificate as per Ex.P-8. He gave intimation to the Extension Police Station about the injured as per intimation Slip Ex.P-9. He also referred the patient to the surgeon. Dr. Puttaraju (PW-18) also examined the injured. S.B.
D Abdul Rawoof (PW-15) Head Constable 58 who was working at Extension Police Station and who was in charge of the police station at that time, immediately rushed to the hospital on getting intimation and in the presence of PW11, he recorded the statement of the injured. He returned to the police station and registered a case in Cr.No.16/88 for the offence under Section
E 307 IPC. He has produced the bloodstained cloth of the injured before the PSI R. Puttaswamaiah (PW17). PW17 took up further investigation and he seized the bloodstained shirt MO-4 as per the panchanama Ex.P-16. Shivanna (PW-16) is a witness to this panchanama which is drawn on 2.2.1988 from 7.15 a.m. to
F 7.45 a.m. in the police station. The case sheet regarding the injured is as per Ex.P-18. PW1 after admitting the injured to the hospital went to the village of the deceased i.e., A Guduganahalli which is at a distance of 29 KMs. from Hassan and he reached the village at about 12 0' clock in the midnight. He informed the
G parents and brother of the deceased about the incident. PW1 and 5, father of the deceased came to Hassan and on the doctor's advice they shifted the injured in a car to Bangalore and admitted him in Victoria hospital at about 6 a.m. PW5 told PW1 that he would bring his daughter and son-in-law who were
H at Bangalore. Jayamma(PW4)is a daughter of PW5 and sister

of the deceased. She resides at Bangalore with her husband. PW5 went and informed her about the incident. PW4 also came to the hospital. The deceased after regaining consciousness, told PW4 and PW5 that A-1 told him that because of the land dispute between PW5 and A-2 he had come to finish him. The deceased succumbed to the injures on 5.2.88 at about 2 a.m. Dr.S.B. Patil (PW13) who was working as Lecturer in the Department of Forensic Medicines in BMC College attached to Victoria Hospital received the dead body along with requisition from the Victoria hospital police through Nagaiah (PW 9) who was police constable 7623, to conduct post mortem. He conducted post mortem from 11.15 am to 1.15 pm. He has issued his report as per Ex.P-11. Ex.P-12 is the requisition along with particulars as per Ex.P.13. Subsequently inquest proceeding was conducted. PW 14 is one of the witnesses to the inquest panchanama Ex.P-14.

After completion of investigation charge sheet was filed. As the accused persons pleaded innocence trial was held. As noted above, A2 died during trial. The trial court found the evidence to be inadequate and therefore directed acquittal.

In appeal, the High Court found that the analysis done by the trial court was erroneous and the conclusions were based on presumptions and surmises. Accordingly, the present appellant was convicted for offence punishable under Section 304 Part II IPC and was sentenced to undergo five years imprisonment.

4. In support of the appeal learned counsel for the appellant submitted that the appeal was disposed of without service of notice on the appellant. The evidence of PW 1 is at variance with the dying declaration (Exh. P. 10). The magistrate should have recorded the dying declaration. The head constable (PW 15) should not have recorded the dying declaration.

5. Learned counsel for the respondent-State, on the other hand, supported the judgment. So far as the dying declaration

A is concerned there is no requirement that it should be recorded only by a magistrate. This position has been reiterated by this Court in several cases. [See: Ramawati Devi v. State of Bihar (AIR 1983 SC 164)].

B 6. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are C dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

D 7. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also E insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the F deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction on the same without any further corroboration. It cannot be laid down as an absolute rule of law that the dying G declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben* v. *State of Gujarat (1992(2) SCC 474)* (SCC pp. 480-81, paras 18-19)

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(*i*) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See: *Munnu Raja* v. *State of M.P.*(1976 (3) SCC 104)] A

(*ii*) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See: *State of U.P.* v. *Ram Sagar Yadav (1985(1) SCC 552)* and *Ramawati Devi* v. *State of Bihar* 1983(1) SCC 211)) B

(*iii*) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See: *K. Ramachandra Reddy* v. *Public Prosecutor(1976(3) SCC 618)]) C

(*iv*) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See: *Rasheed Beg* v. *State of M.P.*(1974(4) SCC 264)] D

(*v*) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See: *Kake Singh* v. *State of M.P.*(1981 Supp. SCC 25)] E

(*vi*) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See: *Ram Manorath* v. *State of U.P.*(1981(2)SCC 654]

(*vii*) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra* v. *Krishnamurti Laxmipati Naidu [1980 Supp. SCC 455)]* F

(*viii*) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See: *Surajdeo Ojha* v. *State of Bihar (1980 Supp.SCC 769)]* G

(*ix*) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks H

A up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See: *Nanhau Ram* v. *State of M.P.(1988 Supp. SCC 152)]*

(*x*) Where the prosecution version differs from the version
B as given in the dying declaration, the said declaration cannot be acted upon. [See: *State of U.P.* v. *Madan Mohan (1989 (3) SCC 390)]*

(*xi*) Where there are more than one statements in the
C nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See: *Mohanlal Gangaram Gehani* v. *State of Maharashtra* (1982 (1) SCC 700)]

D 8. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is
E absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. (See
F *Gangotri Singh* v. *State of U.P.(1993 Supp(1)SCC 327).*

9. There is no material to show that the dying declaration was the result or product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

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10. It is not correct as contended by learned counsel for the appellant that evidence of PW 1 is at variance with the dying declaration. As a matter of fact, the dying declaration refers to one of the parts of the incident as described by PW1. Even otherwise the dying declaration clearly implicates the accused

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appellant. To add to that is the recovery of the weapon of assault. Unfortunately, the trial court did not discuss the evidence relating to recovery and discarded the same without indicating any reason. There was no discussion by the trial court to discard the dying declaration. A

11. The plea that there was no service of notice is clearly without substance. Records clearly show that notice was duly served. B

12. Above being the position, we find no merit in the appeal which is accordingly dismissed. C

B.B.B. Appeal dismissed.