A SUKHAR

v.

STATE OF UTTAR PRADESH

OCTOBER 1, 1999

B [G.B. PATTANAIK, M. SRINIVASAN AND N. SANTOSH HEGDE, JJ.]

Penal Code, 1860—S.307—Conviction of an accused on the uncorroborated evidence of a witness, inimical to accused—Validity of—Enmity due C *to forcible cultivation of land—Accused firing at victim and causing injury—Hearing alarm, witness reaching the spot—Statement of witness that victim told him that accused fired at him—Witness admitting being inimical to accused—No other person present examined to corroborate the evidence of said witness—Held; accused cannot be convicted on the unreliable and shaky* D *evidence of witness without corroboration—Conviction and sentence set aside—Evidence Act, 1872.*

Evidence Act, 1872 :

S. 6—Hearsay evidence—Admissibility of.

E

S. 32—Dying declaration—Admissibility of—FIR and statement given by injured to investigating officer—Victim dying during the pendency of trial—Cause of death or connection between death and injury sustained not established—Held, FIR and statement of victim is not admissible under S.32.

F *S. 33—Statement given by victim under S.161 Cr. P.C.—Admissibility of—Code of Criminal Procedure, 1973—S.161.*

Appellant was prosecuted for an offence under S. 307 IPC. The prosecution case was that the victim's land was forcibly cultivated by his G **nephew without giving him any batai, resulting in enmity between them. On the fateful day, while the victim was going on the road, his nephew, the accused-appellant fired shots at him. On hearing an alarm, PW 1 and PW 2 reached the place of occurrence. In the meantime, accused escaped. Victim was taken to the police station and FIR was recorded. The victim died, during the pendency of trial but cause of his death not established.** H **PW 2 gave a statement before Trial Court that the victim had told him**

that the accused had fired at him. Trial Court relying upon the FIR and statement of victim and the testimony of PW2, convicted and sentenced the accused. On appeal, High Court held that the charge under S. 307 of IPC was established beyond reasonable doubt. Hence the present appeal. A

On behalf of the appellant it was contended that the evidence of PW 2 cannot be held to be admissible under S. 6 of the Evidence Act, 1872 inasmuch as what the victim told the witness when the witness reached the scene of occurrence and the factum of alleged shooting by the accused at the victim cannot be said to have formed part of the same transaction; even if the evidence should be admissible the same cannot be held to be reliable and, therefore, on such unreliable testimony the conviction cannot be sustained for the charge under S. 307 IPC. B C

On behalf of respondent-State it was contended that a plain reading of the evidence of PW 2 clearly establishes that the firing of shot by the appellant and rushing down of PW 2 to the scene of occurrence and the statement of the victim to PW 2 must be held to be part of the same transaction and, therefore, the High Court was fully justified in coming to the conclusion that the evidence is admissible under S. 6 of the Evidence Act as a part of *res gestae*; and that nothing has been elicited in the cross-examination of PW 2 to dub him unreliable and as such the Courts below rightly relied upon his evidence. D E

Allowing the appeal, the Court

HELD : 1.1. Appellant cannot be convicted on the unreliable and shaky evidence of PW 2 without any corroboration. Consequently, conviction and sentence of appellant under S. 307 IPC is set aside. [322-D] F

1.2. Admittedly appellant and PW 2 were inimical to each other since long. It was also elicited in the cross-examination of PW 2 that by the time he reached the scene of occurrence, more than 20 persons had gathered next to victim and yet none of them has been examined by the prosecution to corroborate PW 2 as to what was told to him by the victim. The witness also stated in cross-examination that victim was naming the accused as his assailant in front of all those people who had gathered but it is not understood as to why the prosecution has chosen not to examine any of them but to examine only PW 2 who was admittedly inimically deposed towards the accused-appellant. In this view of the G H

A matter, the evidence of PW 2 cannot be held to be of such an unimpeachable character on whose testimony alone, the conviction can be based without any corroboration. On the other hand, the witness being inimical to the accused and on account of what has been elicited in his cross-examination, his evidence requires corroboration before being accepted. Admittedly there is not an iota of corroboration either from any oral B evidence or from any other circumstance. [321-H; 322-A-B-C]

2. S. 6 of the Evidence Act, 1872 is an exception to the general rule whereunder hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of S. 6, what is required to be C established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter. In the instant case, the evidence of PW 2 indicating that the victim told him that his nephew has fired at him is admissible under S. 6 of the D Evidence Act. [319-E-F; 321-F]

Gentela Vijavavardhan Rao & Anr. v. *State of A.P.*, [1996] 6 SCC 241 and *Rattan Singh* v. *State of H.P.*, [1997] 4 SCC 161, relied on.

E *Wigmore's Evidence Act; Sarkar on Evidence* (Fifteenth Edition) referred to.

3. High Court was justified in holding that the FIR as well as the statement given by the victim to the Investigating Officer is not admissible as dying declaration under S. 32 of the Evidence Act. The High Court was F also justified in holding that the statement of the victim under S.161 of the Code of Criminal Procedure could not be held admissible in evidence under S. 33 of the Evidence Act. [318-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1985 of 1996.

G

From the Judgment and Order dated 29.1.96 of the Allahabad High Court in Crl. A. No. 600 of 1980.

Ms. Sandhya Goswami for the Appellant.

H C.D. Singh for A.S. Pundir for the Respondent.

The Judgment of the Court was delivered by

PATTANAIK, J. : The appellant stood charged for the offence under Section 307 IPC for causing injury to Nakkal on 17.4.78 at 7.30 a.m. near the Chak in village Tejalhera in the district of Muzaffarnagar. On the basis of materials available on record through the prosecution witnesses, the learned Additional Sessions Judge convicted him for the offence under Section 307 and sentenced him to rigorous imprisonment of five years. On an appeal being carried, the High Court of Allahabad upheld the conviction and sentence of the appellant and dismissed the appeal. This Court having granted leave, the present appeal is before us.

Prosecution case in nutshell is that Nakkal appeared at the police station on the date of occurrence at 9.40 a.m. and narrated the incident as to how he was injured by the accused. The police then treated the said statement as First Information Report and started investigation. The informant was then taken to the hospital for medical examination. As per the FIR, the accused Sukhar is the nephew of Nakkal and had cultivated the land of Nakkal forcibly. When Nakkal demanded batai, Sukhar abused Nakkal and refused to give any batai. Thus, there was enmity between Nakkal and Sukhar. On the fateful day during the morning hours, while Nakkal was going on the road, Sukhar caught hold of his back and fired a pistol shot towards him. Nakkal raised an alarm on account of which Ram Kala and Pitam reached the scene of occurrence and at that point of time, Nakkal fell down and the accused made his escape. The two witnesses, Pitam and Ram Kala, brought Nakkal to the police station whereupon the police recorded the statement of Nakkal and started investigation. The said Nakkal was examined by PW 5, the Doctor who was on duty at the Primary Health Centre and gave the injury report, Exh. Ka-6. On completion of investigation, the police submitted the charge-sheet and ultimately the accused stood his trial. During trial, the prosecution witnesses, PW 1 and 2 merely stated as to what they heard from the injured at the relevant point of time and according to PW 2, the injured had told him that the assailant, Sukhar had fired upon him. It is to be stated that while the trial was pending the injured Nakkal died but the prosecution did not make any attempt to establish how he died or his death is in any way connected with the injury sustained by him on the relevant date of occurrence. Even it is not known as to when he died. The learned Sessions Judge was of the

A opinion that the FIR recorded by the Investigating Officer and the statement of Nakkal recorded under Section 161 of the Code of Criminal Procedure was admissible under Section 33 of the Evidence Act and relying upon the said material as well as the statement of PW 1 to the effect that the injured told him that the accused, Sukhar has fired at him, the B learned Sessions Judge convicted the accused/appellant under Section 307 IPC and sentenced him to undergo rigorous imprisonment for five years. On an appeal, the High Court came to the conclusion that the FIR as well as the statement given by the injured to the Investigating Officer is not admissible as dying declaration under Section 32 of the Evidence Act and in our view, the said conclusion is unassailable. The High Court further C came to the conclusion that the statement of the injured under Section 161 of the Code of Criminal Procedure could not be held admissible in evidence under Section 33 of the Evidence Act and we do not see any infirmity with the said conclusion. The High Court however heavily relied upon the statement of Pitam, PW 2 and even though he was an eye witness D to the occurrence but his evidence to the effect that as soon as he reached the place where the injured was lying, the injured told him that the injury has been caused on him by the appellant, should be admissible under Section 6 of the Evidence Act. On the basis of aforesaid statement of PW 2 and the evidence of PW 5, the High Court came to the ultimate E conclusion that the charge under Section 307 has thus been established beyond reasonable doubt. Consequently, the appeal of the accused/ appellant was dismissed.

Ms Sandhya Goswami, learned counsel appearing for the appellant F strenuously contended that the evidence of PW 2 cannot be held to be admissible under Section 6 of the Evidence Act inasmuch as what the injured told the witness when the witness reached the scene of occurrence and the factum of alleged shooting by the accused at the injured cannot be said to have formed part of the same transaction. According to the learned counsel, the evidence of PW 2 being categorical that by the time he reached G the scene of occurrence, several people had gathered, it cannot be said that what the injured stated to him in fact formed part of the same transaction. The learned counsel appearing for the respondent on the other hand contended that a plain reading of the evidence of PW 2 would clearly establish that the firing of shot by the appellant and rushing down of PW H 2 to the scene of occurrence and the statement of the injured to said PW

2 must be held to be part of the same transaction and, therefore, the High Court was fully justified in coming to the conclusion that the evidence is admissible under Section 6 of the Evidence Act as a part of *res gestae.*

Ms. Sandhya Goswami, learned counsel appearing for the appellant further contended that even if the evidence should be admissible but the same cannot be held to be reliable and, therefore, on such unreliable testimony the conviction can not be sustained for the charge under Section 307 IPC. Learned counsel for the respondent, on the other hand, submitted that nothing has been elicited in the cross-examination of PW 2 to dub him unreliable and as such Courts below rightly relied upon his evidence.

In view of the rival submissions, the first question that arises for consideration is whether the evidence of PW 2 indicating what he heard from the injured can at all be held admissible under Section 6 of the Evidence Act. Before examining the question, it would be appropriate to extract the relevant part of the evidence of said PW 2 :

> "2. It was one year and 11 months ago at 7 – 7.30 A.M. while I had gone to attend the call of nature when I heard the sound of firing and I went there and saw Nakkal lying on the ground near the sugar cane of Kallan after being hit by a bullet. I did not see him being hit by the bullet. When I asked him Nakkal told me that his nephew Sukkar hit him with the bullet."

Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus :

> "Under the present Exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excite-

A ment may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued."

Sarkar on Evidence (Fifteenth Edition) summarises the law relating to
B applicability of Section 6 of the Evidence Act thus:

"1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent
C facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.

2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

D

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot & c. the declarations of all concerned in the common object are admissible.

E 4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

This Court in *Gentela Vijayavardhan Rao and Another* v. *State of A.P.*, [1996] 6 SCC 241 considering the law embodied in Section 6 of the
F Evidence Act held thus :

"The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the
G same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation
H to the fact in issue. But it is necessary that such fact or statement

must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*." A B

In another recent judgment of this Court in *Rattan Singh* v. *State of H.P.*, [1997] 4 SCC 161, this Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus :

"... The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus : C

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so **shortly before** or after it as to form part of the transaction, is a relevant fact. D

(emphasis supplied)

Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act." E F

Applying the ratio of the aforesaid two cases to the evidence of PW 2, we have no hesitation to come to the conclusion that his statement indicating that the injured told him that his nephew has fired at him, would become admissible under Section 6 of the Evidence Act. We are, therefore, unable to accept the first submission of Ms Goswami, learned counsel appearing for the appellant. G

The next question that arises for consideration is whether even if the statement becomes admissible, can the statement be held to be so reliable that a conviction under Section 307 can be based thereupon. PW 2 in the H

A cross-examination candidly admitted that Sukhar, the present appellant and he are inimical to each other since long before. It was also elicited in the cross-examination of the said witness that by the time he reached the scene of occurrence, more than 20 persons had gathered next to Nakkal and yet none of them has been examined by the prosecution to corroborate PW 2 as to what was told to him by the injured. The witness also stated in B the cross-examination that Nakkal was naming the accused as his assailant in front of all those people who had gathered but it is not understood as to why the prosecution has chosen not to examine any one of them but to examine only PW 2 who was admittedly inimically disposed of towards the accused/appellant. In this view of the matter, the evidence of PW 2 cannot C be held to be of such an unimpeachable character on whose testimony alone, the conviction can be based without any corroboration. On the other hand, the witness being inimical to the accused and on account of what has been elicited in his cross-examination, his evidence requires corroboration before being accepted. Admittedly there is not an iota of corroboration D either from any oral evidence or from any other circumstance. In this view of the matter, we have no hesitation to come to the conclusion that the conviction of the appellant on the unreliable and shaky evidence of PW 2 without any corroboration, cannot be sustained. We accordingly set aside the conviction and sentence of appellant and acquit him of the charges levelled against him. The accused who is in jail should be released E forthwith. The appeal is allowed accordingly.

S.V.K. Appeal allowed.