

ABRAR

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v.

THE STATE OF UTTAR PRADESH

(Criminal Appeal No. 1668 of 2005)

DECEMBER 16, 2010

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**[HARJIT SINGH BEDI, P. SATHASIVAM AND
CHANDRAMAULI KR. PRASAD, JJ.]**

Penal Code, 1860 – s. 302 – Conviction under – Victim chased by accused and three others armed with weapons – Accused firing shot at victim from the back – Death of victim – Recording of three dying declarations – Acquittal by trial court on account of discrepancies in the dying declarations and eye-witnesses turning hostile – High Court upholding acquittal of others, however, convicting accused u/s.302 – On appeal, held: All three dying declarations, one which formed the basis of FIR, second recorded by Sub-Inspector as a statement u/s. 161 Cr.P.C. and third recorded by Tahsildar, unanimous – Minor discrepancies in the dying declarations not relevant – Tahsildar recorded the dying declarations after the doctor certified that victim was fit to make statement – Thus, dying declarations were reliable – Motive established between the parties – FIR was lodged promptly – FIR – Evidence – Dying declaration – Criminal law – Motive – Code of Criminal Procedure, 1973.

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According to the prosecution case, the parties were on inimical terms. On the fateful day, at about 9.30 p.m., four accused armed with weapons chased advocate 'A'. They shouted at each other that 'A' should be killed. The appellant fired at 'A' from the rear. On hearing the shouts, PW 6 and PW 7 reached the place of incident and witnessed the incident. 'A' was rushed to the hospital. PW 8-doctor attended 'A'. PW 5, junior of 'A' reached the hospital and 'A' dictated the report to his junior and

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- A signed it. FIR was registered under Section 307 IPC. PW 9-Sub-Inspector as also PW 2-Tahsildar recorded the statement of 'A'. 'A' died the next day and the case was converted into one under Section 302 IPC. The accused were tried for an offence punishable u/s. 302/34 IPC. The trial court acquitted the accused since the two eye witnesses had turned hostile and there were several discrepancies in the three statements. The High Court convicted and sentenced the appellant u/s.302 IPC and upheld the acquittal of the other accused giving them benefit of doubt. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

- HELD: 1.1 The entire prosecution story would depend on the dying declarations. It must be borne in mind that all three dying declarations, the first one which formed the basis of the FIR, the second recorded by the ASI as a statement under Section 161 of the Code of Criminal Procedure, 1973 and a third recorded by the Tahsildar are unanimous, as all the accused were mentioned therein. The High Court by way of abundant caution, already gave the benefit to three of the assailants on the plea, that they, though armed, did not cause any injury to the deceased. The motive too was also established as there appeared to be deep animosity between the parties and that the appellant had, in fact, appeared as a witness in several cases in which the victim 'A' or his son were the accused. There are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. However, these are insignificant. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter-se the three dying declarations, they were to be accepted as something normal. The trial court was, thus, clearly wrong in rendering a judgment

of acquittal solely on the said ground. The dying declarations were recorded by the Tahsildar after the doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. Therefore, no fault whatsoever, could be found in the dying declarations. [Para 6] [1223-D-H; 1224-A-B]

1.2 The prompt lodging of the FIR is another circumstance in favour of the prosecution. The incident happened at 9.30 p.m. on 03.04.1979 and the FIR was recorded at 10.30 p.m. i.e. within an hour of the incident under Section 307 IPC. [Para 7] [1224-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1668 of 2005.

From the Judgment & Order dated 29.07.2005 of the High Court of Judicature at Allahabad in Government Appeal No. 313 of 1982.

SWA Qadri, Jubair Ahmad Khan, Saima Bakshi, Minnatullah, Lakshmi Raman Singh for the Appellant.

S.R. Setia, D.K. Goswami, Ajay Kumar Singh, Shrish Kumar Misra for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J.

This appeal by way of special leave arises out of the following facts:

1. At about 9.30 p.m. on the 3rd of April, 1979, Mohd. Ashfaq, a practicing Advocate, residing in Mohalla Kapoorpur of Ghazipur town, was returning home after visiting Suhasini Talkies. As he reached near the house of Saeed Khan, he found the four accused, Mukhtar, Abrar, Mateen and Usman,

- A all armed with country made pistols, standing near the door of the house. Mohd. Ashfaq recognized them in the light of the torch that he was carrying. Apprehending danger, Mohd. Ashfaq ran towards his house which was close by, raising an alarm. The accused chased him shouting at each other that he should
- B be done away with on which Abrar, the appellant herein, fired at him from the rear. The alarm raised by the victim attracted Muzur PW-6, Durga Ram PW-7 and one Bissu to the place of incident and they too saw the shot being fired. As per the prosecution story, the attack on the victim was on account of
- C old enmity and litigation between him and the accused Mukhtar and Abrar. Mohd. Ashfaq was immediately rushed to the District Hospital, Ghazipur where he was attended to by Dr. S.N.Pandey PW-8 who was then on emergency duty. He found multiple gun shot injuries over the left side of the back in an area
- D 12 cm x 14 cm, 9 in number measuring 1 cm x 1 cm, though there was no blackening or tattooing. In the meanwhile, Ram Singh PW-5, Advocate and Mohd. Ashfaq's junior, reached the hospital at 9.45 p.m. on getting information of the incident. Mohd. Ashfaq thereafter dictated a report to him and after it
- E had been signed by him, it was taken to the Police Station and a FIR under Section 307 of the IPC was registered by Head Constable Lalta Yadav. A memo was also received in the Police Station at 10.35 p.m. from Dr. S.N.Pandey about Mohd. Ashfaq's admission on which Sub-Inspector Ram Hit Shukla
- F PW-9 reached the hospital at 10.50 p.m. and recorded another statement of Mohd. Ashfaq. A third dying declaration was recorded the same night by the Tahsildar, Vir Bahudar Prasad PW-2, at 11.50 p.m. after taking a certificate from the Doctor that the injured was fit to make a statement. Mohd. Ashfaq died the next day in the hospital at Varanasi and a case under
- G Section 302 of the IPC was thereupon entered against the accused. The dead body was also subjected to a post-mortem examination and it revealed much the same injuries as detected at the time of the medical examination in the District Hospital, Ghazipur but on the opening of the body the large and small
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intestines and the kidneys were found to be lacerated. The doctor opined that the death had occurred due to shock and haemorrhage resultant to abdominal injuries. The accused were, accordingly, arrested and ultimately brought to trial for an offence punishable under Section 302/34 of the IPC.

2. The prosecution in support of its case, relied primarily on the evidence of Dr. A.K. Dwivedi PW-1, who had conducted the post-mortem examination, Executive Magistrate-cum-Tahsildar Vir Bahadur Prasad PW-2, Ram Singh, Advocate, PW-5, Mujur PW-6 and Durga Ram PW-7, the two eye witnesses named in the FIR, (but who did not support the prosecution), Dr. S.N.Pandey PW-8, the doctor of the District Hospital who had certified as to the mental condition of the victim at the time of the recording of the dying declaration by the Tahsildar, and the investigating officer Sub-Inspector Ram Hit Shukla PW-9. The accused were then questioned under Section 313 of the Cr.P.C. They pleaded false implication due to enmity.

3. The trial court observed that as the two eye witnesses had turned hostile, the case rested exclusively on the three dying declarations of the deceased in the form of the FIR, the statement of the deceased recorded by the investigating officer under Section 161 of the Cr.P.C. and the statement recorded by the Tahsildar. The trial court held that as there were several discrepancies inter-se these three statements, they could not be relied upon and accordingly taking the murder as a blind one, acquitted the accused. The matter was thereafter taken in appeal by the State Government to the High Court. The High Court has, by its judgment, which is now impugned before us, reversed that of the trial court holding that the so called discrepancies were insignificant that they could occur in any statement recorded in Court and the discrepancy with regard to the presence or otherwise of a light which figured in one statement and did not figure in the other was of little or no consequence in the facts. The Court then examined the dying

A declarations and observed that in so far as accused Mukhtar,
 Mateen and Usman was concerned, no direct and positive role
 had been assigned to them in the three dying declarations of
 the deceased and it was the single shot attributed to Abrar, the
 present appellant, which had killed the deceased. The Court
 B also held that if Mukhtar, Mateen and Usman had also been
 carrying country made pistol, they would in normal
 circumstances, have used them as well. The Court also
 observed that there was no bar in relying only on a part of a
 dying declaration as the only test was the test of reliability. The
 C Court observed that the third dying declaration had been
 recorded by the Tahsildar after he had taken a certificate from
 the doctor that Mohd. Ashfaq was fit to make a statement. The
 Court also held that the statement given in the dying
 declarations that the deceased was carrying a torch by which
 D he had been able to identify the accused was to be accepted,
 as he was an educated man and would ordinarily be expected
 to carry a torch. It was also observed that as the incident had
 happened in Ghazipur, which was a District Headquarters,
 street lights were also available as was clear from the evidence
 as well as the site plan. The High Court, accordingly,
 E maintained the acquittal of Mukhtar, Mateen and Usman, but
 allowed the appeal with respect to Abrar, the appellant herein.
 He was, accordingly, sentenced to imprisonment for life under
 Section 302 of the IPC.

F 4. Mr. Quadri, the learned counsel for the appellant has
 raised several arguments before us during the course of
 hearing. He has pointed out that in the background that the two
 eye witnesses had turned hostile and had not supported the
 prosecution, the only evidence against the appellant, were the
 G three dying declarations and as these were discrepant in
 material particulars, no reliance could be placed on them as
 well with the result that there was no evidence against the
 appellant. He has also submitted that it would not have been
 possible for the deceased to have recognized the four
 H assailants as there was no evidence to show that he was either

carrying a torch or there was any electric light available at the site where he had been shot.

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5. The learned counsel for the State has, however, supported the judgment of the High Court by pointing out that the dying declarations were categorical inasmuch that the four accused had been named in each one of them and that three accused who had been acquitted had got the benefit of doubt only on the ground that no shot had been fired by them. It has been submitted that there was in any case absolutely no reason to discard the dying declaration recorded by the Tahsildar at 11.50 p.m. after he had taken a certificate from the doctor that the victim's fitness to make a statement.

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6. We have heard the learned counsel for the parties very carefully. It has rightly been pointed out by the learned counsel for the appellant that the entire prosecution story would depend on the dying declarations. It must be borne in mind that all three dying declarations, the first one which formed the basis of the FIR, the second recorded by the ASI as a statement under Section 161 of the Cr.P.C. and a third recorded by the Tahsildar are unanimous as all the accused find mention therein. The High Court, has by way of abundant caution, already given the benefit to three of the assailants on the plea, that they, though armed, had not caused any injury to the deceased. The motive too has also been established as there appeared to be deep animosity between the parties and that the accused Abrar, the appellant had, in fact, appeared as a witness in several cases in which Mohd. Ashfaq or his son were the accused. It is true that there are some discrepancies in the dying declarations with regard to the presence or otherwise of a light or a torch. To our mind, however, these are so insignificant that they call for no discussion. It is also clear from the evidence that the injured had been in great pain and if there were minor discrepancies inter-se the three dying declarations, they were to be accepted as something normal. The trial court was thus clearly wrong in rendering a judgment of acquittal solely on this specious ground.

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- A We, particularly, notice that the dying declaration had recorded by the Tahsildar after the Doctor had certified the victim as fit to make a statement. The doctor also appeared in the witness box to support the statement of the Tahsildar. We are, therefore, of the opinion, that no fault whatsoever could be found in the dying declarations.
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7. The prompt lodging of the FIR is another circumstance in favour of the prosecution. The incident happened at 9.30 p.m. on the 3rd of April, 1979 and the FIR was recorded at 10.30 p.m. i.e. within an hour of the incident under Section 307 of the IPC. We, therefore, find no merit in the appeal. It is, accordingly, dismissed.
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N.J.

Appeal dismissed.