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landowner had no control, the Act does not protect him.

My attention has been drawn by the learned Advocate-General to an un-reported decision of a Division Bench to which I was a party in *Bachan Singh* v. *State of Punjab* (C.W. 1132 of 1960), dated the 13th November, 1961. Therein I had said—

> "The argument advanced by the learned counsel is that as the consolidation proceedings were going on and the land formed part of the consolidation pool, the orchard could not be planted. Even if this explanation be well-founded on facts, the relevant provisions of the Act referred to above do not contemplate any extension of the period for planting an orchard. The language of section 32-K, leaves no room for any ambiguity. For failure to comply with the requirements of the provisions of section 32-K, exemption from ceiling on land in respect of area of land not exceeding ten standard acres cannot, therefore, be claimed. This writ petition is entirely without merit."

I do not find the argument of the learned counsel for the petitioner sufficiently convincing in order to accept his point of view and to extend the period allowed under the Act to enable him to plant an orchard and earn the exemption. These petitions fail and are dismissed. I would in the circumstances, leave the petitioner in each petition to bear his costs.

B.R.T.

APPELLATE CRIMINAL

Before Inder Dev Dua, and J. S. Bedi, JJ.

KISHAN SINGH,—*Appellant.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 349 of 1962

Murder Reference No. 36 of 1962

1962

May., 10th.

Evidence Act (I of 1872)—Section 32(1)—Dying declaration—Scope, relevancy and value of—Whether can form the

sole basis of conviction—Code of Criminal Procedure (V of 1898)—Section 439—Power under—How to be exercised.

Held, that a dying declaration made to a police officer during the course of investigation is taken out of the limitations imposed by sub-section (2) of section 162, Code of Criminal Procedure. The relevancy and admissibility of a dying declaration is governed by section 32(1), Indian Evidence Act, according to which a statement, written or verbal, of revelant facts made by a person who is dead, is relevant when it is made as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of his death comes in question. The legal position of a dying declaration is that it may in a fit case form the sole basis of a conviction, but each case has to be considered on its own facts in the background of the circumstances in which it is made. It is thus not possible to sustain any general proposition of law that a dying declaration as a piece of evidence as compared with other pieces of evidence has any inherent weakness in contradistinction with other pieces of evidence, and indeed it is to be appraised on the same principle on which other evidence is weighed and sifted. It, therefore, follows that for determining the trustworthiness and value of a dying declaration it is incumbent on the Court to bear in mind the capacity and opportunity of the person making the declaration, to observe the incident in question and to identify the guilty person, his faculty to remember the facts observed by him and to reproduce them, the opportunity and the likelihood of his having been tutored or otherwise influenced by other circumstances or persons in the matter, and the consistency in the various declarations, if he has made more than one. It is also relevant to observe that where a dying declaration is oral and has not been recorded in the words of the author, then the Court has to take precautions of subjecting it to proper scrutiny in the light of all those facts which affect the reliability of such oral evidence, for it is of paramount importance that the actual words of a dying declaration are reproduced before the Court as far as it is practicably possible. Where there is also a declaration made before a magistrate, the probative value of such a declaration has to be tested by considering the manner in which it has been recorded : whether it is recorded in the form of questions and answers and whether the words of the person making a declaration have been actually reproduced, for, if it is thus

properly recorded it may tend to inspire, comparatively speaking, a higher degree of confidence, than otherwise. Finally, a dying declaration from the very nature of things should be closely scrutinised because having been made in the absence of the accused its veracity is not tested by cross-examination and then the Court too has not had any opportunity of watching the demeanour of the person making it.

Held, that if the dying declarations are held to be reliable and inspiring of confidence then there is no bar in sustaining the conviction of the accused on their sole basis. But when they are held to suffer from the infirmities which cast doubt on their truth then they cannot safely form the basis of conviction. Ordinarily, a dying declaration should be either accepted or rejected as a whole.

Held, that section 439 of the Code of Criminal Procedure has been enacted in order to empower the High Court in the interest of justice to examine the orders of acquittal and if it is satisfied that in any case the order of acquittal needs to be revised the High Court can exercise this power *suo motu*. But as is well-known this power has to be exercised with extreme care and caution and it would be justified only where the interests of justice demand interference. Where the impugned order of acquittal is based on reasons which do not seem to be so perverse and unreasonable that to uphold it would be travesty of justice and would mean that a proved guilty person has been wrongly acquitted, a case for the exercise of *suo motu* power of revision can hardly be said to arise.

Appeal from the order of Shri C. G. Suri, Additional Sessions Judge, Hoshiarpur, dated the 19th March, 1962 convicting the appellant.

DURGA DASS AND S. S. SANDHAWALIA, ADVOCATES, for the Appellant.

D. D. JAIN, ADVOCATE, FOR ADVOCATE-GENERAL, for the Respondent.

JUDGMENT

DUA, J.— Kishan Singh, son of Munsha Singh of village Jamshed Chathial, district Hoshiarpur, appeals to this Court from his conviction under Dua, J.

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section 302/34, Indian Penal Code, and sentence of death imposed upon him by the Additional Sessions Judge, Hoshiarpur, for the murder of Parkash Chand, Patwari.

The prosecution story is that Munsha Singh, father of Kishan Singh, accused, made a will in his favour, and on the death of the testator mutation in respect of his succession was under the consideration of the revenue authorities. It may be mentioned that Kishan Singh accused was Munsha Singh's son from his first wife. the second wife Jaswant Kaur. This will was attested by Waryam Singh, P.W. 4. A couple of days before the murder of Parkash Chand. Patwari, the mutation proceedings came up for hearing before the Naib-Tehsildar in village Keshopur. Waryam Singh and other attesting witnesses along with the scribe of the will appeared before the revenue officer and Parkash Chand deceased as Patwari put up the papers before the said officer. As Kishan Sing's step-mother was not present, he was asked to produce her on the next hearing. The case was accordingly adjourned. Kishan Singh suspected that Parkash Chand, Patwari, was instrumental in creating obstacles in these mutation proceedings and according to the prosecution he is stated to have expressed his suspicions in express words to Waryam Singh, after the adjournment of the mutation proceedings. Kishan Singh is also stated to have remonstrated with the deceased over this adjournment. On the night between the 4th and 5th of August, 1961, at about 9.30 or 10.p.m. when Waryam Singh, P.W. 4, was going to watch a dancing performance (rass) which was to be held in village Shihin Chathial, about five or six furlongs away, he heard an alarm coming from the side of one Ram Singh Ramgarhia's house, in a portion of which Parkash Chand deceased used to live. Waryam Singh attracted by this alarm went inside the house to the upper storey and saw Kabul Singh and Kishan Singh accused holding a *kirpan* each and giving injuries to Parkash Chand deceased. Mehar Singh, P.W. 6, was also present

there. Within Waryam Singh's sight, Kishan Singh accused gave one *kirpan* blow under Parkash Chands' chin and Kabul Singh gave a *kirpan* blow on Parkash Chand's right arm above the elbow. Ram Lok. P.W. 5, was also standing nearby raising alarm which had attracted Waryam Singh. On seeing these persons the two accused ran away towards Kishan Singh's *chaubara* from over the roof. Parkash Chand was found unconscious by Waryam Singh and others. Ram Lok thereupon put some water in Parkash Chand's mouth as a result of which he is stated to have regained consciousness. After regaining consciousness he told the persons there that Kishan Singh and Kabul Singh had injured him because of the adjournment of the mutation proceedings. He was put on a cot and taken to the Garhdiwala dispensary, about three miles away, but unfortunately there was no doctor available in the dispensary at that time. Waryam Singh then went to the post office and telephoned to the Superintendent of Police, at Hoshiarpur, by whom he was directed to lodge a report at the police station. The Superintendent of Police is also stated to have informed Waryam Singh that the former would arrange for a conveyance. After this conversation, Waryam Singh went to the police station Hariana and lodged the first information Report at about 4.30 a.m. on 5th August, 1961.

It may here be mentioned that the police had challaned two persons, Kishan Singh and Kabul Singh (the latter has been described to be a remote uncle of Kishan Singh) but the learned Additional Sessions Judge, gave the benefit of doubt to Kabul Singh and acquitted him.

There were about 19 injuries on the person of the deceased all of which were incised wounds, and seven of which were grievous injuries. One of the injuries was an incised wound $7'' \times 1'' \times 3\frac{1}{2}''$ deep downward on right side of scalp occipital region semi-circular with a piece of bone cut through $3'' \times 2\frac{1}{2}''$ exposing the meninges. The brain membranes were exposed under this injury. The

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piece of bone which was cut as a result of this injury measured 3″ × 2½″ as already noticed. There were three more incised wounds on the neck and one on the right side of the face and temporal region just above the ear. The remaining injuries were on other parts of the body.

On 5th August, 1961, Raghbir Singh, Sub-Inspector, Station House Officer, Police Station, Hariana, is stated to have recorded a statement made by Parkash Chand, the injured person, under section 161, Code of Criminal Procedure, in which it is stated that when the mutation proceedings were adjourned by the Naib-Tehsildar, Kishan Singh not annoyed with Parkash Chand and used filthy language towards him, and Kabul Singh, who is the uncle of Kishan Singh and further whose niece is married to Kishan Singh, also cherished ill-will on account of delay in the final disposal of the mutation proceedings. The statement proceeds that on the night of the occurrence at about 9.30 p.m. when Parkash Chand and Ram Lok were, as usual, sleeping on the roof in front of Parkash Chand's residential *chaubara*, on receiving a *kirpan* blow on the left side of his neck, Parkash Chand got up and raised alarm. Ram Lok also got up and started shouting. Kishan Singh and Kabul Singh, however, continued giving injuries to Parkash Chand with their *kirpans*. In the meantime, Waryam Singh and Mehar Singh arrived at the spot who saw Kabul Singh and Kishan Singh inflicting injuries on Parkash Chand. On seeing these persons Kishan Singh and Kabul Singh stopped assaulting Parkash Chand and ran away towards Kishan Singh's *chaubara*. Now, as usual, this statement is not signed by its author. The same day, i.e., 5th August, 1961, Parkash Chand is further stated to have made a dying declaration on solemn affirmation before Shri H. G. Trighatia, Magistrate 1st Class. This statement, described as a dying declaration, is in a narrative form according to which, Parkash Chand, as usual, was lying in front of his *chaubara* and Ram Lok was sleeping close-by Kabul Singh and Kishan Singh *tarkhans* armed with *kirpans* suddenly came there and started

injuring Parkash Chand with their weapons. Ram Lok and Parkash Chand raised alarm whereupon Waryam Singh, Mehar Singh and Amar Singh arrived at the spot. On their arrival, the culprits ran away. It is then stated that injuries had been caused to him on arms, neck, head, temple, legs and back. The accused suspected Parkash Chand to be placing obstacles in the way of the mutation proceedings but he had, except for obeying the orders of higher authorities, done nothing. There is also a mention in this declaration of Kishan Singh having picked up a quarrel with Parkash Chand in the presence of Waryam Singh. This declaration does not bear Parkash Chand's signatures though it is thumb-marked by him. Shri H. G. Trighatia has appeared as P.W. 3 and according to his statement on receiving the information Exhibit P. F., he reached the Civil Hospital at Hoshiarpur at 6.35 a.m. on 5th August, 1961. He made enquiries from the doctor incharge who testified that the injured person was fit to make a statement. The doctor's certificate is Exhibit P.F. 1. The learned Magistrate thereupon recorded Parkash Chand's statement P.F. 3. He admits that the statement was recorded in a narrative form and according to him it was read over to Parkash Chand, who admitted it to be correct and thumb-marked it. The reason for the thumb-impression, as given by the learned Magistrate is that Parkash Chand was extremely weak. The Magistrate has also in his statement in Court deposed that Parkash Chand had named the two accused as his assailants. In cross-examination the witness has admitted that a number of members of the hospital staff including doctors and nurses were present at that time but he was unable to tell whether any non-officials were also present. The Magistrate also could not state if he had asked Parkash Chand about his having been examined by any one earlier.

Waryam Singnh, P. W. has unfolded the prosecution story in Court. The accused persons, according to his statement, were known to him as they belonged to the same village. This witness had also attested

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the will said to have been made by Munsha Singh in favour of his son Kishan Singh accused and indeed he also admittedly appeared before the revenue officer on the date when the proceedings were adjourned last. In his cross-examination it has been elicited that the assailants had muffled their faces and only their eyes and noses were exposed. The witness, however, did not ask the deceased the names of the assailants when he narrated the occurrence. The witness also could not remember if besides the names of the assailants and the motive for the assault Parkash Chand mentioned anything else. The statement of the deceased was not reduced to writing and no other Panch or Lambardar was called to be a witness to what Parkash Chand actually stated. According to him, apart from Mehar Singh, Amar Singh and himself, there was no other person present at that time. In answer to a Court question the witness explicitly asserted that he had no time to narrate the entire occurrence and did not even give the names of the assailants to the Superintendent of Police on telephone when information about the assault on Parkash Chand Patwari was conveyed by him. His memory also failed him when he was asked whether or not the Superintendent of Police had advised him on telephone to get the statement of the injured person recorded in the presence of respectable persons. According to his statement there is a police post at Garhdiwala but the witness did not go there to lodge the report because, according to him, the police post is under the jurisdiction of Police Station, Tanda, whereas the occurrence had taken place in the area of Police Station, Hariana. The witness was then confronted with some tape-recording played in Court which purported to be a reproduction of a conversation between the witness and one Mistri Gurbachan Singh. According to this tape-recording Parkash Chand's statement had been recorded at Garhdiwala and attested by Soma and Raj and the statement had been handed over to the Deputy Superintendent of Police. The witness had further signed a statement at the police station dictated by the Deputy Superintendent of Police. All these facts were admitted by the witness in his deposition to be correct. The witness was then declared hostile at the instance of the

public prosecutor who was permitted to cross-examine him. The public prosecutor put to the witness his statement in the committing Magistrate's Court and he admitted that it was for the first time that he was telling about the muffled up faces of the assailants in the Court of the Additional Sessions Judge. In cross-examination by the public prosecutor the witness has explained that Tarsem, son of Kabul Singh accused, had taken him to Mistri Gurbachan Singh where the talk mentioned above was tape-recorded. This fictitious talk was given because Tarsem wanted the witness to make a statement helpful to the accused persons. Mistri Gurbachan Singh being a friend of the witness, the latter complied with his suggestion that this fictitious drama or farce should be gone through. At the request of the public prosecutor, Waryam Singh's statement in the commitment Court was then transferred to the record of the trial Court. Ram Lok P.W. 5 has stated that Kishan Singh and not Kabul Singh was seen giving injuries to Parkash Chand, though he was present at the spot. This witness was awakened by the shouts of Parkash Chand and it was then that he saw Kishan Singh and Kabul Singh present at the spot armed with a *kirpan* each. According to this witness after the departure of the accused when he brought some water and put it in Parkash Chand's mouth the latter regained consciousness and expressed a desire to be removed to a hospital so that his life may be saved. Parkash Chand, however, did not state anything else at that time. He was put on a cot and removed to a Garhdiwala hospital. It is obvious that this witness does not support Waryam Singh about Parkash Chand having given the names of the assailants and the motive for the assault on regaining consciousness as a result of water having been poured in his mouth. In his cross-examination he has also stated that the assailants had their faces muffled and it was only when they went towards Kishan Singh's *chaubara* that he could identify them. He has expressly deposed that he could not see their faces during the assault. The public prosecutor got this witness also declared hostile and cross-examined him, as a result of which it has come on the record that it was for the first time at the trial that this witness mentioned about the muffled faces of the assailants. His state-

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ment in the commitment Court has also been brought on the Sessions record. Mehar Singh, P.W. 6 has undoubtedly stated that on Waryam Singh's enquiry Parkash Chand stated that Kishan Singh and Kabul Singh had assaulted and injured him because of the dispute over the will. Amar Singh, according to him, had arrived at the spot after the occurrence, though Parkash Chand did name his assailants in his presence. The witness however, did not remember the names of other persons in whose presence Parkash Chand named the assailants, though according to him, when Parkash Chand regained consciousness and made a statement, a number of other persons had actually collected there. According to this witness the accused had not muffled up their faces. Raghbir Singh Sub-Inspector has appeared as P.W. 11 and has proved Exhibit P.Q., a carbon copy of the statement of Parkash Chand recorded by him under section 161, Criminal Procedure Code. He has also deposed to the arrest of the accused by the Assistant Sub-Inspector Abnash Singh and had stated about the interrogation of Kishan Singh and the recovery of the *kirpan* and the blood stained clothes from a room of his house. The witness did not care to examine the Superintendent of Police because according to his information the Superintendent of Police had only been informed that a person had been assaulted and injured without any further details. He also did not care to verify from the Superintendent of Police about his instructions to Waryam Singh on telephone.

Two witnesses were also produced in defence and two tendered for cross-examination. Dr. Shanti Sarup, Dispenser and Private Medical Practitioner, Garhdiwala, has appeared as D.W. 1 and has deposed about a Patwari of village Jumshed Chathial having been brought in an injured condition to Garhdiwala about four or five months prior to his deposition which was made on 16th March, 1962. The cot of the injured person was placed at the fuel wood depot of Raj Kumar, where the witness was called. He found there present Sarvshri Som Raj, Raj Kumar, Municipal Commissioners, Dr. Bedi and some other persons of village Jamshed Chathial including Waryam Singh,

P.W. whom the witness knew. A statement of the injured Patwari was recorded there in the presence of all those persons by Waryam Singh Sarpanch and the same was attested by the witness and two Municipal Commissioners and also by Dr. Bedi and others present. Waryam Singh took that written statement with him when he left the place with the injured person in a truck going towards Bhunga police post. In cross-examination, however, the witness was unable to tell as to what Parkash Chand had stated at that time. He was unable even to state whether or not the names of the assailants were given by Parkash Chand. In his cross-examination, the witness admitted that he had neither a degree nor any diploma in medicines and that he was merely a registered Pharmacist (Dispenser) and not a doctor. The witness explained the necessity of recording the statement to be the fear that the injured person might succumb to the injuries. Shri Raj Kumar has appeared as D.W. 2 and has supported D.W. 1. According to him Parkash Chand was very weak and he neither signed nor thumb-marked his statement.

The learned Sessions Judge noticed the defence version about the statement made by Parkash Chand at Garhdiwala and observed that there was nothing in the testimony of the defence witnesses which might suggest that the deceased had stated anything at Garhdiwala inconsistent with the guilt of the accused. However, withholding of the declaration said to have been made by the deceased at Garhdiwala might, in the opinion of the learned Additional Sessions Judge, suggest that the later dying declarations Exhibits P.F./3 and Exhibit P. Q. and the First Information Report were "an improvement on the spontaneous and unsophisticated version given by the deceased before the police had appeared on the scene." This was considered by the Court below to be highly indiscreet on the part of the investigating officer in destroying or withholding the dying declaration recorded at Garhdiwala in the presence of respectable persons. In spite of this observation the learned trial Judge considered the direct and circumstantial evidence to be sufficiently strong for holding Kishan Singh accused guilty of the offence charged. The Court considered

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the dying declaration recorded by Trighatia, Magistrate, to be sufficiently reliable in spite of the suspicions of improvements made therein. The Court also observed that the injured person had no enmity with the accused nor was any suggestion thrown as to why the police should have falsely fixed the responsibility for the offence on the accused persons. Here, I may reproduce in his own words what the learned Additional Sessions Judge observed:—

> "A revised and retouched dying declaration may have been considered necessary for the reason that the dying declaration recorded at Garhdiwala contained references to the muffled faces of the assailants or failed to give the names of the eye-witnesses. There was nothing surprising that a report recorded by persons un-initiated in such matters failed to satisfy a police officer."

Substantially relying on the dying declarations the Court below convicted Kishan Singh but treated Kabul Singh's case on a different footing on the ground that this accused was not directly concerned with the mutation proceedings or their adjournment. Kabul Singh was also, according to the Court, not shown to be such a near relation of Kishan Singh that he must have joined the assault in spite of his old age. Kabul Singh, I may here observe, is stated to be 75 years old and Kishan Singh 23 or 24 years old. The absence of recoveries of bloodstained clothes or weapon of offence from Kabul Singh as also Ram Lok's statement absolving Kabul Singh from any injury to the deceased also weighed with the learned Judge. The other factor that the other witnesses felt satisfied about the identity of the assailants because they were seen going towards Kishan Singh's *chaubara* also induced the Court below to feel that Kishan Singh's companion need not necessarily be Kabul Singh. Finally, the unsatisfactory nature of the investigation which has been described by the Court to be "not completely above board" induced it to give to Kabul Singh the benefit of doubt.

On appeal, the learned counsel for the appellant has taken us through the record and since the case is also before us for confirmation of the capital sentence, we have also gone through the record ourselves very minutely. In my opinion, the Court below has failed to appreciate and grasp the real principle underlying the scope and the value of dying declarations. A dying declaration made to a police officer during the course of investigation is taken out of the limitations imposed by Sub-section (2) of section 162, Code of Criminal Procedure. The relevancy and admissibility of a dying declaration is governed by section 32(1), Indian Evidence Act, according to which a statement, written or verbal, of relevant facts made by a person who is dead, is relevant when it is made as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, Such a statement is relevant whether or not the person making it was at the time under expectation of death and this is so irrespective of the nature of the proceedings in which the cause of his death comes into question. Without going into the judicial literature on the point the legal position of a dying declaration, as I understand it, is this. A dying declaration may in a fit case form the sole basis of a conviction, but each case has to be considered on its own facts in the background of the circumstances in which it is made. It is thus not possible to sustain any general proposition of law that a dying declaration as a piece of evidence as compared with other pieces of evidence has any inherent weakness in contradistinction with other pieces of evidence, and indeed it is to be appraised on the same principle on which other evidence is weighed and sifted. It, therefore, follows that for determining the trustworthiness and value of a dying declaration it is incumbent on the Court to bear in mind the capacity and opportunity of the person making the declaration, to observe the incident in question and to identify the guilty person, his faculty to remember the facts observed by him and to reproduce them, the opportunity and the likelihood of his having been tutored or otherwise influenced by other circumstances of persons in the matter, and the consistency in the various declarations, if he has made

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more than one. It is also relevant to observe that where a dying declaration is oral and has not been recorded in the words of the author, then the Court has to take precautions of subjecting it to proper scrutiny in the light of all those facts which affect the reliability of such oral evidence, for it is of paramount importance that the actual words of a dying declaration are reproduced before the Court as far as it is practicably possible. As in the instant case there is also a declaration made before a Magistrate, it would be pertinent to state that the probative value of such a declaration has to be tested by considering the manner in which it has been recorded: whether it is recorded in the form of questions and answers and whether the words of the person making a declaration have been actually reproduced, for, if it is thus properly recorded it may tend to inspire, comparatively speaking, a higher degree of confidence, than otherwise. Finally, a dying declaration from the very nature of things should be closely scrutinised because having been made in the absence of the accused its veracity is not tested by cross-examination and then the Court too has not had any opportunity of watching the demeanour of the person making it.

I am not unmindful of the observations of the Supreme Court in *Ram Nath Madhoprasad and others* v. *State of Madhya Pradesh* (1), where it is stated that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not on oath and is not subject to cross-examination and also because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. But these observations have in later Supreme Court decisions been described to be obiter: See *Harbans Singh and another* v. *The State of Punjab* (2), and *Khushal Rao* v. *State of Bombay* (3). Now in the light of what has just been stated above if the dying declarations in this case are held to be reliable and inspiring of confidence then there is no

(1) A.I.R. 1953 S.C. 420.
(2) A.I.R. 1962 S.C. 439.
(3) A.I.R. 1958 S.C. 22.

bar in sustaining the conviction of the accused on their sole basis. But when they are held to suffer from the infirmities which cast doubt on their truth then they cannot safely form the basis of conviction.

Now let us see if the dying declarations in question come up to the above standard and if they can be considered to be sufficient, taken along with the other evidence on the record, for sustaining the conviction of the appellant.

Waryam Singh and Ram Lok in their evidence in Court did not fully support the prosecution case inasmuch as the identity of the accused persons could hardly be safely concluded on the basis of their testimony. Waryam Singh's assertion that he did not give to the Superintendent of Police the names of the assailants when he talked to him on telephone is so unnatural and unconvincing that I have not the least hesitation in rejecting it. If he knew the names of the assailants then, in my opinion, there is no reason why he should not have mentioned it to the Superintendent of Police. If it is believed that he did not mention the names then I am inclined to hold that till then Parkash Chand had not given the names of his assailants to anybody and the statement imputed to him is a concoction. Mehar Singh's testimony is undoubtedly there but the Court below appears to have expressed a clear disinclination to place implicit reliance on his testimony. As a matter of fact it has described this witness not to be absolutely disinterested.

So far as the dying declaration is concerned it is obvious that if Waryam Singh did not mention to the Superintendent of Police the names of the assailants then it is clear that these witnesses have falsely put into Parkash Chand's mouth the statement at the place of occurrence soon after the assault that Kishan Singh and Kabul Singh had assaulted and injured him because of the dispute over the will. This introduction would, in my opinion, affect, adversely to the prosecution, the testimony of all the three witnesses, Waryam Singh, P.W. 4, Ram Lok P.W. 5 and Mehar Singh, P.W. 6. In so far as the statement said to have

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been made to the police is concerned, it is obvious that this statement has not been signed by the deceased. Though proof of such a statement having been made by the deceased might legally be permissible yet the value of such a statement would not be much, unless the Court is satisfied that it was actually made and it was not, and could not have been, inspired by interested parties. The declaration made before the Magistrate again is not very inspiring. It was not made in the form of questions and answers and appears to be a substantial reproduction of the statement under section 161, Criminal Procedure Code. When the learned Magistrate apeared in Court as P.W. 3, he could not remember having asked Parkash Chand whether he had been examined by any one earlier. It is obvious that the learned Magistrate did not realise the importance of the dying declaration which he was called upon to record. This statement was to be used as a strong piece of evidence against the persons named as his assailants by Parkash Chand, without those persons having any opportunity of cross-examining him. It was, therefore, incumbent on the learned Magistrate to take all necessary precautions to satisfy himself that this statement was not being influenced by any other consideration except that of truth. When the police had already got a statement recorded, there would in all probability have been a tendency on their part to see that the statement made before the Magistrate tallies with the one recorded by them under section 161, Criminal Procedure Code. The record does not show whether the police officers who were concerned with the recording of Parkash Chand's earlier statement were absent when the learned Magistrate recorded the dying declaration and indeed the testimony of the learned Magistrate in Court is also wholly unhelpful in determining this point. The likelihood is that they were present and there is nothing to show that it was not so. Now, if they were actually present then it is not possible to believe that they did not inform the Magistrate of the earlier statement. On the existing record, therefore, I find it exceedingly difficult to place implicit reliance on the two dying declarations which appear to me to have been recorded in the circumstances which do not inspire confidence, for, the possibility of the deceased having been influenced

by what others might have suggested to him, in making the declarations, cannot reasonably and safely be ruled out.

There was a reference on the part of the State Counsel to the recoveries made in pursuance of Kishan Singh's statement. But when the prosecution evidence is held to be untrustworthy or unsafe of credence and the dying declarations to have been recorded in circumstances which do not inspire confidence I would be most reluctant to base the conviction of the appellant only on the recovery of the *kirpan* and the clothes, particularly when the investigating agency also does not appear to have conducted themselves in a straightforward manner. Here it is pertinent to notice that according to Raghbir Singh, P.W. 11 when he was going to the place of occurrence with Waryam Singh, he met the Deputy Superintendent of Police with a police party and they all then got into the jeep to cover their remaining journey, and are stated to have met the party bringing Parkash Chand on a cot at a place called Bhunga. In these circumstances non-production of the Deputy Superintendent of Police and even failure to examine him during the investigation is not easy to appreciate. I am wholly unconvinced that the Deputy Superintendent of Police had merely been told or that he was satisfied with the information that a person had been assaulted and injured. The background of the case appears to me to be inconsistent with this suggestion. The contention that the recovery should be held to be a strong corroborative piece of evidence and the occular testimony should, therefore, be held to be true also does not appeal to me.

It may in this connection also be stated that Kabul Singh has been acquitted on the same evidence. Ordinarily, a dying declaration should be either accepted or rejected as a whole. According to the dying declaration on which the Court below has placed reliance in the case in hand, both Kishan Singh and Kabul Singh gave injuries to the deceased. If Parkash Chand is to be considered to have falsely implicated Kabul Singh, I do not see any convincing reason for holding this very declaration to constitute

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a safe piece of evidence for convicting Kishan Singh. No plausible reason has been urged distinguishing the case of one from the other so far as the declaration goes, and the State having not appealed against Kabul Singh's acquittal it is obvious that his acquittal is considered to be justified by the State. Now, even if it may be legally permissible to accept and to reject in part a dying declaration (a question on which I do not express any considered opinion on this occasion) on the facts and circumstances of the present case I do not think there are sufficiently convincing and cogent grounds to rely on these declarations for convicting Kishan Singh when Kabul Singh has been acquitted.

On behalf of the State a suggestion has been thrown that this Court should issue notice to Kabul Singh and order his retrial because his acquittal is wrong both in law and on facts. Kabul Singh is not a party to this appeal and the State has not cared to file an appeal against his acquittal. According to section 439(5), Criminal Procedure Code, a party which could have appealed and has failed to do so cannot invoke the revisional jurisdiction of this Court. It is, however, suggested that this Court should *suo motu* issue a notice to Kabul Singh and consider the merits of the order of his acquittal. Reference has in this connection been made to some reported cases dealing with revisions by private parties and it has been stressed that this Court has full jurisdictionn to take seizin of Kabul Singh's case *suo moto*. Now, on revision an acquittal cannot be converted into a conviction and indeed this is not controverted and cannot be controverted in the face of section 439(4), Criminal Procedure Code. It is, however, urged that after setting aside Kabul Singh's acquittal this Court should remand the case for a fresh trial. I would grant that section 439 has been enacted in order to empower the High Court in the interest of justice to examine the orders of acquittal and if it is satisfied that in any case the order of acquittal needs to be revised the High Court can exercise this power *suo moto*. But as is well-known this power has to be exercised with extreme care and caution and it would, in my opinion, be justified only where the interests of justice

demand interference. On the facts and circumstances of the present case I am unable to persuade myself to hold that the order of the Court below is so perverse or contrary to the record that to uphold it would be travesty of justice and would mean that a proved guilty person has been wrongly acquitted. The impugned order of acquittal is based on reasons which do not seem to be so perverse and unreasonable as to call for the exercise of the *suo motu* power of revision; and there is hardly any grave miscarriage of justice. It is hardly necessary for me to say anything more on this point.

In the result this appeal succeeds and allowing the same I acquit the appellant. The murder reference must thus be held to have been declined.

J. S. BEDI, J.—I agree. Bedi J.

B.R.T.

CIVIL MISCELLANEOUS

Before Shamsher Bahadur, J.

DR. AYA SINGH,—*Petitioner.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 1460 of 1961

1962

May., 10th.

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—Section 29—Property forming part of compensation pool sold in public auction and Sale certificate issued—Property in possession of a tenant under custodian—Such tenant whether can be ejected by Rehabilitation authorities—Constitution of India—Article 226—Writ for restoration of possession in case of illegal ejectment—Whether can be granted.

Held, that evacuee property which formed part of compensation pool and having been sold in public auction, the