
(2022) 12 UK CK 0048

In the Uttarakhand High Court

Case No : Criminal Appeal No. 289, 335, 336, 343, 344 Of 2012, Criminal Jail Appeal No. 95 Of 2020

Kanchan Verma & Others

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision : 13-12-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 302, 394, 412
Arms Act, 1959 — Section 25
Code Of Criminal Procedure, 1973 — Section 313, 437A
Evidence Act, 1872 — Section 25, 26, 27

Citation : (2022) 12 UK CK 0048

Hon'ble Judges : Sanjaya Kumar Mishra, J;Alok Kumar Verma, J

Bench : Division Bench

Advocate : Ramji Shrivastava, J.S. Virk, Sandeep Adhikari, Arvind Vashistha, Pooran Singh Rawat

Final Decision : Allowed

Judgement

Alok Kumar Verma, J

1. These five Criminal Appeals and the Jail Appeal No. 95 of 2020 have arisen from a common judgment dated 11.09.2012, passed by the learned 1st Additional Sessions Judge, Rishikesh, District Dehradun. These Appeals are connected appeals, therefore, these Appeals are being decided by this common judgment. Criminal Appeal No. 289 of 2012 will be treated as a leading case.

2. In short, the prosecution's case is that Kanchan Verma, the appellant-accused, lodged a First Information Report that on 04.02.2008 at around 7.30 p.m., he was going to his house from his shop 'Verma Jewelers' along with his friend and artisan Proveer (deceased) on a motorcycle. They went to the house of Parvej Ansari (PW1). After talking to him (Parvej Ansari) for ten minutes, he was going to his house with his artisan Proveer. Proveer was sitting behind on the motorcycle. When they reached Ramnagar Ashram near Veerbhadra Road, a red

colored motorcycle, Hero Honda CD 100, came from behind and asked him to stop. He (Kanchan Verma) accelerated his motorcycle. The person sitting behind on that motorcycle fired, which hit Proveer. He (Kanchan Verma) stopped his motorcycle. The person sitting on that motorcycle opened the dikki of his motorcycle and took out a bag from it, which contained gold jewellery and cash. They took his mobile phone, Nokia No. 9411729942. After that, both the miscreants fled towards the barrage on their motorcycle. He (Kanchan Verma) ran to Gali No. 10 and told the people present there about the incident. Proveer was taken to the hospital in Uma Shankar's (PW3) vehicle, where he was declared brought dead.

3. The said FIR (Ext. Ka-7) was registered at 20.35 hrs. on 04.02.2008 against the unknown persons under Section 302 of the Indian Penal Code, 1860 (in short, "IPC") and Section 394 IPC.

4. The inquest proceedings and the post-mortem examination of the dead body of the deceased-Proveer were conducted on 05.02.2008. A bullet was recovered from the dead body of the deceased at the time of the post-mortem examination.

5. During the investigation, Kanchan Verma's mobile phone was put on surveillance. Then, it was known that his mobile phone was being used by one Netrapal. Netrapal (PW5) informed that the said phone was being used by his son Sanjay. According to Sanjay (PW6), the said mobile phone was given to him by his friend Sudhir, the present appellant, for Rs. 500/-, but, later he returned that mobile phone to Sudhir. On 06.03.2008, the appellants-Sudhir, Rupesh Tyagi and Amit Sharma were arrested by the police. At that time, the appellant Sudhir was searched. During the search, a mobile phone of Kanchan Verma and two five hundred rupees notes were recovered from him. He confessed that the said note belonged to Kanchan Verma. The confessional statement of the appellants-Sudhir and Rupesh Tyagi led to the recovery of a tamancha from the appellant-Rupesh Tyagi, in which a hollow cartridge was stuck and a tamancha was recovered from the appellant- Sudhir. These tamanchas were recovered from the bushes at the instance of these appellants. The recovered tamancha from the appellant-Rupesh Tyagi was sent to the Forensic Science Laboratory for ballistics examinations. One bullet was found in the dead body during the post-mortem examination. The said bullet was also sent to the Forensic Science Laboratory. However, the said bullet was not examined. During the investigation, the appellant- Amit Sharma told that Kanchan Verma was involved in this conspiracy. The District Magistrate, Dehradun had given sanction under Section 25 of the Arms Act, 1959. After completion of the investigation, the Investigating Officer filed the charge-sheet. The case was committed to the Court of Session.

6. Charges under Section 394 IPC read with Section 120B IPC were framed against all the appellants – accused persons. Additional charge under Section 302 IPC read with Section 34 IPC, Section 412 IPC and Section 25 Arms Act against the appellant – Sudhir, additional charge under Section 302 IPC and Section 25 Arms Act against the appellant- Rupesh Tyagi, additional charge

under Section 302 IPC read with Section 120B IPC against the appellant-Amit Sharma and additional charge under Section 302 IPC read with Section 34 IPC against the appellant-Kanchan Verma were framed. The appellants – accused persons pleaded not guilty and claimed to be tried.

7. The prosecution, in order to establish the charges, examined fifteen witnesses.

8. Statements of the appellants were recorded under Section 313 of the Code of Criminal Procedure, 1973. They denied all the incriminating evidence, produced by the prosecution against them.

9. The appellant – accused Kanchan Verma examined two witnesses, namely, Sanjay Tyagi (DW1) and Deen Dayal Verma (DW2) in his defence evidence. Remaining appellants – accused persons did not adduce any defence evidence.

10. Learned Trial Court heard the arguments, appreciated the evidence and passed the judgment by which all the appellants – accused persons have been acquitted of the charge under Section 394 IPC read with Section 120B IPC and the appellant – accused Sudhir has been acquitted of the charge under Section 412 IPC. However, the appellant – accused Sudhir has been convicted and sentenced to undergo imprisonment for life along with a fine of Rs.5,000/- for the offence punishable under Section 302 IPC read with Section 34 IPC, and, in default of payment of fine, he has been directed to undergo further additional imprisonment for a period of four months; he has been further convicted and sentenced to undergo imprisonment for a period of three years along with a fine of Rs.3,000/- for the offence punishable under Section 25 of the Arms Act, and, in default of payment of fine, he has been directed to undergo further additional imprisonment for a period of two months. The appellant – accused Rupesh Tyagi has been convicted and sentenced to undergo imprisonment for life along with a fine of Rs.5,000/- for the offence punishable under Section 302 IPC, and, in default of payment of fine, he has been directed to undergo further additional imprisonment for a period of four months; he has been further convicted for the offence punishable under Section 25 Arms Act and he has been sentenced to undergo imprisonment for a period of three years along with a fine of Rs.3,000/-, and, in default of payment of fine, he has been directed to undergo additional imprisonment for a period of two months. The appellant – accused Amit Sharma has been convicted for the offence punishable under Section 302 IPC read with Section 120B IPC and has been sentenced to undergo imprisonment for life along with a fine of Rs.5,000/-, and, in default of payment of fine, he has been directed to undergo further imprisonment for a period of four months. The appellant – accused Kanchan Verma has been convicted for the offence punishable under Section 302 IPC read with Section 34 IPC and has been sentenced to undergo imprisonment for life along with a fine of Rs.5,000/-, and, in default of payment of fine, he has been directed to undergo additional imprisonment for a period of four months. All the sentences have been directed to run concurrently.

11. Originally, five appeals were preferred, three by Rupesh Tyagi, Sudhir and

Kanchan Verma for the offence punishable under Section 302 IPC read with Section 34 IPC and two appeals were preferred against the conviction of Rupesh Tyagi and Sudhir under Section 25 of the Arms Act. The appellant-Amit Sharma did not prefer an appeal. He preferred an appeal in the year 2020. All the five Criminal Appeals except the Jail Appeal No. 95 of 2020 came before the Co-ordinate Bench of this Court, and, as per the judgment dated 22.09.2017, all the appeals were dismissed. Only, the appellant – Kanchan Verma preferred an appeal to the Hon'ble Supreme Court, which was registered as Criminal Appeal No.922 of 2018, arising out of SLP(Crl.) No.783 of 2018, which was disposed of by the Hon'ble Supreme Court on 20.07.2018, whereby, the Hon'ble Supreme Court, without going into the merits and claims of the parties, set aside the impugned judgment passed by this Court and remanded back the matter for fresh disposal, in accordance with law, with a request to the High Court to dispose of the matter, as expeditiously as possible, without being influenced by any observations made by the Hon'ble Supreme Court in the aforesaid judgment. Thereafter, this matter has been listed before us for final disposal.

12. We have carefully assessed the evidence, adduced by the prosecution.

13. According to the prosecution, on 04.02.2008 at around 7:30 p.m., the appellant – Kanchan Verma was going to his house from his shop along with the deceased on a motorcycle. They went to the house of Parvez Ansari (PW1) and after talking to him for ten minutes, he was going to his house with the deceased, when the incident happened. PW1 Parvez Ansari has stated that he used to give gold to the deceased and the appellant – Kanchan Verma. On 04.02.2008 at around 07:30 p.m., the appellant – Kanchan Verma and the deceased had come to his house because he had to give gold to Kanchan Verma. After talking to him, they both left his house.

14. PW2 Ravi Sangal stated that hearing the appellant – Kanchan Verma's cries, he reached the spot. The injured had said in front of him that he had been shot and goods looted.

15. According to the prosecution witness PW3 Uma Shankar, he had taken the injured to the hospital in his car.

16. PW4 Smt. Kajal is the wife of the deceased. She stated in her examination-in-chief that her husband used to give gold to Kanchan Verma and her husband had to take his money from him, for which he left his house on 04.02.2008 at 04:00 p.m. She further stated that a cheque was given to her after the death of her husband, but, that cheque was also bounced.

17. PW5 Netrapal Singh did not support the prosecution case.

18. PW6 Sanjay has stated that on 28.02.2008, Sudhir (appellant) came to him and a mobile phone was given to him by the appellant – Sudhir for Rs.500/-. After 4-5 days, he returned the said mobile phone to Sudhir.

19. PW7 Constable Shanti Prasad Dimri, PW8 S.S.I. Rakesh Rawat and PW11 Km.

Sweeti Agarwal, Superintendent of Police are the witnesses of arrest and recovery. According to these witnesses, on 06.03.2008, the appellants – Sudhir, Rupesh Tyagi and Amit Sharma were arrested. At that time, the appellant – Sudhir was searched. During the search, a mobile phone (Material Ext.1) of Kanchan Verma was recovered from the possession of the appellant – Sudhir. Two Rs.500/- notes were also recovered from the possession of the appellant – Amit Sharma. They confessed their guilt. The confessional statements of the appellants – Sudhir and Rupesh Tyagi led to the recovery of a tamancha and a hollow cartridge at the instance of the appellant – Rupesh Tyagi and one tamancha was recovered at the instance of the appellant – Sudhir.

20. PW9 Sub-Inspector Shishupal Singh Negi and PW12 Sub-Inspector Nitin Chauhan are the witnesses of arrest of the appellants, and, recovery of the mobile phone and two currency notes of Rs.500/-.

21. PW10 Dr. N.S. Khatri conducted the post-mortem examination at 04:00 p.m. on 05.02.2008. According to him, the cause of death was anti-mortem firearm injury and one bullet was found in the dead body of the deceased during the post-mortem examination.

22. PW13 Sub-Inspector Bhag Singh is the scribe of the Chick Report (Ext. Ka.7).

23. PW14 S.S.I. Laxman Singh and PW15 Sub-Inspector Om Prakash Arya are the Investigating Officer.

24. Mr. Ramji Shrivastava, Advocate, has argued that the appellant – Kanchan Verma was the informant of the present case and according to the prosecution witness Ravi Sangal (PW2), the injured had informed that he had been shot and the goods were looted. Mr. Ramji Shrivastava, Advocate, further submitted that there is no evidence on record regarding any conspiracy.

25. Mr. Arvind Vashistha, learned Senior Advocate, appearing for the appellant – Sudhir and Mr. Sandeep Adhikari, Advocate, appearing for the appellants – Rupesh Tyagi and Amit Sharma submitted that nothing was recovered at the instance of these appellants. The alleged recoveries were planted. There is no independent witness of the said recoveries and the alleged confession is not admissible in evidence. Mr. Arvind Vashistha, learned Senior Advocate further submitted that the appellant – Sudhir has already been acquitted of the charge under Section 412 IPC. Mr. Sandeep Adhikari, Advocate, submitted that the said recovered bullet was not examined by the Forensic Science Laboratory and there are no evidence on record against the appellant – Amit Sharma.

26. On the other hand, Mr. J.S. Virk, learned Deputy Advocate General for the State, has supported the impugned judgment. However, he fairly conceded that due to lack of facility, the examination of the bullet, recovered from the dead body of the deceased, could not be done by the Forensic Science Laboratory.

27. The present case rests on circumstantial evidence. When a case rests on circumstantial evidence, such evidence must satisfy these tests:

(i) The circumstances from which the conclusion of guilt is to be drawn, should be fully established.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, it should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature.

(iv) There must be a chain of evidence to show complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities, the act must have been done by the accused.

28. The principle of circumstantial evidence has been reiterated by the Hon'ble Supreme Court in a plethora of cases. In *C. Chenga Reddy vs. State of A.P.*, (1996) 10 SCC 193, the Hon'ble Supreme Court observed, "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances, must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence." The same principles were reiterated by the Hon'ble Supreme Court in *Trimukh Maroti Kirkan vs. State of Maharashtra*, (2006) 10 SCC 681, *Mohd. Arif alias Ashfaq vs. State (N.C.T. of Delhi)*, (2011) 13 SCC 621, *Sunil Clifford Daniel vs. State of Punjab*, (2012) 11 SCC 205 and a number of other decisions.

29. The circumstances, which are pressed into service to fasten the guilt on the appellants-accused persons are, as follow: -

(i) That the appellants, namely, Sudhir, Rupesh Tyagi and Amit Sharma had confessed their guilt.

(ii) That one tamancha and a hollow cartridge were recovered at the pointing out of the appellant – Rupesh Tyagi.

(iii) That one tamancha was recovered at the instance of the appellant - Sudhir.

(iv) That a bullet was recovered from the dead body of the deceased.

(v) That money was to be paid by the appellant – Kanchan Verma to the deceased, and, subsequently, Rs.40,000/- was paid to the wife of the deceased through cash. The cheques were given to the wife of the deceased by the appellant – Kanchan Verma, but, the cheques bounced. This is the motive.

30. Section 25 of the Indian Evidence Act, 1872, is broadly worded and it excludes from evidence a confession made by the accused to a police officer under any circumstances and a confession made by a person while he was in the custody of the police is also inadmissible under Section 26 of the Indian Evidence

Act, 1872, unless made in the immediate presence of a Magistrate.

31. In invoking the provisions of Section 27 of the Indian Evidence Act, 1872, the Court should be very vigilant to ensure the credibility of the evidence. In the present matter, even after having the opportunity to take independent witness in the said recovery proceedings, no serious effort was made to take independent witness, therefore, the statements of the witnesses of police regarding the said recoveries do not inspire confidence. In *Satpal vs. State of Haryana*, 2018 (2) CCSC 1104 (SC), the Hon'ble Supreme Court has held that any recovery on the basis of confession, under Section 27 of the Indian Evidence Act, 1872, cannot form the basis for conviction.

32. The bullet, which was recovered from the dead body of the deceased at the time of the post-mortem examination, could not be examined by the Forensic Science Laboratory due to lack of facility. Therefore, it is not certain that the said recovered bullet was fired from the tamancha, recovered at the instance of the appellant - Rupesh Tyagi.

33. True, criminal conspiracy is an independent offence and conspiracy is a clandestine activity and it is also true that a conspiracy is hatched in secrecy, but, in the present matter, no reliable and cogent evidence has been produced by the prosecution, which can prove the case of the prosecution that there was a criminal conspiracy between the appellants.

34. Though, motive is an important element in commission of the offence, but, conviction cannot be based on the motive alone. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution.

35. In *Bhagwan Singh and Others vs. State of M.P.*, (2002) 4 SCC 85, the Hon'ble Supreme Court observed that the golden thread which runs through the web of administration of justice in criminal case 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 of his innocence, the view which is favorable to the accused should be adopted.

36. It is also a basic rule of the criminal jurisprudence that suspicion, however, strong cannot take place of proof. In *Sujit Biswas vs. State of Assam*, AIR 2013 SC 3817, the Hon'ble Supreme Court held that suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be true" and "must be true", must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an

accused is condemned as a convict, and the basic and golden rule must be applied.

37. Although, the gunshot injury was found on the dead body of the deceased and the death of the deceased was homicidal, the prosecution has to prove that the death of the deceased was caused by the appellants and in all human probabilities, the act must have been done by the appellants only. Even, grave suspicion cannot take place of proof. There are no positive, cogent and any reliable evidence placed on record against the appellants by the prosecution to prove its case against the appellants.

38. As a result, we accept the case of the appellants. Accordingly, all the five Criminal Appeals and the Jail Appeal are allowed. The impugned judgment of the conviction and the sentence dated 11.09.2012, passed by the learned 1st Additional Sessions Judge, Rishikesh, District Dehradun are set aside. The appellant - Kanchan Verma is acquitted of the offence punishable under Section 302 IPC read with Section 34 IPC. The appellant - Rupesh Tyagi is acquitted of the charge under Section 302 IPC and of the charge under Section 25 Arms Act, 1959. The appellant - Sudhir is acquitted of the charge under Section 302 IPC read with Section 34 IPC and of the charge under Section 25 of the Arms Act, 1959. The appellant - Amit Sharma is acquitted of the charge under Section 302 IPC read with Section 120B IPC.

39. According to the learned counsel for the parties, the appellants – Kanchan Verma, Rupesh Tyagi and Sudhir are on bail. The appellant – Amit Sharma is in judicial custody.

40. Let the appellant – Amit Sharma be set at liberty forthwith, if his presence is not required in any other case.

41. The appellants are directed to make compliance of Section 437A of the Code of Criminal Procedure, 1973, within two weeks' from today by appearing before the court concerned and execute a personal bond and two reliable sureties, each in the like amount, to the satisfaction of the court concerned, which shall be effective for a period of six months.

42. A copy of this judgment be placed in the connected Appeals.

43. Let a copy of this judgment be sent to the court concerned and the Superintendent of Jail concerned for necessary compliance.