

(2003) 03 SHI CK 0019

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No's. 72 and 378 of 2001

Banwari Lal

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 14-03-2003

Acts Referred:

Evidence Act, 1872 — Section 133
Penal Code, 1860 (IPC) — Section 30

Citation : (2004) CriLJ 1067 : (2003) 1 ShimLC 408

Hon'ble Judges : R.L. Khurana, J;M.R. Verma, J

Bench : Division Bench

Advocate : Jagdish Vats, for the Appellant; J.K. Verma, General and Anuj Nag, for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana, J.—The abovenoted two appeals arising out of judgment dated 2-2-2001 in Sessions Trial No. 9-P/97 of the learned Additional Sessions Judge (I), Kangra at Dharamsala, are being disposed of by a single judgment.

2. Appellant, Banwari Lal in Criminal Appeal No. 72/2001, hereinafter referred to as A-1, stands convicted for the offences under Sections 302 and 201, Indian Penal Code, and sentenced to life imprisonment and fine of Rs. 5000/- for the offence u/s 302. Indian Penal Code, simple imprisonment for one year and fine of Rs. 1000/- for the offence u/s 201, Indian Penal Code. In default of payment of fine, he has been sentenced to undergo simple imprisonment for a further period of six months and three months respectively, in respect of each of the two offences.

3. Respondent No. 1, Rajinder Kumar, in Criminal Appeal No. 378/2001, hereinafter referred to as A-2, was tried for the offence under Sections 302 and 201, Indian Penal Code. He stands acquitted of such offences.

4. Respondents Nos. 2 to 5, S/Shri Sri Ram, Milap Chand, Chuni Lal and Jai

Kishan, hereinafter respectively referred to-as A-3, A-4, A-5 and A-6, in Criminal Appeal No. 378/2001, upon having been tried for the offences under Sections 176 and 201, Indian Penal Code were acquitted of such offences.

5. Criminal Appeal No. 78/2001 has been preferred by A-1 assailing his conviction and sentence, while Criminal Appeal No. 378/ 2001 has been preferred by the State assailing the acquittal of A-2 to A-6 as recorded by the learned trial Judge vide the Impugned judgment.

6. The prosecution story, in brief, may be thus stated. The deceased Smt. Subo Devi, widow, was a resident of Khadul in Tehsil Palampur. She has two sons and a daughter, namely, PW4 Hans Raj, Bikram Singh and Smt. Om Piari (PW5). The elder son Hans Raj is employed at Shimla, where he is residing with his family. The younger son Bikram Singh is employed somewhere in Uttar Pradesh. His wife PW7 Smt. Sunita was living in the village along with the deceased Smt. Subo Devi.

7. On 24-5-1993, PW4 Hans Raj received a telegram at Shimla regarding the death of the deceased. He accordingly rushed for his village on the same day. On reaching home on 25-5-1993 he found that the dead body had already been cremated. Upon enquiries made as to the cause of death, he was informed by PW 7 Smt. Sunita that the deceased had developed severe headache during the night as a result of which she had died. However, subsequently on further enquiries by PW4 and Bikram Singh, husband of PW7 who had also in the meanwhile reached home on hearing the news of the death of his mother, PW7 disclosed that the deceased was killed by A-1 and his companion, who was having a beard, on the night intervening 21/22-5-1993.

8. On the following day, that is, on 26-5-1993 PW4 accompanied by his brother Bikram Singh and PW7 Smt. Sunita Devi went to the Police Station to lodge a report. However, the police refused to record the report on the ground that since the dead body stood cremated, no action was possible. PW4 then went to A-4 the Pradhan of the Gram Panchayat and made the report to him, PW4 was informed by A-4 that he was also present at the time of cremation. Complaints were then made by PW4 to the Superintendent of Police as also to the Deputy Inspector General of Police. Ultimately on 14-6-1993 a case of the offences under Sections 302/201 and 176, Indian Penal Code, came to be registered at Police Station, Palampur, vide FIR Ex.PW4/A on the basis of statement of PW4 recorded u/s 154, Code of Criminal Procedure.

9. The case was initially being investigated by the local police. However, such investigation subsequently was taken up by the State CID.

10. PW7 Smt. Sunita Devi came to be arrested on 14-6-1993. She was admitted to and released on bail on 30-6-1993. During such period of her detention in police/ judicial custody she, during the course of investigation, did not disclose anything. While on bail, she on 24-9-1993 had moved an application Ex.PW6/A before the then Chief Judicial Magistrate (PW-6) Kangra at Dharamsala

expressing her intention to make a full disclosure of facts and praying for her being declared as an approver and for granting pardon. The Chief Judicial Magistrate on 28-9-1993 granted pardon to her and after declaring her as an approver recorded her statement Ex.PW6/F. In such statement she deposed that she was having illicit relations with A-1. One day about 8/9 days prior to the murder of the deceased her mother-in-law had gone out to graze the cattle as usual. She returned home early after leaving the cattle in the jungle. It was noon time. She saw her (PW7) and A-1 indulged in sexual act in the "Bohar" (upper storey of the house). Her mother-in-law told her that she would be writing letters to her husband as well as to PW4 informing them about what she had seen. On 21-5-1993 at about 8.10 p.m., when she was sitting in her courtyard along with her mother-in-law, she had seen A-1 and A-2 proceeding towards the house of A-1. Thereafter she and her mother-in-law went to sleep. After sometime, she heard A-2 asking her mother-in-law to open the door. She at that time was sleeping in the "Bohar". She heard the cries of her mother-in-law calling her for help. She came down and found the electric supply having been disconnected. In the darkness she went to the place where her mother-in-law was sleeping. The moment she reached there, she was caught hold of by A-2, who gagged her mouth and pressed her to the wall with his knee. In the torchlight, which was kept under the pillow by A-1, she saw A-1 hitting her mother-in-law with a stone by sitting on her chest. When she (PW-7) tried to free herself from the clutches of A-2 in order to help and save her mother-in-law, A-1 threatened her with dire consequence if she dared make a noise. On seeing the blood oozing from the mouth and nose of her mother-in-law, she became unconscious. On regaining consciousness on the following morning, she found herself in the house of A-1 in bed with Sushma, niece of A-1. She was threatened by A-1 who was then having a knife, that in case she dared disclose the occurrence to anyone, her husband would be killed. A-1 further proclaimed that he was an influential person. She was further advised by A-1 and A-2 to name some other persons for the crime in order to mislead her husband and PW4. She was also threatened that in case she happen to take their names, they would get her involved and implicated in the murder. She was also advised that being pregnant she should not go back home near the dead body otherwise she may suffer due to ill spirits of the dead. She was left in his house by A-1 under the care of his wife, mother of A-2 and wife of A-3. From the window of the room on the upper storey of the house of A-1, she saw that when the dead body of her deceased mother-in-law was being carried for cremation by A-1, A-2 and other villagers. Jai Kishan (maternal uncle of her husband) and PW5 (her husband's sister) had come there. Both of them had seen the face of the deceased. They asked A-1, A-2 and others not to cremate the dead body. Their requests were not acceded to on the ground that it was not summer day and the dead body may decompose. The dead body was then carried away and cremated. She further deposed that out of fear from A-1 and A-2 she did not disclose the incident to anyone. It was only on fifth day after the occurrence that she narrated everything to PW4 and her husband.

11. Investigation revealed that A-1 and A-2 in furtherance of their common intention had committed the murder of the deceased, who was an obstacle in the illicit affairs of PW7 and A-1 and that with the assistance of A-3 to A-6, they had hurriedly cremated the dead body in order to destroy the evidence so as to screen themselves of the offence of murder. It was further found that A-4 and A-5 being the Pradhan and Lambardar respectively had failed to give necessary information to the police with regard to the murder of the deceased as required by law.

12. A-1 and A-2 were charged for the offence under Sections 302 and 201 read with Section 34, Indian Penal Code. A-3 and A-6 were charged for the offence u/s 201 read with Section 34, Indian Penal Code, while A-4 and A-5 were charged for the offences under Sections 176 and 201 read with Section 34, Indian Penal Code. They pleaded not guilty and claimed trial.

13. The prosecution in support of its case, in order to bring home the offences against A-1 to A-6, examined 14 witnesses in all. The defence put forth by the accused is that of denial and false implication. No evidence in defence was led by any of the accused.

14. The learned trial Judge on consideration of the evidence coming on record, vide the impugned judgment dated 2-2-2001 convicted and sentenced A-1, and acquitted A-2 to A-6 of the offences charged against them as aforesaid leading to the filing of the present two appeals.

15. We have heard the learned counsel for the parties and have also gone through the record of the case.

16. The case of the prosecution primarily rests on the sole testimony of PW7 Smt. Sunita Devi, the approver. In convicting and sentencing A-1, the learned trial Judge has relied upon such testimony of PW7.

17. The first question which arises for considerations is -- Whether conviction can be based on the sole and uncorroborated testimony of an approver?

Section 133 of the Evidence Act, provides :--

"Accomplice :-- An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to Section 114, Evidence Act, further provides :--

"The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."

18. Dealing with the scope and ambit of the above noted two provisions contained in Illustration (b) to Section 114 and in Section 133 of the Evidence Act, the Hon"ble Supreme Court in Bhiva Doulu Patil Vs. State of Maharashtra, has held that both the Sections are part of one subject and have to be

considered together. It has further been held :--

"The combined effect of Sections 133 and 114, Illustration (b) may be stated as follows :--

According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter, which is a rule of practice, it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars."

19. This principle was reiterated in Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc., and it was held :--

"The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal, the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another."

20. Similar question again came up for consideration before the Hon"ble Supreme Court in Ram Narain Vs. State of Rajasthan, and it was held :--

"..... Section 133, Indian Evidence Act, which falls in Chapter IX dealing generally with witnesses, expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this section has to be read along with Illustration (b) of Section 114 which falls in Chapter VII dealing with Burden of Proof. Section 114 empowers the Court to presume the existence of certain facts and the illustration elucidate what the Court may presume and make clear by means of examples as to what facts the Court shall have regard in considering whether or not the maxims illustrated apply to a given case before it. Illustration (b) in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars; two examples are also given to further explain this subject. The statute thus permits the conviction of an accused person on the basis of uncorroborated testimony of an accomplice but the rules of credence embodied in illustration (b) of Section 114 strikes a note of warning cautioning the Court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. This rule of caution is traceable to the fact that an accomplice witness from the very nature of his position is a suspect. This rule is guided by long human experience and has become a rule of prudence of general application. The Court therefore, consider it prudent to look for corroboration in material particulars for sustaining the

conviction of an accused person. An approver who is admittedly guilty of the crime is an accomplice who has betrayed his associates and has apparently sought pardon for saving his own skin. In other words he has purchased complete immunity for his prosecution at the expense of his associates by agreeing to give evidence against them for the prosecution. He is, therefore, presumed not to be a man of high character or a fair witness. His pardon being conditional, to please the prosecution he may well weave some false detail into the true details of the prosecution story and may also falsely involve some innocent person. There is thus a real danger of his telling a story true in general outline but containing some untruth which he can easily work into the story. It is for this reason that the Courts as a matter of prudence and caution anxiously look for some corroboration to satisfy their conscience that the approver's testimony which is clearly admissible is also worthy of belief/credit. One can of course visualise an accomplice who is genuinely repentant for the commission of his crime and truly desires to make a clean breast of the whole affair by way of penitence. But even in such cases the Court has to judicially determine the extent to which his uncorroborated testimony can be considered as trustworthy by looking to the other relevant material and the attending circumstances on the basis of which the accused can be safely convicted. The rule which seems to emerge from the foregoing discussion and judicial decisions is that the necessity of corroboration as a matter of prudence except when it is safe to dispense with such corroboration must be clearly present to the mind of the Judge.

It is in this background that the Court is required to determine the nature and extent of corroboration of an approver's evidence necessary in a given case for sustaining the conviction of the accused. The corroborating evidence, broadly stated, must connect or tend to connect the accused with the crime charged. This is so because of the danger of the approver introducing some innocent person or persons into an otherwise true prosecution story. Such evidence, however, need not by itself be sufficient for sustaining the conviction of the accused for in that case the evidence of the approver would be wholly unnecessary and mere surplusage.

Before considering the evidence on the record it may be borne in mind that the Court should evaluate the evidence of an approver de hors the corroborating pieces of evidence for, if his testimony is itself uninspiring and unacceptable justifying its rejection outright, then, it would be futile and wholly unnecessary to look for corroborating evidence. It is only when the approver's evidence is considered otherwise acceptable that the Court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged....."

21. Further in Ravinder Singh Vs. State of Haryana, the Hon'ble Supreme Court while considering the approver's testimony within the meaning of Section 133, Evidence Act, has observed :--

"An approver is a most unworthy friend, if at all, and he, having bargained for his

immunity, must prove his worthiness for credibility in Court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected *brevi manu*. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case, taking into consideration all the factors, circumstances and situation governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, as determined by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

22. In *Abdul Sattar Vs. Union Territory, Chandigarh*, where the prosecution had sought to prove its case by relying upon the evidence of the approver, it was held that an approver is a competent witness but the position in law is fairly well settled that on the uncorroborated testimony of the approver, it would be risky to base the conviction, particularly in respect of serious charge of murder. Once the evidence of the approver is found to be not reliable, the worth of his evidence is lost and such evidence, even by seeking corroboration, cannot be made the foundation of a conviction.

23. The above said ratio has been reaffirmed and reiterated by the Hon'ble Supreme Court in *Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh*, ; *Ramprasad Vs. State of Maharashtra*, and in *Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra*,

24. In *Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra*, has further held that for corroborative evidence, the Court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable. Once the evidence of the approver is held to be trustworthy, it must be shown that the story given by approver so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and not merely a rule of law.

25. Keeping the above principles in mind, it is to be considered if the evidence of the approver PW7 Smt. Sunita Devi, is reliable and whether the same is corroborated in material particulars to assume its trueness first and then to

consider the other circumstantial evidence against the accused persons.

26. A bare perusal of the statement Ex.PW6/F made by the approver PW7 before the learned Chief Judicial Magistrate and her evidence in Court while appearing as PW7 shows that her confession which preceded the pardon as a result of which she became an approver is wholly exculpatory and she did not implicate herself in any way in the murderous assault on the deceased. She has only tried to implicate A-1 and A-2.

27. It has been held by the Hon"ble Apex Court in Joga Gola Vs. State of Gujarat, that where the confession made by the approver is self exculpatory and the approver do not implicate himself, no reliance can be placed on the evidence of the approver.

28. In the present case as well, no reliance can be placed on the evidence of the approver which is self exculpatory and this Court need not look for corroboration of the evidence of PW7. Even otherwise, the evidence of PW7 is full of infirmities.

29. The statement Ex.PW6/F on the basis of which pardon was granted to PW7 and she was made an approver, does not appear to have been voluntarily made. The same appears to have been obtained by PW4 with the assistance of the police.

30. As observed above, PW7 was arrested in the case as an accused on 14-6-1993 and was admitted to bail on 30-6-1993. During such period of detention in police/judicial custody she was being subjected to interrogation. Nothing could be elicited from her. It is in the evidence of PW4 that PW7 after having been admitted to bail was brought by him to Shimla where she lived with him for about two years and that during such period PW7 was being summoned for interrogation after every two/three days by the investigation officer. PW7 has also admitted that after her release on bail she was living under the supervision of PW4.

31. The application Ex.PW/6A was made by PW7 to the Chief Judicial Magistrate expressing her intention to make a complete and true disclosure of facts and praying for pardon on 24-9-1993, that is, about three months after her release on bail and while she was living under the supervision, of PW4 at Shimla. It cannot be believed that PW7, who did not disclose anything during her interrogation while in custody, would have voluntarily come forward to make a statement like Ex. PW6/F. Such statement appears to be a procured one. PW7 has admitted that PW4 was present in the Court when her statement Ex.PW6/F was recorded.

32. If the evidence of PW7 (the approver) is discarded from consideration, there is no evidence worth the name to show that the deceased had died an unnatural death or to connect the accused with the commission of the offence charged against them.

33. PW 13 Ishwar Dass, who was present at the time when the dead body was

being carried for cremation as also at the time of cremation, during the course of cross-examination has admitted as under :--

"It is correct that number of persons are collected there. It is correct that it was a hot season. Pradhan, who is an accused person, asked some persons including the relations of the deceased as to what should be done. PW Sunita was specifically asked as to whether they should wait for her husband and Hans Raj sons of the deceased before Subo Devi is cremated and he also suggested that if her relations so like they can wait for the sons of the deceased. None of them expressed any suspicion. All the villagers present there wanted that she may be cremated as they apprehended the decomposition of the body to set it and in that case it would emit bad smell."

34. PW5 Smt. Om Piari is the daughter of the deceased. She claims to be present at the time of taking of the dead body for cremation. Her father-in-law. Khemdi Ram, and mother-in-law, Smt. Dano Devi, were also present at such time. No objection appears to have been raised by her parents-in-law to the cremation of the dead body. She has admitted that it was Summer season and it was very hot in those days and that all the persons present there had insisted that if the dead body was not cremated early it may lead to decomposition and emit foul smell due to summer season.

35. Admittedly, A-6 (Jai Kishan) is the real brother of the deceased. According to PW5, he was having a great affection for the deceased. Therefore, it cannot be believed that having noticed injuries on the person of the deceased, he would have agreed to cremation of the dead body without reporting the matter to the police in order to screen A-1 and A-2 of the offence of having committed the murder of his real sister.

36. PW3 Purshottam Singh was also present at the time when dead body was taken away for cremation. He has deposed that the dead body of the deceased was prepared and made ready for cremation by the ladies who had gathered in the house of the deceased. No foul play was suspected in the death of the deceased and all had participated in the cremation.

37. To the similar effect is the statement of PW2 Nehru Ram. This witness has further gone to state that PW5 Om Piari, the daughter of the deceased, was present when bath was given to the dead body for the purpose of readying it for cremation. She did not suspected any foul play nor had raised any objection to the cremation of the dead body.

38. On the basis of evidence coming on record, the prosecution has miserably failed to bring home the offences against any of the six accused. Therefore, the conviction and sentence of A-1 cannot be sustained and the acquittal of A-2 to A-6 cannot be interfered with.

39. As a result, Criminal Appeal No. 72 of 2001 is allowed. The conviction and sentence of A-1, Banwari Lal, as recorded by the learned trial Judge are set aside

and A-1 is acquitted of the offences under Sections 302 and 201, Indian Penal Code. Criminal Appeal No. 378 of 2001 preferred by the State is dismissed and the acquittal of A-2 to A-6 as recorded by the learned trial Judge, is affirmed.

40. A-1, Banwari Lal, who is presently lodged in Jail undergoing sentence imposed upon him by the learned trial Judge, shall be set at liberty forthwith if not required in any other case. The bail bonds of A-2 to A-6 shall stand cancelled and discharged. Case property may be dealt with as per orders/ directions of the learned trial Judge.