

P L D 1986 Lahore 418

Before Riaz Ahmed, J

TARIQ AND OTHERS-Appellants

versus

THE STATE-Respondent

Criminal Appeal No. 473 of 1985, decided on 9th July, 1986.

(a) Evidence Act (I of 1872)-

-S. 133-Penal Code (XLV of 1860) Ss. 302, 148 & 149-Approver Person trying to exculpate himself and having no mens rea cannot be considered as approver.-[Approver].

(b) Evidence Act (I or 1972)-

S. 133-Penal Code (XLV of 1860), Ss. 107 & 201-Criminal Procedure Code (V of 1898), S: 337-'Accomplice'-Meaning An accomplice must be a conscious participator in crime about which he is required to give evidence and must be a guilty associate and partner in a crime, or who in some way or other, whether before, during or after commission of offence, is consciously connected with offence in question alongwith his confederates or who makes admission of fact showing that he had a conscious hand in offence-A witness not concerned with commission of crime, held, could not be treated as an accomplice in crime.-[Accomplice].

Mahadeo v. The King A I R 1925 P C 130 ; Phullu and another v. Emperor A I R 193- P C 242 ; Govinds Baluji Sonar v. Emperor A I R 1936 Lah. 731 ; Narain Ghandra Biswas and others v. Emperor A I R 1936 Nag. 245 ; Nga Pauk v. The King A I R 1936 Cal. 101 ; In re: Addanki Venkadu A I R 1937 Rang. 513, In re: S. A. Sartar Khan and others A I R 1939 Mad. 266; Kr. Shyam Kumar Singh and another v. Emperor A I R 1939 Mad. 283 ; Jogunnath v. Emperor A I R 1-941 Oudh 130 and Emperor v. Percy Henry Burn A I R 1942 Oudh 221 rel.

(c) Penal Code (XLV of 1960)-

Ss. 107, & 201--Criminal Procedure Code (V of 1898), S. 337 Approver -Prosecution witness who had no mens rea, nor had participated in actual commission of offence ; neither planning nor sharing intention with accused nor a member of an unlawful assembly-Such witness, held, could not be an approver but would be considered as an accessory after the fact -[Approver].

Crown v. Ghulam Rasool and others P L D 1950 Lah. 129 ; Jagannath v. Emperor A I R 1942 Oudh 221 and Ghudo and others v. Emperor A I R 1945 Nag. 143 rel.

(d) Penal Code (XLV of 1960)

-- S. 302/148/149-Prosecution case resting upon testimony of approver and corroboration thereof in for n of recovery of wrist watch of deceased and his bicycle-Approver had e.) mens rea, nor he had participated in actual commission of offence with accused - No credence attached to recovery of wrist watch-Hatchet produced by approver not connecting accused with crime-Defence evidence unjustifiably rejected by Trial Court and reasons given for rejecting same were against principles laid down to govern appraisal of evidence-Implication of accused in case appearing to have been cleverly manoeuvred-Accused arrested three days before statement of approver was recorded which cast doubt upon veracity of prosecution case-Statement of approver discrepant and not at all inspiring confidence-Motive for murder of deceased by accused shrouded in mystery-Prosecution miserably failing to establish its case against accused beyond shadow of doubt-Accused acquitted in circumstances.

Ch. Mushtaq Ahmad Anwar for Appellants.

Sadiq Hayat Lodhi for the State.

Dates of hearing : 13th and 15th October, 1985.

JUDGMENT

Tariq son of Dildar, aged 17 years, Khalid son of Muhammad Yaqub, aged 17 years, Dildar, aged 35 years, Maqbool aged 36 years and Munawar aged 26 years sons of Malang Khan. Dildar, Akram, sons of Yaqub. alongwith Shafique son of Dildar Khan, aged 13 years, were tried by the Additional Sessions Judge, Faisalabad, on charges under section 148/30 read with section 149 and under section 201 of the Pakistan Penal Code, for having caused the murder of Muhammad Rafique, aged 23 years, resident of Chak No. 266 R. B., Kurianwala, Faisalabad.

The learned Additional Sessions Judge, vide his judgment dated 29th July, 1985, found Munawar, Akram, Khalid, Shafique and Tariq, appellants guilty on the charge under section 148, P. P. C. and also on the charge.

under section 302, P. P. C. Under section 148, P. P. C. these appellants were sentenced to suffer R. I. for a period of two years each. On the charge under section 302 read with section 149, P. P. C. all these appellants

were sentenced to suffer life imprisonment and to pay a fine of Rs. 5,000 each, or in default to suffer further R. I. for a period of two years each. Each of these appellants were further directed to pay Rs. 5,000 each as compensation under section 544-A, Cr. P. C. On the charge under section 201, P. P. C. these appellants were also sentenced to suffer seven years R. I. each.

Dildar and Maqbool, appellants were convicted on the charge under section 201, P. P. C. only and were sentenced to suffer seven years R. I, each and to pay a fine of Rs. 3,000 each or in default to suffer R. I. for a period of one year each. They were also directed to pay, R . 2,000 each as compensation under section 544-A, Cr. P. C.

2. The deceased Muhammad Rafique was a vendor of sweet and used to sell such sweet on bicycle by visiting village to village. The deceased disappeared on 6-2-1982, and the occurrence is alleged to have taken place and on 11th February, 1982, Siddique P. W. 11, real brother of the deceased, lodged the first information report at the Police Station Chak Jhumra. On 11th February, 1982 at 8.00 a. m. initially police registered a case under the provisions of section 364, P. P. C. On 12th February, 1982, on the discovery of the dead body of the deceased lying in a field, the registration of the case was converted from section 364 to section 302, P. P. C.

It may be stated here, that before lodging the F. I. R. Muhammad Siddique, P. W. had also found the bicycle of the deceased in the area of Chak No. 156 on a road leading to Chak Jhumra, near a canal and, thus, be suspected some foul play.

After the registration of the case under section 364, P. P. C., Abdul Sattar, S.-I. proceeded to the spot, where the bicycle of the deceased was lying. On reaching there he was informed by Abdul Ghani, Lumberdar, that a dead body tied in a cloth was laying in the area of Chak No. 164, R. B. The S. 1. reached the spot, where the dead body was lying. Muhammad Siddique P. W. 11, the complainant identified the dead body of the deceased, S. 1. sent the dead body for post-mortem examination, which was conducted by Dr. Muhammad Ajmal Khan. The said doctor noticed the following injuries :-

(1) An incised wound 8 c. m. x 21 c. m. bone deep which was found cut through and through transversly on the left cheek and ear.

(2) An incised wound 8 c.m. x 2 c.m. bone cut through and through situated anteroposteriorly on front top of head.

(3) An incised wound 8 c. m. x 2 c. m. bone cut through and through obliquely on the back of head.

(4) An incised wound 10 c. m. x2 c. m. bone cut through and through horizontally on the left back part of head.

(5) An incised wound 11 c. m. x 3 c. m. bone deep across the front of neck cutting all the of soft parts and blood vessle underneath including trachea through and through.

(6) An incised wound 7 c. m. x 1 c. m. bone deep a little obliquely on the left from part of neck joining injury No. 5.

3. Thereafter the investigation was entrusted to Raza Saleem, S.-I. On 24th July, 1983, the S. I. received an order of the Deputy Commissioner, passed on the application of Muhammad Boota son of Muhammad lqbal P. W. 5, who vide his said order of the

District Magistrate had been tendered pardon. Accordingly, the S. I. got the statement of Muhammad Boota recorded by Malik Khaliq Dad, a Magistrate at Faisalabad. Boota, thus, became approver and after having got his statement recorded, he also produced a hatchet, which the S. I. took into possession.

4. The investigation was again transferred to Medhi Khan, S. L, before whom Khalid appellant during interrogation disclosed, that he had sold wrist watch of the deceased to one Muhammad Boota son of Allah Bakhsh. Muhammad Boota, the purchaser of the watch was also interrogated and he disclosed, that he had sold this watch to Mushtaq. The wrist watch was produced by Mushtaq and was taken into possession by the S. I., vide recovery memo. The complainant Muhammad Siddiqua, P W. I also identified the watch as belonging to his deceased brother.

5. The prosecution case rests upon the testimony of Muhammad Boota son of Muhammad Iqbal and the corroboration thereof in the form of the recovery of wrist watch of the deceased and his bicycle. On the basis of this evidence, the conviction as aforesaid, was recorded, against which, this appeal has been filed jointly by all the appellants.

6. Before proceeding further in the matter, it will be necessary to scrutinize the statement of approver. The approver before the Magistrate stated, that a year and four months ago at 6-00 p. m. he had gone with meal to the Dera of his father. After delivery of the meal, he proceeded to the Dera of Munawar Khan appellant, which was situated near the Dera of his father. On reaching the Dera of Munawar Khan, he found, that Khalid, Akram, Shafique and Tariq appellants were also sitting there. The approver further stated, that he saw a boy of Faqir caste sitting there, who used to sell 'Ladoo' (sweet) in the villages. According to the approver, when he reached the Dera, the said Faqir boy seller of sweets, requested him to come to his rescue, as already a severe beating had been administered to him by Khalid, Akram, Shafiq and Tariq. The approver asked the appellants to release the boy, but they refused to do so and at once Akram appellant exhorted the others to kill the said boy, whereupon Tariq and Snanque appellants held the deceased from his legs, while Munawar Khan appellant inflicted 'Toka blows on the persons of the deceased. At this time, Akram appellant was holding a hatchet in his hand, while, Khalid appellant was holding a Datter in his hand. According to the approver, after killing the deceased, he alongwith the appellants digged a pitch and buried the deceased. On the other day, he alongwith Munawar, Dildar and Maqool appellants went to the Dera of Munawar and in the night exhumed the dead body and after loading it on a she donkey, threw it at a distance, of 2/3 squares, in state land and the approver thereafter returned to his house. The approver further stated, that on the next morning, he was threatened by Dildar appellant with dire consequence in case he disclosed the crime to any body. Tariq, appellant had brought out Rs. 400, from the pocket of the deceased and the approver was paid Rs. 50 out of the said amount. Khalid appellant removed the wrist watch of the deceased and the bicycle of the deceased was thrown near the bridge of canal in the area of Dheladwala by approver and Dildar.

After 3/4 months of the occurrence, the approver stated, that Munawar appellant and others spread a rumour in the village, that the approver had murdered the deceased and

thus the appellants wanted to murder the approver. To save his life, the approver went to Sialkot and stayed with his maternal uncle for .about two months. On Eid, he returned to the village and stayed there for a year and, then left for Karachi, where his he stayed for .about five months. . The approver further stated; that he had returned to the village ten days before the statement was recorded by the Magistrate. According to the approver, he had disclosed all these facts to his brother Maqbool and, six days before this statement was recorded, he had moved an application -before, the Deputy Commissioner for becoming an approver.

7. The. appellants, when examined under section 342, Cr. P. C. denied all the allegations and stated, that they had been involved in this case due to enmity. Khalid, appellant also denied-to have sold the watch after removing it from the dead body of the deceased. Tariq, appellant entered the witness-box and stated, that, he had been involved on account of long standing enmity of his, uncle Dildar and Maqbool, with one Sultan. Similarly, Dildar; appellant also entered the witness-box and explained further the enmity. He stated, that, Sultan is the husband of the aunt of Boota and enmity exists on account of murder case. He stated, that one Ghulam Muhammad, an uncle of the approver had got the case registered against them under section 307, P. P. C Sultan had appeared as witness against Maqbdol, Munawar and his brother in a murder case. It was further, stated, that a private complaint was also filed, against Sultan. Abdul Ghafoor, a real brother of the appellants hid gal a case registered under section 324, P. P. C. against ; the foresaid Sultan. ,and Ghulam Muhammad, an uncle of -Boota, the approver . In the said case. Sultan was convicted and sentenced to imprisonment for a period of four months. He further stated, that on 22nd of December, 1968, Sultan and his party men committed murderous assault, in which 'bildar appellant and his brother were injured and one of their party men was murdered as a result of which, Sultan was sentence to death, but was acquitted by the High Court.

Maqbool, Munawar Khan, Akram and Shafique appellants stated, that they had nothing to do with the murder of the deeeased. Dildar, appellant also produced Ajmal Khan as defence witness, who stated that he was a .refugee from Hoshiarpur and knew Boota approver. The witness further stated, that Sultan was the maternal uncle of Boota and he was the son of Wazir and the name of his wife was Mst. Hussaina. Msi. Hussaina 9 was the sister of the mother of Boota, whose name is Mst. Sharifan. It was further stated by the defence witness, that the appellants and Sultan are danger drawn with each other for the last 18 years and about 5/6 cases were pending between. the two parties. On behalf of the appellants, the docu mentary evidence in the form of two F. I. Rs. was also brought on the record.

8. After hearing the learned counsel for the parties at length and having gone through the statement of the approver, the crucial question falling for determination is, whether on the basis of his statement can Muhammad Bona be held ac an accomplice. After careful consideration of the case law on the subject, I have come to conclude, that P .W. 5 Muhammad Boota cannot be considered as an approver in as much as, he has tried to exculpate himself. Basic ingredient of mens rea is absent. The approver had casually visited the Dera of the appellant; where he found the deceased sitting, who entreated him to come to his rescue and the approver asked the appellant to release the

boy. According to the appellant, suddenly Akram exhorted the other appellants to kill the boy and thereafter, Tariq, Shafiq held the deceased boy from his legs and Mtina-ar gave Toka blow and at that time, Akram appellant was holding a hatchet, while Khalid appellant had a datter in his hand. The big question is, what is the participation of the approver in the crime. In this context, I would refer to the observations made by Munir in his Law of Evidence (Pakistani Edition), page 1448 defining the word "accomplice" which is reproduced hereunder :-

"An accomplice' means a guilty associate or partner in crime, a person who is believed to have participated in the offence, or who, in some way or other, is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence."

9. The word accomplice has not been defined, but the perusal of sections 107 and 201 of the Pakistan Penal Code and section 337, Cr. P. C. under which the pardon is granted can be taken into consideration. On this question, the judges, lawyer and text-book writers have also used expression "accessory" before fact and "accessory" after the fact. Section 337; Cr. P. C also does not throw any light on the definition of accomplice, but the said provisions of law contains the necessary elements under which pardon is tendered to an accomplice on the condition of making full disclosure of the whole of the circumstance,, within his knowledge relative to the offence and to every other person involved therein, after considering the case law on the subject, consistent view is, that an accomplice must be conscious participator in the crime about which he is, required to give evidence. It, therefore, necessarily means, that an accomplice must be a guilty 'associates and partner in a crime, or who in some way or the other, whether before. during or after the commission of offence is he consciously connected with the offence, in question, or who makes, admission of facts showing that he had a conscious hand in the offence, thus where a witness, who is not concerned with the commission of the crime, cannot be treated as an accomplice in the crime. In other word, an accomplice should be a person, who is consciously connected with the crime alongwith his confederates. Another test is that on account of the necessary mens rea and his participation in the crime can he be tried alongwith the confederates,, actually perpetrating the crime. The test laid down, is whet-her an accomplice could be indicted on account of the presence of means rea.

10. I am further fortified in this view by the ration of following judgments :-.

Mahadeo v. The King A I R 1925 P C 130 ; Phullu and another v. Emperor A I R 1936~P C 242 ; Govinds Balaji Sonar v. Emperor A I R 1936 Lah. 731 ; ,Narain .Ghandra Biswas and others v. Emperor A I R 1.936 Nag. 245 ; Nga Paulc v. The King A I R 1936 Cal. 101 ; In re: Addanki Venkadu A I R 1937 Rang: 513 ; In re: S: A Sattar Khan and others A I R 1939 Mad. 266 ; Kr. Shyam Kumur Singh and another v. Emperor A I R 1939 Mad. 283 ; Jogannath v. Emperor A I R 1941 Oudh 130 and Emperor v. Percy Henry Burn A I R 1.942 Oudh 221.

11. Applying the test, as laid down above, Boota cannot be an approver, because he had no mens rea, nor be had participated in the actual commission of the offence. Besides, that he had not planned, nor shared, the intention with the appellants, he was not a

member of the unlawful assembly. At the most he could be considered guilty under C section 201, P. P. C. which reads as under :-

"Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false."

12. Thus, in my view, the approver Boota should be considered as an accessory after the facts. This view was also followed in a case reported as *Crown v. Ghulam Rasool and others* (P L D 1950 Lah.129) and also in a case reported as *Jagannath v. Emperor* (A I R 1942 Oudh 221) and *Ghudo and others v. Emperor* (A I R 1945 Nag. 143).

13. Considering the case conversely and following the rule of prudence to seek corroboration of the testimony of approver, unfortunately, I do not find any corroborative evidence worth the name, to lend support to the testimony of the approver. As far as the recovery of watch is concerned and the sale thereof by Khalid appellant is concerned, no credence can be attached to it. I am further surprised as to why a hatchet was produced by the approver, which was taken into possession by the appellant. This hatchet has nothing to do so, nor it can connect the appellants with the crime.

The defence evidence was unjustifiably rejected by the learned trial Judge. The reasons to reject the same are against the principles laid down to govern the appraisal of evidence. In my view, the finding of the learned trial Judge, that the appellants have failed to establish the relationship of Boota approver with Sultan is erroneous. Merely because the defence witness could not name the village, where Msr. Hasina, the wife of Sultan was living could not be considered as a valid reason to reject the testimony of the defence witness. Afs. Hasina is a daughter of Hakim Ali. The defence witness could not tell the number of the children of the Hakim Ali; nor he could name of any such child. On this basis as well the learned trial Judge proceeded to disbelieve him. I am afraid, that there are no cogent reason to discard the testimony of the defence witness and also the long standing between Sultan and uncle of the approver with the appellants.

It may be stated here, that appellants Dildar, Maqbool; Munawar are the real brothers, while Tariq and Shafique appellants are real brothers and sons of Dildar. Khalid and Akram, appellants are sons of Dildar. Khalid and Akram, appellants are sons of Yaqub, who is the brother of Dildar. It is thus manifest, that the implications of the appellants in this case was cleverly manoeuvred. Another view of the case is, that Shafique, Khalid and Akram, appellants were arrested on 23rd of April, 1983 i. e. three days before the statement of approver was recorded. This circumstance alone casts doubt upon the veracity of the prosecution case. Similarly, the statement of Boota is discrepant and does not at all inspire confidence. Boota P. W. 5 is also silent as to the role of Khalid and Akram, who were holding Dattar and hatchet respectively.

11. It does not at all stand as to reason, as to how, and under what circumstance, the deceased became subject of the wrath of the appellants. The deceased was a poor

vendor, who used to sell sweets on bicycle roaming village. Obviously, the deceased belonging to Faqir caste could not have any dispute, nor could have annoyed the person like the appellants. Neither there seems any earthly reason nor the prosecution has hinted any, so as to conclude, that the appellants in fact had any motive to kill the deceased.

For the foregoing reasons, I am of the view, that the prosecution has] miserably failed to establish its case against appellants beyond any shadow of doubt. Accordingly, this appeal is allowed. The appellants shall be released forthwith if not required, in any other case.

Appeal allowed.

