

Bhagi and anr. Vs. the Crown

Bhagi and anr. Vs. the Crown

SooperKanoon Citation : sooperkanoon.com/888771

Court : Himachal Pradesh

Decided On : Apr-11-1949

Reported in : AIR1950HP35

Judge : Bannerji, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 164; ;[Evidence Act, 1872](#) - Section 30; ;Indian Penal Code (IPC) - Sections 302 and 457

Appeal No. : Criminal Appeal Nos. 2 and 3 of 1948

Appellant : Bhagi and anr.

Respondent : The Crown

Advocate for Def. : L.N. Sethi, Public Prosecutor

Advocate for Pet/Ap. : Ved Vyas (in No. 2) and; Des Raj (in Nos. 3), Advs.

Judgement :

1. Three accused persons. Bhagi, Bholar and Moti were tried before the Sessions Judge, Chamba, the first two for offences under Sections 302 and 457, Penal Code and the third for offences under Sections 460 and 411, Penal Code. Bhagi and Bholar were found guilty under Section 460, Penal Code and sentenced to transportation for life. Moti was convicted under Section 411, Penal Code and sentenced to two years' rigorous imprisonment.

2. The date of the judgment of the trial Judge is 11-6-2004. S. Moti will have served out his sentence by now. He is not an appellant in this Court. Bhagi and Bholar have appealed separately against their conviction and sentence. But as the facts are the same and their conviction and sentence are under the same section of the Penal Code and the same point of law is involved, the judgment will govern both the appeals.

3. The prosecution story is that one Dehnju of the village Taretha, some ten miles from Chamba, was found dead in his house on 3rd Har, 2003. In the afternoon of the 2nd Har, 2003, all the three accused persons were seen walking from Chamba towards Taretha. They were also seen returning to Chamba at dawn on 3rd Har 2003. Some ornaments were recovered from the persons of the accused. Other ornaments were recovered from those with whom they were pawned by the accused Moti. These ornaments were proved to have belonged to the deceased Dehnju.

4. The defence was a total denial of the commission of the crime.

5. Both the learned advocates for the two appellants argued that the judgment of the learned trial Judge was based on the statement of the prosecution witness, Mt. Jini (mistress of the accused Bhagi) under Section 164, Criminal P. C. They also laid stress on the inadmissibility of the confession of the co-accused Moti which was used against the appellants.

6. It will be better to dispose of these two points of law, before the facts are discussed.

7. The first point is, if the statements of Mt. Jini, P. W. 36, under Section 164, Criminal P. C. can be used as substantive piece of evidence?

8. The learned trial Judge observes in his judgment as follows :

'The corroboration of Moti accused's statement under Section 164, Criminal P. C. is on material points by the witness, Bheki, P. W. 22 Further corroboration of Moti accused's statement under Section 164, Criminal P. C. occurs when he mentions the names of the prosecution witnesses he met on the way when he was

going along with the two other accused towards Sila Gharat. Moti accused also states in his statement under Section 164, Criminal P. C. about the earthen pot, Ex. P-1, containing ghee In my opinion there is ample corroboration of the statement of Moti accused under Section 164, Criminal P. C., although retracted afterwards. Bhagi accused in his statement under Section 164, Criminal P. C. admits that he was present on the spot and he was with Bholar when Bholar accused struck the deceased with Danda, Ex. P-3.'

9. Just a little before this the learned Judge held that the statements under Section 164, Criminal P. C., of Mt. Jini, Moti accused, Bholar and Bhagi accused, may be taken into consideration although they retracted from their previous statements under 8. 164, Criminal P. C. He further held, that the statement of Mt. Jini under Section 164, Criminal P. C., is a relevant piece of evidence.'

10. In my opinion, the learned Judge was quite wrong to rely upon the statements under 164, Criminal P. C., as substantive pieces of evidence. The statement of a witness like Mt. Jini, P. W. 36, made under Section 164, Criminal P. C., can be used only to discredit the evidence given by her in Court and not for any other purposes. Such a statement cannot be treated as a substantive piece of evidence of the facts stated. It is an improper use of such statements if they are used as substantive pieces of evidence. A statement under Section 164, Criminal P. C., can be used to cross-examine the person who made it and the result may be to show that the evidence of the witness is false. But that does not establish what the witness stated out of the Court under Section 164, Criminal P. C., is true. (See Brij Bhushan Singh v. Emperor, A. I. R. (33) 1946 P. C. 38: (47 Cr. L. J. 336) and also Mamand v. Emperor, A. I. R. (33) 1946 P. C. 45: (47 Cr. L. J. 844).

11. I, therefore, agree with the learned Advocates that such statements under Section 164, Criminal P. C., relied upon by the learned Judge, should not be taken into consideration.

12. The next point is whether the retracted confession of Moti can be used against his accomplices, the other two accused, Bhagi and Bholar

13. The learned Judge was not correct in using the confession of Moti against two other accused, Bhagi and Bholar. Section 30, Evidence Act provides:

'When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.'

14. Therefore, this section requires that the persons must be tried jointly for the same offence, which expression means an offence coming under the same legal definition, that is, under the same section of the law.

15. In the trial the accused Moti was charged under Sections 460 and 411, Penal Code and he was convicted under Section 411, Penal Code only. Bhagi and Bholar were charged under Sections 302 and 457, Penal Code. The offence under Section 460, Penal Code with which Moti was charged cannot be sustained because this offence relates to the constructive liability of the persons engaged in committing the offence under Section 459, Penal Code. When the two other accused, Bhagi and Bholar, were not charged under Section 460, Penal Code, Moti alone could not be charged under Section 460 and on the face of it, this charge was wrong and illegal and he was ultimately acquitted of that charge and convicted under Section 411, Penal Code.

16. I, therefore, find that all the three accused were not charged under Section 460, Penal Code. Moreover, Moti was never charged under Section 302 or Section 467, Penal Code. Therefore, Section 80, Evidence Act, does not apply and the confession of Moti even if it were not retracted, could not be used against the two other accused, Bhagi and Bholar, under Section 30, Evidence Act. I, therefore, hold that neither the statements under Section 164, Criminal P. C., nor the confession of Moti could be taken into consideration to determine the guilt of the appellants.

17. The question, therefore, is whether the prosecution on the evidence on record, has been able to prove, beyond all reasonable doubt, the guilt of the appellants

[His Lordship then discussed the evidence and came to the following conclusion

18. In conclusion I hold that Bhagi was rightly convicted under Section 460, Penal Code, and sentenced to transportation for life. So far as Bholar is concerned, I think he was under the complete control of Bhagi. The evidence of recovery of ornaments is not so strong in his case as in the case of Bhagi and Moti. Though I hold he was rightly convicted under Section 460, Penal Code, I think that the ends of justice will be met if he gets lesser sentence, that of seven years' rigorous imprisonment and fine of Sections 100 (one hundred) or in default, a further rigorous imprisonment for six months. I shall advise the Chief Commissioner accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com