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SUCHAND PAL

v.

PHANI PAL AND ANR.

NOVEMBER 6, 2003

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[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Penal Code, 1860/Arms Act, 1959—Sections 302 and 307/Section 25—Murder—Prosecution—Different versions of incident by prosecution and defence—Prosecution version inconsistent with medical evidence—Dying C *declaration by deceased not made directly but was only an affirmation to her husband's statement—Conviction by trial Court—Acquittal by High Court—On appeal, held: Acquittal justified as there was inconsistency in the prosecution case and medical evidence and the dying declaration is not admissible.*

Evidence Act, 1872—Section 32—Dying Declaration—Nature of— D *Statement not made directly by the deceased—Only affirmed the statement of her husband—Held: such response of the deceased cannot be elevated to the level of dying declaration.*

Practice and Procedure : E

Criminal case—Review of order of acquittal by appellate Court—Permissibility of—Held: Generally it is not permissible but where an admissible evidence is ignored, a duty is cast upon the appellate court to re appreciate the evidence.

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Respondent-accused alongwith 4 accused was charged for offences u/s 302, 307, 447 IPC and respondent-accused was further charged under Section 25 of Arms Act, 1959. Two of the accused died before completion of trial. As per the prosecution there was strained relation between the complainant and accused party and over a dispute respondent-accused G **fired shot with a gun at PW1 who escaped the same and fired another gunshot from a distance which caused injury to the wife of PW1. Defence pleaded innocence and false implication and stated that one of the accused had taken out the gun in self defence and when the complainant party started scuffle with him, a shot was accidentally fired which hit the**

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A deceased. According to the medical evidence injury on the deceased was possible by a gunshot fired from a short range. During trial prosecution varied its stand stating that the gun was fired from a short range. Prosecution also relied on dying declaration of the deceased. But the person recording the statement admitted that the husband of the deceased had answered the queries and the deceased had merely affirmed them. Trial
B Court relying on the prosecution version convicted the respondent-accused. However, other two accused were acquitted. On appeal, High Court acquitted the respondent relying on defence version holding that as regards injuries on the deceased, prosecution version was not supported by medical evidence and the prosecution tried to improve upon its version in order
C to reconcile the oral and the medical evidence; and that the dying declaration having been answered by the husband of the deceased and her merely affirming to it, the same was not acceptable.

In appeal to this Court appellant-informant contended that merely because medical evidence was different, the reliable ocular evidence could
D not have been discarded; and that the dying declaration should have been relied on.

Dismissing the appeal, the Court

HELD : 1.1. There is no infirmity in the judgment of the High Court
E to warrant interference. The trial Court appears to have discarded the defence version highlighting unacceptability of the prosecution version, and came to a conclusion that the shot was made from a close range. This plea was taken at the argument stage by the prosecution, trying to read prosecution evidence in a manner so that the ocular evidence and medical
F evidence do not appear to be irreconcilable. High Court was right in disapproving the course adopted by the Trial Court. Prosecution can succeed by substantially proving the version it alleges. It must stand on its own legs and cannot take advantage of the weakness in defence case. The Court cannot on its own make out a new case for the prosecution and convict the accused on that basis. Only when a conclusion is arrived at on
G the evidence and the substratum of the case is not changed, such a course is permissible. The High Court noticed the medical evidence to be consistent with the defence version that the deceased was hit by the gunshot from a close range and that she was accidentally shot in the scuffle between the informant party and the accused. [289-B; 288-C-F]

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1.2. High Court has rightly discarded the dying declaration. The declaration made by the deceased was not voluntary and in fact the answers were not given by her and it was her husband who was answering. Such nature and manner of response from the injured who ultimately succumbed to injuries can by no means be elevated to the level of her 'dying declaration', even when it is found to sound. In the true sense of the term or in legal parlance statement made by the deceased cannot be called a dying declaration. In view of the admitted hostility and strained relations the natural effort was to rope in the accused. [288-F-H; 289-A]

2.1. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [287-F-H; 288-A]

Bhagwan Singh and Ors. v. *State of Madhya Pradesh,* (2002) 2 Supreme 567, referred to.

2.2. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. [288-A-B]

Shivaji Sahabrao Bobade and Anr. v. *State of Maharashtra,* AIR (1973) SC 2622; *Ramesh Babulal Doshi* v. *State of Gujarat,* (1996) 4 Supreme 167; *Jaswant Singh* v. *State of Haryana,* (2000) 3 Supreme 320; *Raj Kishore Jha* v. *State of Bihar and Ors.,* (2003) 7 Supreme 152; *State of Punjab* v. *Karnail*

A *Singh,* **(2003) 5 Supreme 508 and** *State of Punjab* **v.** *Pohla Singh and Anr.,* **(2003) 7 Supreme 117, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.176 of 1997.

B From the Judgment and Order dated 29.8.96 of the Calcutta High Court in Crl. A. No. 305 of 1987.

H.K. Puri for the Appellant.

Raj Kumar Gupta, S.K. Gupta, Bhanu Pratap Gupta, A.N. Bardiyar and C Avijit Bhattacharjee for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. This appeal has been filed questioning correctness of the judgment rendered by a Division Bench of the Calcutta D High Court directing acquittal of the respondent No. 1 (hereinafter referred to as the 'accused'). The Additional Sessions Judge, 3rd Court, Midnapore, had found the accused guilty of offence punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (For short the "IPC") and also Section 25 of the Arms Act, 1959 (for short the "Arms Act").. Sentence of E imprisonment for life, 7 years and one year respectively was awarded. Originally 5 accused persons were there, and each was charged for the commission of offence punishable under Sections 302, 307 read with Section 34, and 447 IPC. One Golok Pal died before charge sheet was filed. Similarly accused Narendra Patra died during trial and three persons namely accused appellant Phani, Niranjan Pal and Swaran Dutta faced trial. The trial Court F found accused Niranjan Pal and Swaran Dutta to be not guilty. It was only the accused-respondent no.1 who was found guilty and convicted as aforesaid.

Accusations which led to trial of the accused is as follows:

Information was lodged at the Binpur Police Station on 1.6.1977 about G murderous assaults on one Midap Bhanumati and infliction of serious injuries on others. Investigation was undertaken. It transpired during investigation that the accused persons and the complainant party being close relations have been residing in the same homestead with separate portions earmarked by mutual arrangement. Golok Pal was the eldest member of one branch and H Brindaban Pal (PW-1) is the eldest member of the other branch, Golok Pal

and Brindaban Pal being brothers to each other. On 1.6.1977 in the morning the accused persons conspired together to erect a fence inside the courtyard which they have been contemplating since a long time. They also conspired that if the complainant party caused obstruction they should be finished. At about 7.30 a.m. the party led by Golok Pal started digging holes in the midst of the inner courtyard of the house. Brindaban (PW-1) and his sons protested. At this Golok and Niranjan ordered to finish Brindaban Pal. At this stage, Niranjan Pal and accused Phani Pal rushed to the first floor of their house and Pani brought out the gun belonging to his father Golok, and Niranjan took out bows and arrows. They came on the balcony of the first floor room and accused Phani aimed at Brindaban. So did Niranjan with his bow and arrow. Neither the gunshot nor the arrow struck the target. Phani once again loaded the gun and fired another shot aiming at Bhanumati, wife of Brindaban Pal (hereinafter referred to as the "deceased"), who was then engaged in sweeping the courtyard. The bullet struck on her back. She fell down. At his stage two sons of Brindaban, Suchand and Ratan, PWs 5 and 4 respectively together with Brindaban rushed out of the house and raised hue and cry. Before the villagers assembled, all except accused Phani left the house. Phani was still standing on the balcony of the first floor room with the gun in his hand threatening the villagers with dire consequences in case they proceeded further. As the assemblage outside the house grew larger, accused Pani fled away and the villagers entered into the house. By that time Gouribala (PW-2), daughter of Brindaban, carried the injured body of Bhanumati on the verandah of their house from the courtyard. The villagers who assembled there found Bhanumati in injured condition and also heard from her that she was killed by gunshot made by accused Phani Pal. Brindaban rushed to the police station and lodged the F.I.R. at about 8.30 a.m. Police arrived at the spot and arranged for sending the injured Bhanumati to the local Binpur Primary Health Centre with the help of local Chowkidar. There decreased-Bhanumati made a dying declaration before the doctor who reduced the same into writing in the presence of Brindaban Pal. As the condition of the patient Bhanumati deteriorated she was taken to Jhargdram Hospital where she succumbed to her injuries. The case was instituted against Gokol Pal and his two sons. Phani Pal and Niranjan Pal. There were two more persons-Narendera Patra and Swaran Dutta who were also implicated in this case and all these five were named in the F.I.R. Before the charge sheet was submitted on 27.2.1979, Golok Pal died on 8.4.1978. Therefore, only four persons were committed to the Court of Sessions. Here charges under Sections 302/34 and 307/34 IPC were framed against all the four accused persons; and accused Phani Pal was further

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A charged under Section 25(1)(a) of the Arms Act. The charges as above were framed on 27.8.1980. But the complainant party moved the Hon'ble High Court on 5.11.1981 in Criminal Revision case no. 2270/81, the four accused persons were charged further under Sections 447 IPC on 2.2.1982. Before trial of the case started, accused Narendera Patra died and the case against him was filed on 20.1.1983. Thus the case remained with only three persons B viz. Phani Pal, Niranjan Pal and Swaran Dutt. They have faced trial for charges under Sections 302/34, 307/34 and 447 IPC. Besides the above charges a further charge under Section 25(1)(a) of the Arms Act was framed against accused Phani Pal.

C In order to further its case, prosecution examined 21 witnesses, while accused persons who pleaded innocence and false implication examined two witnesses. Their stand was a fence has already in existence inside the courtyard. On the date and time of occurrence, the informant, his sons and some others went to uproot the fence. Only Golok Pal was present and he tried to resist. As he was about to be assaulted he rushed to the first floor. But Brindaban's D sons chased him. In the meantime Brindaban and the deceased broke open the lock of the ground floor room of Golok's portion and collected valuables from that room. On the first floor Golok picked up his gun to save himself and made a blank shot from the first floor and he loaded the gun for the second time and at that stage the sons of Brindaban and his associates started E a scuffle with him and in course of that a shot was accidentally fired which hit the deceased on the back when she was coming out of the first floor room of Golok.

At the stage of trial, prosecution varied its stand and stated that gun was fired from a short range.

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On consideration of the evidence, as aforesaid the conviction was made and sentence awarded on the accused-appellant. The conviction and sentence were challenged before the Calcutta High Court. The Division Bench as noted at the threshold directed acquittal by holding that the defence version was more probable. Two factors weighed with it. Firstly, it was noted that the G gunshoot injuries as were received by the deceased were not possible but have been sustained in the manner suggested by the prosecution. The medical evidence clearly indicated that the injuries indicated marks of tattooing and scorching which were possible only when the gunshot was made from a close range. It was noticed that the prosecution tried to improve upon its version by making a departure form the scenario as projected form the beginning and H

tried to reconcile the oral evidence and the medical evidence by indicating a new background. Additionally, the so-called dying declaration on which reliance was placed by the prosecution was not acceptable inasmuch as there was clear admission by the person who recorded the dying declaration that the deceased only affirmed what her husband (PW-1) stated in response to the queries put by the officer recording the dying declaration. That being so, the High Court found that the prosecution version to be untrustworthy and not capable of acceptance.

Learned counsel for the informant-appellant submitted that the approach of the High Court is erroneous. Merely because the medical evidence pointed out one way, the reliable ocular evidence should not have been discarded. Further, the dying declaration should not have been discarded merely because the husband had answered the queries and the deceased had repeated it.

Per contra, learned counsel for the respondent no. 1 accused submitted that the view of the High Court is on terra firma. There is nothing infirm in the reasoning indicated by the High Court to warrant interference, particularly when the appeal is directed against the judgment of acquittal. Though a credible ocular evidence is not to be discarded when it is somewhat at variance with the medical evidence, yet a doubt can be case on the truthfulness of the oral evidence when medical evidence totally improbabilises the ocular evidence. Interestingly, in this case the prosecution made a departure from its original stand and a change was introduced by trying to reconcile the oral evidence and the medical evidence.

The respective stands need careful consideration. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed

A any offence or not. See *Bhagwan Singh and Ors.* v. *State of Madhya Pradesh*, [2002] 2 Supreme 567. The principle to be followed by appellant Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra*, AIR [1973] SC 2622, *Ramesh Babulal Doshi* v. *State of Gujarat*, [1996] 4 Supreme 167, *Jaswant Singh* v. *State of Haryana*, [2000] 3 Supreme 320, *Raj Kishore Jha* v. *State of Bihar and Ors.*, [2003] 7 Supreme 152, *State of Punjab* v. *Karnail Singh*, [2003] 5 Supreme 508 and *State of Punjab* v. *Pohla Singh and Anr.*, [2003] 7 Supreme 17.

The Trial Court appears to have discarded the defence version highlighting unacceptability of the prosecution version, and came to a conclusion that the shot was made from a close range on the courtyard. This plea was taken at the argument stage by the prosecution, trying to read prosecution evidence in a manner so that the ocular evidence and medical evidence do not appear to be irreconcilable. The High Court was right in disapproving the course adopted by the Trial Court. It is an established position in law that prosecution can succeed by substantially proving the version it alleges. It must stand on its own legs and cannot take advantage of the weakness in defence case. The Court cannot on its own make out a new case for the prosecution and convict the accused on that basis. Only when a conclusion is arrived at on the evidence and the substratum of the case is not changed, such a course is permissible. The High Court noticed the medical evidence to be consistent with the defence version that the deceased was hit by the gunshot from a close range and that she was accidentally shot in the scuffle between the informant party and the accused. Coming to the acceptability of the dying declaration, the High Court has rightly discarded it. The declaration made by the deceased was not voluntary and in fact the answer were not given by her and it was her husband who was answering. Such nature and manner of response from the injured who ultimately succumbed to injuries can by no means be elevated to the level of her "dying declaration", even when it is found to sound - "the voice of jacob". Stand of the prosecution that he tried to clarify by stating that it was the accused who had fired the gun does not improve the situation. In the true sense of the term or in legal parlance statement made by the deceased cannot be called a dying

declaration. In view of the admitted hostility and strained relations, the natural effort was to rope in the accused. The High Court, at therefore, discarded the evidence as not worthy of acceptance. A

We do not find any infirmity in the judgment of the High Court to warrant interference. The appeal fails and is dismissed. B

K.K.T. Appeal dismissed