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**The State Vs. Balchand**

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**Court** : Rajasthan

**Decided On :** Jul-23-1959

**Reported in** : AIR1960Raj101; 1960CriLJ520

**Judge** : J.S. Ranawat and; Jagat Narayan, JJ.

**Acts** : Evidence Act, 1872 - Sections 24, 25, 114 and 154; Code of Criminal Procedure (CrPC) , 1898 - Sections 162 and 164; Code of Criminal Procedure (CrPC) (Amendment) Act, 1955 - Sections 162; Indian Penal Code (IPC), 1860 - Sections 302 and 304

**Appeal No.** : Criminal Appeal No. 40 of 1958

**Appellant** : The State

**Respondent** : Balchand

**Advocate for Def.** : Braham Deo Parihar, Adv.; for Bal Chand, Adv.

**Advocate for Pet/Ap.** : C.B. Bhargava, Dy. Govt. Adv.; Magh Raj, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**Jagat Narayan, J.**

1. Bal Chand respondent was tried of charges under Sections 302, 326 and 380 I. P. C. for having committed the murder of one Nath Mal in his shop at village Sadri at about 3 p. m. on 19-9-55, for biting of a portion of his wife's nose on the same day inside his own house, and for stealing the dagger Ex. 7 with which the murder was committed from the shop of one Kundan Mal Kharnia on the same day. Bal Chand admitted having killed the deceased at the time and place as alleged by the prosecution, but pleaded that his case was covered by Exception 1 to Section 300 I. P. C. The learned Additional Sessions Judge believed the version of the occurrence put forward by him and convicted him only under Section 304 (part I) I. P. C. and sentenced him to undergo rigorous imprisonment for 5 years. He also convicted him under Section 335 I. P. C. and sentenced him to undergo rigorous imprisonment for one year. He acquitted him of the charges under Sections 302 and 380 I. P. C. The State has filed the present appeal against his acquittal under Section 302 I. P. C.

2. We have heard the learned Deputy Government Advocate and the learned counsel for the respondent and have perused the evidence on record; We are satisfied that the learned Additional Sessions Judge arrived at a perverse finding of fact. This was mainly due to a misunderstanding of the provisions of law.

3. The prosecution case was that about a week before the occurrence the accused heard rumour that his wife was prosecuting an intrigue with Nath Mal deceased. The information was first given to him by Bal Chand son of Manak Chand. The accused made enquiries from various peYsons including his wife and Nath Mal deceased. His wife and Nath Mal both denied that there was any truth in the rumour. On the day of occurrence the suspicion of the accused was confirmed as a result of his enquiries from one Mitha Lal Suthar at about 1 p. m. He immediately went to his house and esked his wife whether she had illicit intimacy with Nath Mal in the Kotri of the latter. She confessed that she had once had sexual intercourse with him.

At this the accused lost his temper and bit off her nose. He then proceeded to take revenge upon Nath Mal. He first went to the shop of Kundan Mal son of Otagi Khatina to fetch a dagger. Kundan Mal was not present at his shop nor was any

one else present there. He picked up a dagger along with a sheath and went to the shop of Nath Mal deceased. Nath Mal was found sitting inside his shop. He caught him by his hair and stabbed him on the chest with a dagger. Nath Mal fell down on the floor of the shop. The accused then inflicted some more injuries on him with the dagger and finally severed his head from his body. He picked up the head and went to the police out-post at Sadri along with the head and the dagger. There he lodged a report Ex. P. 1 at 3.30 p. m. This report was taken down by Nathu Singh, Head Constable, who was incharge of the out-post.

4. The accused admitted having killed the deceased with the dagger. He also admitted that after killing him he severed his head from his body and took the head to the police out-post along with the dagger with which he had killed Mm. But he alleged that he liad seen his wife Smt. Durga having sexual intercourse with Nath Mal in the shop behind an almirah at about 3 p. m. on the day of occurrence and killed the deceased under grave and sudden provocation. He denied having taken the dagger from the shop of Kundan Mal. He alleged that he picked up the dagger from the almirah lying in the shop of Nath Mal.

5. In support of the prosecution case a number of witnesses were examined. It may be mentioned here that on 20-9-55 the accused was produced before Shri Umed Singh Magistrate First Class Bali for recording his statement under Section 164 Cr. P. C. The Magistrate told him that it was not necessary for him to make a statement and that if he made it it could foe used in evidence against him. He asked him to think over and decide whether he really wanted to make a statement and sent him to the judicial lock up. The accused was again produced before the Magistrate on the next day.

He was again interrogated by him and when the Magistrate was satisfied that the accused wanted to make a voluntary confession and was not tinder the influence of any threat or promise he recorded his statement. This statement is Ex. P-11A. It was tendered in evidence. This confession fully supports the prosecution story. The accused admitted that he made this statement but alleged that he did so under the influence of the police. The learned Additional Sessions Judge was under the erroneous impression that this confession could not be treated as

substantive evidence.

He has referred to a decision of their Lordships of the Supreme Court in Kashmira Singh v. State of Madhya Pradesh, AIR 1952 SC 159. The observations made in that case relate to the confession of a co-accused which is admissible in evidence under Section 30 of the Evidence Act. The headnote in the All India Reporter is misleading. The confession of an accused person is substantive evidence and a conviction can be based solely on a confession.

6. We are satisfied that the confession Ex. P-11A was voluntarily made by the accused and that it is substantially true. It is mentioned in the confession that about a week before the occurrence Bal Chand son of Manak Chand told him that his wife had illicit intimacy with another person. Bal Chand was examined as a prosecution witness. He did not support the allegation made in the confession. This was one of the reasons on account of which the learned Additional Sessions Judge did not believe the confession to be true.

We have gone through the statements of the prosecution witnesses and we find that a number of them resiled from the statements made by them during the course of investigation. The Public Prosecutor made a request to the learned Additional Sessions Judge to permit him to cross-examine these witnesses, under Section 154 of the Evidence Act, but this permission was declined under the misapprehension that it was not possible for him to do so under the provisions of the unamended Code of Criminal Procedure.

This impression was erroneous. Section 154 of the Evidence Act has not been amended. It provides that the court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in crass-examination by the adverse party. Ordinarily if it is made to appear to the court that a witness has resiled from the statement made by him during investigation it should permit the cross-examination of such a witness under Section 154. When the trial took place the amended Code had come into force.

Section 162 of the Code has been amended and it is open to the prosecution to confront a witness with his statement made during investigation with the

permission of the court. The learned Additional Sessions Judge was under the erroneous impression that as the case was committed to hiscourt before the amendment of the Code the provision of the amended Section 162 was not applicable.

The provisions of the amended Code came into force with effect from 1-1-56 save as provided under Section 116 of the Code of Criminal Procedure (Amendment) Act, 1955. This section does not contain any saving with regard to the amendment of Section 162 Cr. P. C.

As the request for cross-examining earlier prosecution witnesses was refused by the learned Additional Sessions Judge no request was made for the cross-examination of Bal Chand who was examined as prosecution witness No. 14. Another reason given by the learned Additional Sessions Judge for not relying on the confession was that some other persons mentioned in it from whom the accused enquired as to whether there was any truth in the rumour that his wife had illicit intimacy with Nath Mal were not examined as prosecution witnesses. If the learned Additional Sessions Judge had any doubt in his mind on the point he should have put a question to the investigating Officer as to why he had not examined these witnesses at the trial.

It is not the duty of the prosecution to produce witnesses about whom it is satisfied that they are not willing to speak the truth. The last reason given by the learned Additional Sessions Judge for not relying on the confession was that it is mentioned in it that no one else was present at Nath Mal's shop at the time of occurrence. The prosecution has examined one Kupa P. W. 1 who stated that he was present at the shop at the time of the murder. So far as the presence of Kupa is concerned there can be no doubt about it as his name was mentioned by the accused himself in the first information report Ex. P. 7 which he lodged at the outpost immediately after the occurrence. We shall presently deal with this report. It appears that under some misapprehension the accused stated in the confession that no one else was present at Nath Mal's shop at the time of the occurrence. The context in which he made his statement is as follows:

'I severed his neck from his body. Then I went with the head and the dagger to the Chowki, I was arrested there. The occurrence took place between 2 and 3 p. m. At that time there was no one at Nath Mal's shop.

It has come in evidence that as soon as the accused started attacking Nath Mal with the dagger Kupa ran away from the shop. It may be that what the accused meant was that when he left the shop of the deceased with his head and the dagger for the police out-post there was no one else at the shop.

7. From the above confession it is clear that the murder of Nath Mal was a deliberate act on the part of the accused. He had been making enquiries about the chastity of his wife and as soon as he was confirmed in his mind that she had committed adultery with Nath Mal he made up his mind to kill him and he brought the dagger from the shop of Kundan Mal Kharnia.

8. That the dagger was brought by the accused from the shop of Kundan Mal is proved by the evidence of Kundan Ma], his wife Smt. Devi and Thania. Kundan Mal stated that he himself made the dagger Ex. 7, which was kept at his shop along with the sheath Ex. S from where it disappeared on the day of occurrence during his absence. On return to his shop he found the dagger missing and made an enquiry from his wife Smt. Devi who told him that she had not seen anyone coming to the shop. She also resiled from the statement made by her during investigation to some extent. She stated in court however that Ex, 7 was the only dagger of its type which her husband had made. Kundan Mal stated in cross-examination that he had made 4 or 5 daggers similar to Ex. 7.

But in re-examination he admitted that he made only one dagger with an aluminium handle like Ex. 7. Thania made sheath Ex. 8 for this dagger. This was found lying outside the shop of Nath Mal by the investigating officer S. H. O. Bhoor Singh. The learned Additional Sessions Judge disbelieved the evidence of these witnesses for the reason that the prosecution failed to prove the identification memo of the dagger and the sheath. It may be mentioned here that the dagger and the sheath were put up for identification before a Magistrate. The identification memo was on the record of the case but the Public Prosecutor did not consider it necessary to examine the Magistrate and to prove the identification memo as he

thought that the evidence of Kundan Mal, Devi and Thania was sufficient On the point.

Both Kundan Mal and Thania stated that they identified the dagger and the sheath at the identification proceeding. If the learned Additional Sessions Judge thought that the production of the identification memo was necessary he should have himself summoned the Magistrate who conducted identification parade and got the identification memo proved. If he did not want to take the trouble of finding out whether identification memo was on the record which had been received from the court of the committing Magistrate he should have asked the Public Prosecutor where the memo was and why he had not proved it. We have no doubt that the dagger Ex. 7 belonged to Kundan Mal and was picked up from his shop by the accused as was stated by him in his confession.

9. Three witnesses Kupa, Himmat Mal and Smt. Indra were examined as eye witnesses of the occurrence. Out of them the presence of Kupa and Himmat Mal is mentioned in the first information report lodged by the accused himself. First information reports are reduced to writing under Section 154 of the Code of Criminal Procedure and are admitted in evidence as they are not statements to a police officer in the course of any investigation which begins after the first information report has been made.

A question however arises whether those first information reports which contain a confession of the accused should be completely ruled out in view of Section 25 of the Indian Evidence Act. In Ramsingh v. the State, 1952 Raj LW 269 a Division Bench of this Court held that where a first information report is made by the accused himself and contains his confession the entire report is not inadmissible in evidence merely because it has been made by the accused; parts of it which can be properly separated from the confessing part can be and should be admitted in evidence as first Information. This ruling was brought to the notice of the learned Additional Sessions Judge and he accepted that parts of the report were admissible in evidence. But he misinterpreted certain observations of the Supreme Court decision in Nisar Ali v. State of U.P., (S) AIR 1957 SC 366 to mean that a first information report cannot be used for any purpose in a criminal case.

In that case two persons Nisar Ali and Qudrat Ullah were tried for murder. The first information report in the case had been lodged by Qudrat Ullah. Both the accused were acquitted by the Sessions Judge. An appeal was filed against the acquittal of Nisar Ali alone. An objection was taken to the admissibility of the report against Nisar Ali. Their Lordships observed as follows:--

'An objection has been taken to the admissibility of this report as it was made by a person who was a co-accused. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence.'

What their Lordships meant was that if Qudrat Ullah had been a witness in the case the first information report could have been used to corroborate him or to contradict him, but as he was a co-accused the report could not be used for any purpose. The observations should be read in the context of the circumstances of that case. The decision in the above Supreme Court case does not affect the decision of this Court in Ram Singh's case, 1952 Raj LW 269. Parts of the first information report which can be properly separated from the confessing part are therefore admissible in evidence as first information. They are as follows:--

'About a week before Mal Singh son of Manak Chand taunted that my wife was having sexual intercourse with other persons. I asked him who had seen her in this act. Bal Chand gave the names of Nabia, Mithia and Pukh Raj and told me that she had intimacy with Nath Mal for about a month. I asked my wife Durga and Nath Mal but they denied this. Yesterday night in the presence of Motilal and Mohan Lal I asked Nath Mal whether he had intimacy with my wife and he denied this.

At this I told him that I was making enquiries about it and if I find this to be true he would not be safe. At this Mohan Lal told me that I should not rely on rumours and should have patience. Today at 11 a.m. Pukhia came to my house and I told him that there was rumour that my wife had illicit intimacy with Nath Mal and if I find

that there is truth in it I shall not leave Nath Mal alive. After this at about 1 p.m. I went to the river and asked Nabia whether my wife had intimacy with Nath Mal. He told me that Mithia had seen my wife committing adultery with Nath Mal at the latter's shop. Mithia had spread rumour about it. At this I met Mithia at about 2 p.m. and he told me that about a month before he saw my wife in Nath Mal's Kotri at about 9 p.m. with Nath Mal. After that I went to my house and closed the door from inside. I then went to the upper storey with my wife and asked her if she had intimacy with Nath Mal. She admitted her fault and! said that only once Nath Mal had sexual intercourse with her in his Kotri at night. This enraged me and I felled my wife.....

I went to the shop of Kundan Mal son of Otaji Kharnia as I remembered that a dagger was lying there which was for sale. From my house I went to Kundan Mal's shop. By chance there was no one at his shop at that time. The shop was open and the dagger which I am producing was lying there along with the sheath..... then wentto Nath Mal's shop. At that time Nath Mal was talking to Kupa at some distance. Himmat Mal son of Bhoora Lal, Khiya Mali and Natia were standing. .....I caught hold of the head in one hand and the dagger in another and left for police chowki. At some distance I met Sagar Mal and Kundan Mal ..... I1 threw the sheath at the shop.....Nath Mal deceased had illicit intimacy with my wife.....'.

The accused stated that he did not make this report. He was asked--

Q. Shri Nathu Singh P. W. 18 has stated that what information you gave was recorded by him and you signed it. That report is Ex. P. 1. He sent it with constable Shambhusingh to Desuri. What have you to say

The accused replied--

A. I did not file any report to the police. The police asked me to sign and so I put my signatures, The reply of the accused implies that he admitted that report Ex. P. 1 was written by Nathu Singh, Head Constable when he went there with the head of the deceased. Considering the detailed facts that this report contains it is wholly improbable that the police concocted the story contained in it. We have no doubt that the accused himseH gave the information which is contained in report Ex. P.

1. The finding of the learned Additional Sessions Judge that this report was concocted by the police is in our opinion wholly perverse.

10. Parts of the first information report substantiate the confession made by the accused. It is mentioned specifically in the first information report that Kupa and Himmat Mal were present near the place of occurrence when the accused attacked the deceased. We see no reason to disbelieve the statements of Kupa and Himmat Mal.

The learned Additional Sessions Judge disbelieved the statements of these two witnesses on the ground that there were certain discrepancies between their statements made in court and the statements made by them during investigation. These discrepancies are of a very minor nature and are not regarding material facts. The witnesses were examined before the learned Additional Sessions Judge more than a year after the occurrence and the discrepancies may be mostly due to lapse of memory on the part of these witnesses.

11. Coming now to the statement of Smt. Durga who was examined as a prosecution witness but who supported the defence version of the occurrence we find that what she stated in the Sessions Court was not stated by her before the Magistrate who recorded her statement under Section 164 Cr. P.C. She admitted having made the statement before Magistrate but alleged that she made false statement under the influence of the police. The story which was put forward by Smt. Durga in the Sessions Court is however wholly improbable.

She has alleged that she had gone to the shop of Nath Mal to enquire if he had ghee and asked him to show it to her. He told her that it was lying in two or three tins which were behind an almirah. When she went to see the ghee Nath Mal followed her and started having sexual intercourse with her. The shop of Nath Ma] is situated along a street in the bazar and the evidence of Smt. Durga herself shows that there is the shop of Ealchand son of Manak Chand opposite his shop.

No one in his senses would try to commit adultery in the shop at 3 p.m. Further if there had been any truth in the story put forward by Smt. Durga the accused would have given it in the first information report and in his confession.

It was quite natural for Smt. Durga who is the wife of the accused to make a false statement in his favour. We may mention here that the accused: himself stated in the first information report that Kupa was talking with Nath Mal when he went there on the day of occurrence. Nath Mal could not have tried to molest Smt. Durga in Kupa's presence,

12. We therefore find that the version of the occurrence put forward on behalf of the accused is not true. What really happened was that the accused heard rumours a week before the occurrence that his wife had illicit intimacy with Nath Mal, he investigated into these rumours and was confirmed in his mind on the day of occurrence that the rumour was true and went to his wife and confronted her with the information which he had received. She made a confession about her unchastity and this enraged the accused.

He bit off her nose then and there and then proceeded to take revenge upon Nath Mal. He took a dagger from the shop of Kundan Mal and went to the shop of Nath Mal who was talking to Kupa. He attacked him with the dagger and killed him and after severing his head from his body he went to the police out-post with the head and the dagger and made a report Ex. P. 1 there. The accused had undoubtedly received some provocation.

But this provocation cannot be regarded as grave and sudden enough to extenuate the offence under section 302 to one under section 304 I.P.C. We accordingly set aside the acquittal of Balia alias Bal Chand son of Shankar resident of Sadri under Section 302 I.P.C. and convict him of the offence of murder. The conviction and sentence passed under Section 304 I.P.C. are set asido. Taking the circumstances of the case into consideration the sentence of imprisonment for life will meet the ends of justice.

13. We accordingly allow the appeal and sentence Balia alias Bal Chand respondent to imprisonment for life under Section 302 I.P.C.

14. Learned counsel for the respondent prayed that the case be certified as a fit one for appeal to the Supreme Court. We do not see sufficient reason to do so and reject the prayer.

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