

State of Rajasthan Vs. Teka Alias Tekchand and ors.

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Court : Rajasthan

Decided On : Aug-08-1977

Reported in : 1977WLN473

Judge : A.P. Sen and; M.L. Shrimal, JJ.

Appeal No. : D.B. Criminal Jail appeal Nos. 1 and 91 of 1977

Appellant : State of Rajasthan

Respondent : Teka Alias Tekchand and ors.

Disposition : Appeal allowed

Judgement :

M.L. Shrimal, J.

1. The accused-appellant Teka alias Tek Chand has been convicted and sentenced to death by the learned Additional Sessions Judge No. 2, Alwar by his judgment dated January 28, 1977. The learned Additional Sessions Judge has made this reference for confirmation of the sentence of death and, accused-appellant Teka alias Tek Chand has filed an appeal from Jail against his conviction and sentence. As both these cases arise out of the same judgment, they are being disposed of by common, judgment

2. Tersely speaking shorn of unnecessary details the prosecution story as disclosed at the trial is that Umar Khan (since deceased) and accused Jai Dayal (acquitted by the trial Court) were at daggers down Jai Dayal wanted Umar Khan to be removed from the surface of earth and as such he approached Bholaram PW 2 (Approver) to suggest some way out. There after Jai Dayal, Teka and Bholaram hatched a criminal conspiracy to commit the murder of Umar Khan. On the next day all the three met at the well of Jai Dayal where from a distance Jai Dayal pointed out Umar Khan and asked Teka to observe him properly so that mistake may not be committed. In pursuance of this conspiracy on April 7, 1975 the appellant went to the house of Umar Khan and inquired about the whereabouts of the inmates of the house. PW 5 Mst. Safedi informed him that Subhan had gone out and Umar Khan was on the well whereupon the appellant went at the well of Umar Khan and found him sleeping Umar Khan was awakened and the appellant expressed his desire to purchase a she buffalo. Umar Khan asked him to select the buffalo, but ultimately the accused-appellant disapproved them and asked the deceased to help him in purchasing a buffalo from some one else. Umar Khan showed his inability as he was shortly going to Tijara for some urgent work. It is alleged that in the evening at 5:30 p.m. the accused-appellant in the company of Umar Khan came to his field. He enjoyed the hospitality of Umar Khan, took his meals there Umar Khan (deceased) Teka (accused-appellant) and PW 3 Mohammed Hanif (brother of the deceased) and PW 4 Ishak Mohammed (son of the deceased) all the four slept on the well on the fateful night. It is alleged that PW 3 Mohammed Hanif and PW 4 Ishak Mohammed slept on the same charpai. At the dead of the night PW 3 Mohammed Hanif and PW 4 Ishak Mohammed hearing the noise of a gun shot woke up Both of them saw the accused-appellant firing another shot at Umar Khan as a result of which he met instantaneous death. The accused-appellant took to his heels. A first information report of this occurrence Ex. P/4 was lodged at the Police Station Kishangarh by PW 3 Mohammed Hanif at 5:30 am. on April 8, 1975. The distance between the Police Station and the place of occurrence is ten miles. PW 14 Mahendra Singh after registering the case came at the scene of occurrence. He prepared the site plan Ex. P/3 and inquest report Ex. P/34 the pillow, Baniyan and hair of the deceased were also seized. Autopsy on the dead body of Umar Khan was performed by PW

1 Dr. G.B. Khandelwal on April 8, 1975. On opening the body he noticed pellets in the wound which were collected, sealed labeled and sent to the investigating officer with a forwarding letter Ex. P/2 on the same day. The post mortem report is Ex. P/1. The police during the course of investigation arrested accused Bholaram and Jai Dayal on April 14, 1975 and submitted a challan against them in the Court of Munsif Magistrate, Kishangarh on June 13, 1975. The learned Magistrate committed both of them to take their trial under Section 302 and Section 302 read with Section 120B I.P.C. On June 23, 1975 Bholaram was tendered a pardon and was made approver in the case. Accused-appellant Teka was arrested on August 12, 1975 vide arrest memo Ex. P/6. At the time of his arrest he was armed with a gun. During the course of investigation he expressed his desire to get the pistol recovered. The information was reduced into writing and the same has been marked as Ex. P/44. In consequence of the information given by the accused-appellant Teka a country made 12 bore pistol was recovered from the place of its concealment. The recovery memo is Ex. P/45. The police after completing the investigation submitted a challan against the accused-appellant.

3. The accused-appellant along with Jai Dayal (acquitted by the trial Court) was ultimately tried by the learned Additional Sessions Judge No. 2, Alwar. The accused appellant pleaded not guilty to the charge. The prosecution examined 15 witnesses in support of their case, out of whom PW 1 is Dr. G.B. Khandelwal, who performed autopsy on the dead body of Umar Khan. PW 2 Bholaram is the approver. PW 3 Mohammed Hanif is the brother of the deceased and PW 4 Ishak Mohammed is the son of the deceased. Both of them were examined as eye witnesses of the occurrence. PW 12 Mumtaz Ahmed Siddiqi was examined to prove the identification of the accused in the identification parade held under his supervision. The identification memo is Ex. P/7 PW 14 Mahendra Singh and PW 15 Padam Singh have been examined to prove the different steps taken during the course of investigation of the case. The accused-appellant denied his complicity in the crime. He did not examine any witness in his defence.

4. The learned Additional Sessions judge held that the evidence produced in the case against accused Jai Dayal was unbelievable. He further held that the prosecution has failed to prove that there was any dispute between Umar Khan

and Jai Dayal regarding land. He extended benefit of doubt to accused Jai Dayal and acquitted him of the charges levelled against him. Placing reliance on the statement of PW 2 Bholaram (approver), the two eye witnesses PW 3 Mohammed Hanif and PW 4 Ishak Mohammed and other circumstantial evidence, the learned Additional Sessions Judge found the prosecution case against the accused-appellant proved beyond any shadow of doubt. He convicted the accused-appellant under Section 302 I.P.C. and sentenced him to death. He also found him guilty of the offence punishable under Section 302 read with Section 120B I.P.C. but he did not award any separate sentence under this court.

5. The learned Additional Sessions judge has made this reference for confirmation of the death sentence and the accused has challenged the conviction and sentence by filing an appeal from the jail.

6. It cannot be disputed and has not rightly been disputed that the shots were fired at Umar Khan on the date and time alleged by the prosecution as a result of which he met instantaneous death. Dr. G.B. Khandelwal PW 1 performed the post mortem examination on the dead body of Umar Khan. He found three lacerated wounds. In the opinion of the doctor, injury No. 1 was a wound of entry and injury No. 2 was the result of external injury No. 1. As regards the third injury the doctor noticed that it was a lacerated wound 2.5 c.m. x 2 c.m. perforating the whole thickness of the skull and brain. The margins were inverted and the surrounding area was blackened. Brain matter was coming of the wound. The temporal and occipital bones were fractured. The death of Umar Khan was, in the opinion of the doctor PW 1 G.B. Khandelwal, due to fatal injury on the vital part i.e. the brain. He further opined that the deceased must have taken his food approximately before four hours of his death.

7. The learned Counsel appearing on behalf of the accused-appellant have urged that there are certain outstanding features of the case, which, according to them, are sufficient to throw doubt on the entire prosecution case. The arguments advanced by them will be dealt with shortly ad seriatim. The learned Public Prosecutor appearing on behalf of the State has supported the prosecution case.

8. The learned Counsel for the accused-appellant urged that criminal conspiracy has been defined in Section 120A, Indian Penal Code. By the term of definition itself there ought to be, two or more persons, who must be parties to such a crime, one person alone can never be held guilty for criminal conspiracy for the simple reason that one person cannot conspire with himself, In the case in hand two persons namely, Jai Dayal and the appellant were charged with having committed the offence under Section 120B I.P.C. and as Jai Dayal has been acquitted of the charge, the remaining accused-appellant cannot be held guilty of the offence of criminal conspiracy. No doubt the argument is attractive, but it suffers from an inherent weakness. We do not feel persuaded to agree with the learned Counsel for the appellant. In the case in hand, apart from the two persons namely, Jai Dayal and the accused-appellant placed on trial, there was the approver PW 2 Bholaram, who implicated himself squarely with the other accused as having been privy to the conspiracy. In such circumstances, the acquittal of Jai Dayal under Section 302 read with Section 120B I.P.C. cannot have the effect of vitiating the conviction of the appellant under Section 302 read with Section 120B I.P.C. and his conviction cannot be set aside only on the ground that Jai Dayal was acquitted by the trial court. It is not the requirement of law that more than ONE person should be convicted of the offence of criminal conspiracy Reference may be made to *Bimbadhar Pradhan v. State of Orissa* : [1966]1SCR450 .

9. Keeping the above principle in view, we now proceed to evaluate the evidence regarding criminal conspiracy against the accused appellant. The trial Court has held that the evidence of conspiracy against the acquitted accused Jai Dayal was unreliable. Admittedly there is no other evidence regarding conspiracy against the accused appellant except the statement of PW 2 Bholaram, who is an approver in the case. PW 2 Bholaram has been disbelieved by the trial Court regarding Jai Dayal and the State has not come up in appeal against his acquittal. If his statement regarding Jai Dayal has been disbelieved how ought we know that it is true against the appellant, Besides that, his statement suffers from contradiction and inherent improbabilities. This witness in his statement recorded before the Magistrate stated that Teka agreed to commit the murder of Umar Khan for an amount of Rs. 1,000/- whereas in his statement before the trial Court he stated that the deal was settled for Rs. 10,000/- The learned trial Court while discussing

the evidence against the appellant though notices this contradiction, but brushed it aside simply by saying that the contradiction might have appeared due to mistake in writing. The story as disclosed at the trial regarding criminal conspiracy of committing the murder of Umar Khan appears to be. incredible on the very face of the record. It does not stand to reason why a man should risk his own life by committing the murder without obtaining a single pie in advance and even after committing the murder be satisfied by not getting anything for the ghastly murder committed by him. According to PW 2 Bholaram, Teka appellant is an out law and a dacoit by profession. It has come in the statement of this witness that after committing the murder of Umar Khan Teka went to Jai Dayal and demanded the stipulated amount, where upon Jai Dayal put him off by saying that he will pay him on 29th or 30th. If Teka is an out law, a dacoit and a murderer as the 'witness wants us to believe then he would not have left Jai Dayal so easily without obtaining the price of the murder alleged to have been committed by him.

10. It is pertinent to note that PW 2 Bholaram is an approver. An approver has always been regarded as an infamous witness, who on his own showing has participated in a crime and later to save his own skin, turned against his former associated and agreed to give the evidence against him in the hope that he will be pardoned for the offence committed by him. Whether the evidence of the approver be accepted or not is required to be determined by applying the usual test such as the probability of the truth of what he has deposed to. He is required to fulfil the double test. His evidence must show that he is a reliable witness. That is a test which is common to all witnesses. If this test is satisfied the second test, which still remains to be satisfied is that the approver's evidence must receive sufficient corroborating. The statements of PW 2 Bholaram cannot be said to have been corroborated in material particulars by the statement of PW 8 Rampal Simply because Bholaram PW 2 and the accused were seen together, it cannot be said that they were going from place to place in pursuance of the conspiracy. The statement of Bholaram has not been corroborated in material particulars regarding conspiracy and as such the evidence of conspiracy cannot be relied upon. We hold that PW 2 Bholaram is neither a witness of truth nor his statement stands corroborated in immaterial particulars and as such the conviction of the accused-appellant under Section 302 read with Section 120B I.P.C. cannot be maintained.

11. Now we will deal with the conviction of the accused appellant under Section 302 I.P.C. The learned Counsel for the appellant urged that the first information report is a highly suspicious document. Though it is alleged to have been despatched on April 8, 1975, but it appears from the endorsement on the first information report that the Magistrate received it on April 14, 1975. The court of the Magistrate was nearby, which makes it difficult to understand why the report could be received by the learned Magistrate after six days. He further urged that the first information report must have been recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements, embellishments and set up a distorted version of the occurrence. In spite of sufficient opportunity and persistent query by the Court learned Public Prosecutor appearing on behalf of the State failed to give any explanation for the extraordinary delay in the receipt of the report by the learned Magistrate. In this case the suspicion regarding the first information report hardens into a definite possibility when one finds that the detailed description of the accused alleged to have given by the author of the first information report has been disowned by him PW 3 Mohammed Hanif stated as under:

eS Fkkus es fjiks ZV djus lqcg x;k Fkk A eSus fjiks ZV fy[kkrs oDr gqfy;k vtuch dk lgh crk;k iqfyl esjs lkFk igqap x;h Fkh A iqfyl us ekSds ij yk'k dk iapk;rukek cuk;k A iapk;rukes es eSus gqfy;k ugh crk;k A c;ku b0,DIOMh02 es Vsdk dk gqfy;k eSus ugh fy[kk;k A^

PW 2 Bholaram in his statement before the trial Court admitted that he was summoned by the police on April 9, 1975 who interrogated him regarding Teka. A categorical statement by PW 3 Mohammed Hanif that he did not give description of physical features of Teka accused to the police while giving the first information report when read with the statement of PW 2 Bholaram is suggestive of the fact the police might have noted down the physical features of the accused after knowing it from Bholaram and Jai Dayal and the first information report Ex. P/4 was recorded much later than the date & hour mentioned in the first information report. The above mentioned circumstances do cast a reflection on the fairness of the investigation.

12. Then we have got the statements of the two eye witnesses PW 3 Mohammed Hanif and PW4 Ishak Mohammed. The main point which arises for decision is whether we can safely act. upon the evidence of PW 3 Mohammed Hanif and PW 4 Ishak Mohammed Both these witnesses are close relatives of the deceased. PW 3 stated that at the relevant time when. the accused and Umar Khan came on the field he was cutting the crop. On inquiring his brother told that the stranger wanted to purchase the she buffalo. At that time the stranger told him that the did not approve the buffalo of Umar Khan and that he would purchase the buffalo owned by a Sharnarhi of Sallam village. The witness goes on to stale that after some time he left the place and went to his house for taking his meals and when he returned back his nephew, the stranger and Umar Khan all were fast asleep. He slept by the side of his nephew on the same cot. In between the period he had gone for taking his meals, the meals were provided to the stranger by his nephew. There appears to be considerable force in the contention of the learned Counsel for the accused-appellant that this witness had no reason to be on the scene of occurrence at the relevant time. A perusal of the first information report Ex. P/4 shows that the accused appellant had seen.the buffalo of Umar Khan in the morning and as such there was no reason for him to come to the well of Umar Khan again in the evening. It appears unusual that though the accused did not intend to purchase the Buffalo of Umar Khan and yet he should come to his well at 5:30 in the evening and the latter should provide him meals and allow him to sleep with him Admittedly PW 3 Mohammed Hanif did not take his meals at the well. He had gone to take his meals to his house and there was no reason for him to have his own wife all alone in the house and come to the well late in the night and sleep on the cot on which his nephew was sleeping. It will be pertinent to note that it was hot summer night and sleeping of two persons on one cot can by no means be said to be convenient or comfortable.

13. PW 4 Ishak Mohammed has more or less made a similar statement as made by PW 3 Mohammed Hanif Being the son of the deceased he is an interested witness. He also stated that 15 or 16 persons were mixed with the accused at the test identification parade. This portion of the statement is apparently false, because in the test identification memo Ex. P/7 it has been specifically mentioned that six persons were mixed with the accused at the time of test identification

parade. His statement also suffers from the infirmities appearing in the statement of PW 3 Mohammed Hanif. Besides that, he was a young boy and it would be prudent to seek corroborating from other evidence. In *Bhikha Valu and Ors. v. The State of Gujarat* : 1971 CriLJ927 their Lordships of the Supreme Court while considering the evidence of Khangar, who was a boy of 14 years observed as under:

The High Court adopted the correct approach in finding that though there were no infirmities of Khangar's evidence as it stood but in view of the fact that he was a young boy it would be prudent to seek corroboration of Khangar's evidence.

The observations made by their Lordships of the Supreme Court in the above noted case squarely applies to the facts of this case, because PW 4 Ishak Mohammed was admittedly a boy of nearly 15 years on the date of the occurrence.

14. It is surprising that though two shots were fired at that quiet hour of the night according to both the eye witnesses, yet not a single person from the vicinity turned up. Besides that, the conduct in the past of the eye witnesses creates some doubt regarding their being the eye witnesses of the occurrence. PW 3 Mohammed Hanif and PW 4 Ishak Mohammed are Meo by caste belonging to a valiant race. At the time of the occurrence, according to this witness, his nephew Ishak Mohammed was also on the scene of occurrence, but none of them tried to pursue the accused. Curiously enough they are silent as to what they did with the deceased after the accused had left the scene of occurrence. This inaction on their part suggest that they had not witnessed the occurrence.

15. Now we will consider the material omissions and contradictions and inherent improbabilities in the statements of the two eye witnesses. PW 3 Mohammed Hanif under cross-examination first stated that he and his brother Umar Khan took the evening meals together, then took a some result and in the same breath stated that he took his meals in his house and Umar Khan took his meals on the well. The witness goes on to state that his nephew took the meals for his brother on the well and thereafter did not return, whereas PW 4 Ishak Mohammed stated that after providing meals to his father he went to his house for taking his meals and

returned after an hour. Thus there are contradictions in the statements of these two eye witnesses regarding the time of their reaching on the well. A perusal of the identification memo Ex. P/7 reveals that six other persons. were made to stand with the accused at the time of the identification, whereas the witness in his statement before the Court had the audacity to state that there were 15 to 16 persons mixed with the accused at the time of the identification parade. This purposeful improvement in the statement has been made with an intention to make the test identification full proof. PW 3 Mohammed Hanif was confronted with the first information report Ex. P/4 regarding non-mentioning of the fact of enmity between the deceased and Jai Dayal Instead of explaining the contradiction the witness had the audacity to state that he stated this fact at the time of making the first information report, but he did not know why it was not mentioned therein. Thus the statement of this witness suffers from defects of vital character not free from doubt and it has not been proved by cogent and reliable evidence that the witness had any reason to be on the scene of occurrence. At the most he can be termed to be simply a chance witness. Though the chance witness is not necessarily a false witness, it is proverbially rash to rely upon such evidence. Reference may be made to *Ismail Ahmed Prepaid v. Momin Bili and Ors.* AIR 1941 PC 11.

16. Besides that, it will be pertinent to note that according to the prosecution it was a preplanned murder, as such the criminal before committing the offence was expected to take precaution of not being detected. A perusal of the statements of the two eye witnesses and other evidence on record shows that the accused had an opportunity of committing the murder of Umar Khan early in the morning on April 7, 1975 when he went on the well under the pretext of seeing the buffalo and found Umar Khan sleeping. It has also come in the evidence of PW 4 that after providing meals to Umar Khan and the accused PW 4 Ishak Mohammed left for his house for taking meals and returned nearly after an hour. Thus the accused had another opportunity of committing the murder without being hampered and detected by any person. It is highly unnatural that though he had two opportunities to commit the murder of Umar Khan when he was all alone with the deceased, he would choose a time to commit the murder when two of the close relations of the deceased were just sleeping beside the deceased and would put his own life in peril to be caught on the spot and ultimately be hanged by the court.

17. Both the witnesses have stated that they raised hue and cry but it is surprising that not a single person residing in the locality has been examined in this case. We can understand people not intervening the accused armed with a pistol, but we are not prepared to accept that at that quiet hour of the night even after hearing the shot of a fire none should dare to come on the scene of the occurrence. PW 5 Mohammed Hanif stated that just after the occurrence he raised hue and cry but none came on the spot at that time. He further stated that before giving the first information report he went to village Ballabh and informed Motu and Mevaram that, his brother was shot dead. Neither Motu nor Mevaram have been examined by the prosecution in support of their case, If these two witnesses would have been examined, they would have thrown light on the point whether these two witnesses PW 3 Mohammed Hanif and PW 4 Ishak Mohammed were on the scene of occurrence or not at the time when Umar Khan was shot dead. It has not been explained why these two witnesses could not be examined. 'With Holding of these important witnesses from the Court is another infirmity in the prosecution case. It is the bounden duty of the prosecution to examine a material witness particularly when no allegation has been made that if produced he would not speak the truth. Not only does an adverse inference arise against the prosecution case from his non-production as witness in view of illustration (g) of Section 114 of the Indian Evidence Act. but. the circumstances of his being withheld from the court casts a serious reflection on the fairness of the trial. Reference may be made to *Habeeb Mohammed v. State of Hyderabad* : [1954]1SCR475 . In the present case it appears that the case of the prosecution case was that Jai Dayal and Umar Khan were at daggers drawn. Jai Dayal wanted to take a revenge and get Umar Khan removed from the surface of the earth. For that purpose he utilised the services of Teka with the help of PW 2 Bholaram. The trial Court found this story regarding Jai Dayal being a party to the criminal conspiracy to commit the murder of Umar Khan as false and acquitted him. The State of Rajasthan has not come up in appeal against the acquittal of Jai Dayal. As such we will proceed on the assumption that the prosecution allegation regarding forming of criminal conspiracy by accused Jai Dayal to commit the murder of Umar Khan was false. The counsel for the accused-appellant is correct in raising the principal contention in the fire front that the bedrock of the prosecution case has failed, as the pivot of

the prosecution case has not been accepted and a new case cannot be made to imperil the defence. The entire prosecution case was that accused-appellant entered into a criminal conspiracy with Jai Dayal and Bholaram to commit the murder of Umar Khan at the instance of Jai Dayal. When it has been found by the trial court that the story regarding participation of Jai Dayal in the criminal conspiracy to be false the whole prosecution case changes colours and has become unworthy of beliefs

18. The evidence regarding extra judicial confession relied upon by the prosecution in support of the statements of the eye witnesses is of not much consequence in this case. It is alleged to have been made before PW 2 Bholaram, who cannot be held to be a witness of truth for the reasons already mentioned above. PW 2 Bholaram in his police statement Ex D/1 stated that for the first time on April 9, 1975 he came to know that Umar Khan was murdered. If the accused Teka would have made an extra judicial confession before him on April 8, 1975, he would not have made such statement. Due to this apparent contradiction in the two statements made by this witness, it cannot be safely held that the accused-appellant made an extra judicial confession before this witness.

19. The recovery of the pistol Article at the instance of the accused Teka is not of much consequence, because neither the pistol nor the pellets were sent to the ballistic expert for examination and there is nothing on the record to connect the pistol with the crime.

20. As the presence of the witnesses PW 3 Mohammed Hanif and PW 4 Ishak Mohammed on the scene of occurrence at the time of the murder has been held to be doubtful by us for the reasons mentioned above the evidence regarding test identification as well as identification of the accused-appellant by these 2 witnesses in the Court does not take further the prosecution case. The conviction of the appellant is mainly based on the evidence of PW 3 Mohammed Hanif and PW 4 Ishak Mohammed. The consideration of the evidence of these witnesses by the learned Additional Sessions Judge in our opinion, was faulty and erroneous. Having due regard to the circumstances that the prosecution has miserably failed to prove that the accused appellant entered into a criminal conspiracy with Jai

Dayal to commit the murder of Umar Khan, the prosecution story as a whole has become doubtful. This really is a case, in our opinion, where the trial court has substantially disbelieved the substratum of the prosecution case and has reconstructed a story against the appellant which is not permissible.

21. In the result, the impugned judgment of the learned Additional Sessions Judge No. 2, Alwar convicting the appellant of the offences defined to earlier as well as the sentence imposed upon him are set aside. The accused-appellant is acquitted of all the charges levelled against him. He is in jail and he shall be released forthwith if not required in any other case.

22. The appeal is allowed and the reference is rejected.

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