

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARHCRA-D-1728-DB-2015
Reserved on : 10.01.2019
Date of decision : 16.01.2019

Sushil Kumar and another

... Appellants

Versus

State of Punjab

... Respondent

***CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA
HON'BLE MR.JUSTICE HARINDER SINGH SIDHU***Present: Mr.D.S.Pheruman, Advocate
for appellant No.1.Mr.Naresh Gopal Sharma, Advocate
for appellant No.2.

Mr.S.P.S. Tinna, Addl.A.G. Punjab.

RAJIV SHARMA, J.

This appeal is instituted against the judgment and order dated 02.12.2015 rendered by the learned Additional Sessions Judge, Pathankot, passed in Sessions Case No.74 dated 03.10.2001 whereby the appellants were charged with and tried for offences punishable under Sections 302, 404, 201 of the Indian Penal Code (in short "IPC"). They were convicted and sentenced as under:-

Convict Sushil Kumar

Section 302/34 IPC	Rigorous imprisonment for life, which shall continue for remainder of convict's natural life. He is also sentenced to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for 2 years.
Section 404 IPC	3 years rigorous imprisonment with fine of Rs.10,000/- and in default of fine to undergo rigorous imprisonment for 3 months.
Section 201 IPC	5 years rigorous imprisonment with fine of Rs.10,000/- and in default of fine to undergo rigorous imprisonment for 6 months.

Convict Parmodh Kumar

Section 302/34 IPC	Rigorous imprisonment for life, which shall continue for remainder of convict's natural life. He is also sentenced to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for 2 years.
Section 404 IPC	3 years rigorous imprisonment with fine of Rs.10,000/- and in default of fine to undergo rigorous imprisonment for 3 months.
Section 201 IPC	5 years rigorous imprisonment with fine of Rs.10,000/- and in default of fine to undergo rigorous imprisonment for 6 months.

2. The case of the prosecution in a nutshell is that Ankur Kumar, complainant had deposed that he and his deceased father Balwant Singh were doing the finance business under the name and style of M/s Shiv Shakti Finance Company, Pathankot. On 20.03.2001, they closed the office in the evening. Deceased Balwant Singh asked Ankur Kumar complainant to go home and he would come later on. The complainant came back to home. He received telephone call from his father that he would come late. The complainant further testified that his father did not come back. In the morning they received telephone call that their car was parked near Alishan Hotel. The complainant accompanied by his maternal uncle, Vijay Kumar and 2/3 persons reached there. They found that their car was parked on the back side of hotel. They noticed blood on rear seat and mats of the car. They also noticed sand and grass on the car seat as well. The car stereo was missing. The complainant along with his maternal uncle Vijay Kumar, Rajesh Kumar and Om Dutt went towards Dalhousie. When they reached Simbal Adda, someone told them about a dead body lying in trench at some distance. They rushed to that place. The complainant found dead body of his father. It was only having vest, underwear and socks. He noticed that the rings including one ring bearing inscription 'BS', chain, Titan watch, gold bracelet, mobile phone were missing. Thereafter the formal FIR Ex.PG/2 was registered on the basis of the complainant's statement Ex.PG. The

police party reached at the spot. The blood stained earth was lifted. After preparing parcel, it was taken into possession vide memo Ex.PB. A pant and shirt were found at a distance of 15 karams from dead body. Photographs were clicked on the spot. The body was sent for post-mortem examination. The post-mortem was conducted by PW-3 Dr.Surjit Singh. The cause of death was due to haemorrhage and shock due to injuries on the vital organs, i.e. heart, lung, intestine, kidney. These injuries were sufficient to cause death in the ordinary course of nature. The injuries were ante mortem in nature. The probable time elapsed between injuries and death was immediate and between death and post-mortem was 24 to 48 hours. The post-mortem report is Ex.PF. The matter was investigated and challan was put up after completing all the codal formalities.

3. Prosecution examined a number of witnesses. The statement of appellants were also recorded under Section 313 Cr.P.C. They have denied the case of the prosecution. The appellants were convicted and sentenced as noticed hereinabove. Hence the appeal.

4. Learned counsel appearing for the appellants have vehemently argued that the prosecution has failed to prove the case against the appellants.

5. Learned counsel appearing on behalf of the State has supported the judgment and order dated 02.12.2015.

6. We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

7. PW-2 HC Kapal Dev testified that on 21.03.2001 he was posted at Police Station Dhar Kalan. He joined the police party. Blood stained earth was lifted from near the dead body vide memo Ex.PB. A pant and shirt was

found at a distance of 15 karams from the dead body. These were taken into possession vide Ex.PC. A car bearing registration No.PB-10-AF-7732 was parked behind Alishan Hotel, Pathankot. It was taken into possession vide memo Ex.PD.

8. PW-4 Swaran Kanta is widow of deceased Balwant Singh. According to her, Balwant Singh used to wear two rings, one inscribed with BS and the other having a design, a gold *karra* (bracelet), a gold chain, a wrist watch of Titan make having black dial. These were missing when she saw dead body of her husband. In cross-examination she admitted that she did not visit the spot from where the car and dead body were recovered. She saw the dead body at her house. She came to know about the recovery of dead body on the evening of Wednesday. She waited for him the whole night when he did not turn up. The police came to their house but she could not narrate the time. When her husband did not return, her health deteriorated at about 3.00/4.00 A.M. She was admitted in hospital.

9. PW-5 Charanjit Verma is a material witness. He testified that he owned PCO on Mission Road, Pathankot. On 20.03.2001 at about 07.45 P.M. he was present in his PCO. One boy and girl came to the PCO. They were in the age group of 22/23 years. However they were not the persons who were present in the Court as accused. After making a telephone call, they went away in Ambassador car. The girl was of normal size having a round face. He did not know the number of car. He could not identify the person who was standing outside the PCO.

10. PW-6 Sukhwinder Singh deposed that he run Karyana shop. There were two PCOs near his shop. On 20.03.2001 at about 8.15/8.30 P.M. he was present in his shop. One girl of the age of 18/20 years, height of 5' 4"

of whitish colour having hair cut along with one boy of the height of 5' 4" of the age of 22/23 years wearing shirt came to his shop. They purchased a cold drink from him. They went away in a Zen car. On 29.06.2001 he came to Gurdaspur. He saw accused Shilpa in a bus. She got down from the bus at village Anandpur Bharoli. In his cross-examination, he deposed that he was called by SHO Gajinder Singh. His statement was recorded. He was shown to the accused but he could not tell the date. He was not told on 29.06.2001 that the accused had been arrested. He further deposed that one hundred people visit his shop daily.

11. PW-7 Ankur Kumar is son of the deceased Balwant Singh. He testified that on 20.03.2001 at about 8.30/8.45 P.M. they closed their office. His father asked him to go home and he would follow him soon. He went to his home. He received telephonic message from his father that he will come late. But he did not come during the night. In the morning they received a telephone that their car was found near Alishan Hotel. He and his maternal uncle Vijay Kumar went there. The car was parked on the back side of the hotel. They noticed the blood on the rear seat and the mats of the car. Grass and sand were also found on the seat. He along with Vijay Kumar, Rajesh Kumar and Om Dutt went towards Dalhousie. When they reached at Simble Adda, somebody told them that a dead body was lying in a *khad* (rivulet) at some distance. They went there. He found the dead body to be of his father. He noticed injuries on the dead body. It was having only vest, underwear and socks. He left Rajesh Kumar and Om Dutt near the dead body. He reported the matter to the police. His statement was recorded vide Ex.PG. He identified gold rings Ex.P1 & P2, gold chain Ex.P3, gold ring Ex.P4, wrist watch Ex.P5, mobile phone Ex.P6 and stereo Ex.P7. In cross-

examination, he deposed that the phone of his father came on 20.03.2001 at about 10.00/10.30 P.M. that he would come late. He did not receive the phone regarding recovery of dead body on 21.03.2001 himself. He did not inform the police from the place where the car was parked. He remained there for about half an hour. He did not remember whether the car was locked or not. He saw the seats of the car from the window pane. They went towards Dalhousie in search of his father. The place, where the dead body of his father was found, was at a distance of 15/20 kilometers from the place where the car was parked. Police reached the spot. He went to his house at about 7.00 /8.00 P.M. Accused were arrested after three months of the incident.

12. PW-11 SI Sukhjinder Singh deposed that he recorded the statement of Ankur Ex.PG. Thereafter formal FIR Ex.PG/2 was registered. He along with Ankur reached the place where the dead body was lying. He took into possession clothes of the deceased vide memo Ex.PC. Blood stained earth was also removed. It was taken into possession vide memo Ex.PB. Photographs of the dead body were also taken. Dog squad was called. The car was recovered. He recorded the supplementary statement of Swaran Kanta. Blood stained mat was also recovered from the car. The dead body was sent for post-mortem examination.

13. PW-12 HC Ranjit Singh deposed that Constable Kewal Krishan has deposited four parcels with him.

14. PW-13 Constable Kewal Krishan deposed that he deposited the parcels with MHC Ranjit Singh.

15. PW-15 Satwinder Singh Chahal, Additional District & Sessions Judge, Amritsar, deposed that on 11.07.2001 he was posted as Additional

Chief Judicial Magistrate at Gurdaspur. Police had brought one lady Smt. Shilpa. He identified her in the Court. Her statement Ex.PW15/A was recorded by him in his handwriting. He signed the same. In his cross-examination, he deposed that accused Shilpa had expressed her desire to become approver. He had not given any note after recording her statement. After 11.07.2001 she never appeared before him. He did not disclose any conditions as contained under Section 306, 307 Cr.PC before recording her statement.

16. PW-16 Sudhir Mahajan is a material witness. He deposed that about 3 / 2³/₄ years back, he was present at his house at Pathankot. At about 07.45/8.00 AM, Shilpa @ Shalu accused present in Court came to him. She was alone at that time. She told him that she along with her companions had committed some murder. She sought his help in producing her before the police. She had named Sushil Kumar and Parmodh as her companions. She told him that they had committed the murder of Balwant Singh. She further told him that she had illicit relations with Sushil Kumar and whatever she earned she would retain 10% of that and remaining 90% was to be paid to Sushil Kumar. On 19.03.2001 they had called Balwant Singh in the shop of Sushil Kumar. Sushil Kumar and Balwant Singh started talking with each other. Sushil Kumar told Balwant Singh that there was a girl at Dunera and she could be arranged for him. He agreed to the proposal. On the next day, Shilpa told him that she along with Sushil Kumar, Parmodh and Balwant Singh went to Dunera. Parmodh and Sushil Kumar took liquor. There was no girl. It was just an excuse. They started back from Dunera. When they were about 2 kms. ahead of Dunera, Sushil gave a signal to Shilpa and she was to put rope around the neck of Balwant Singh. However she was seen

by Balwant Singh. He immediately stopped the car and came down. Shilpa further told that Parmodh immediately gave 3 /4 knife blows to Balwant Singh. The knife fell down. Shilpa picked up and handed over the same to Sushil Kumar. Sushil also gave 4 / 5 knife blows to Balwant Singh. All of them inflicted stone blows to Balwant Singh. He died. The dead body was put in the car. Shilpa sat on the rear seat and removed all the articles of Balwant Singh. The dead body was thrown in the *khad* (rivulet) after removing his pant. They parked the car behind the Alishan Hotel. In his cross-examination he deposed that he knew Balwant Singh for the last 5/7 years. His shop was adjacent to his shop. He came to know about the murder of Balwant Singh in March, 2001. He had no business dealings with Balwant Singh. He had never gone to the house of Shilpa. As he was President of BJP, she knew him. It was only on 06.07.2001 when Shilpa came to him and he took her to the police for recording her statement. Prior to that, Shilpa never met him. Ankur was known to him for the last 4/5 years. One Mangal Dass Bhatia had business dealings with him. He did not tell the police any fact regarding the murder of Mangal Dass Bhatia having come to his knowledge except taking money from Mangal Dass Bhatia. No accused had made any confession to him regarding murder of Mangal Dass Bhatia. Volunteered on 06.07.2001 when Shilpa had made confession before him she had also narrated the murder of Mangal Dass Bhatia. He did not remember the date when his statement was recorded in the Court. In the statement, he did not disclose anything in the Court regarding any confession made by accused Shilpa about the murder of Mangal Dass Bhatia. He also met Ankur son of Balwant Singh in the market after the confession made to him. He produced Shilpa before Inspector Gajinder

Singh in CIA staff because he was investigating the case.

17. PW-18 SI Sukhdev Raj Joshi testified that on 29.06.2001 he was posted at CIA Staff Pathankot. He accompanied SI Gajinder Singh. On 06.07.2001 he was present at CIA Staff Pathankot. Abdul Kavi and Sudhir Mahajan produced Shilpa accused present in Court before SI Gajinder Singh. Shilpa was arrested. The houses of other accused Sushil Kumar and Parmodh Kumar were raided by the police. Sushil Kumar and Parmodh Kumar were also arrested. Accused Sushil Kumar made a disclosure statement vide Ex.PW18/D in which Sushil Kumar disclosed that he had kept concealed one car stereo, one ring in front of his house wrapped in a glazed paper which he could get recovered. Sushil Kumar led the police party to the disclosed place and got recovered one car stereo and one gold ring. These were taken into possession vide recovery memo Ex.PW18/E. Disclosure statement of accused Parmodh Kumar was also recorded vide Ex.PW18/F. The wrist watch of deceased Balwant Singh was recovered on the basis of disclosure statement. Recovery memos Ex.PW18/E and PW18/G were signed by him and one Ravinder Singh. Disclosure statement of Shilpa was also recorded vide memo Ex.PW18/H in which she disclosed that she had kept concealed one mobile phone mark 'Panasonic' in her house which she could get recovered. Shilpa got recovered the mobile phone vide memo Ex.PW18/J. Another disclosure statement of accused Sushil Kumar was recorded by SI Gajinder Singh vide Ex.PW18/K. He disclosed that he had kept concealed one gold bracelet in his house. The same was got recovered vide recovery memo Ex.PW18/L. Accused Parmodh Kumar disclosed that he had kept concealed clothes in the cantonment area. He could get the same recovered. The disclosure statement is Ex.PW18/N. It

was attested by him and HC Parduman Kumar. The clothes were recovered vide memo Ex.PW18/O. SI Gajinder Singh also recorded the disclosure statement of accused Sushil Kumar vide Ex.PW18/P on 10.07.2001. On the basis of disclosure statement, gold ring and chain were recovered and they were taken into possession vide memo Ex.PW18/Q. In cross-examination, he categorically admitted that Inspector Gajinder Singh did not obtain the signatures of Sudhir Mahajan and Abdul Kavi on the statement of Shilpa. The articles recovered from the accused were not got identified from Ankur in the Police Station. I.O. tried to call some persons from the village but none came. He did not know whether any action was taken against those persons by the I.O. or not. On 06.07.2001 statement of Sushil Kumar was recorded regarding the car stereo. He did not make any disclosure statement regarding other articles. Sushil Kumar was again interrogated. He made disclosure statement Ex.PW18/N on the basis of which car stereo and gold ring were recovered.

18. PW-21 Inspector Gajinder Singh testified that he was posted as Incharge CIA staff Pathankot on 06.07.2001. Shilpa was produced before him by Sudhir Mahajan and Abdul Kavi. She made disclosure statement that she had kept concealed mobile phone in her house. Her statement Ex.PW18/H was recorded. Recovery of mobile phone was effected from her house. She led the police party to the place of occurrence where Balwant Singh was murdered. The site plan was prepared. He got a secret information that accused Sushil Kumar and Parmodh Kumar were sitting in a tea shop. They were apprehended. The disclosure statements were made by the accused on the basis of which recoveries were effected. The clothes were taken into possession. During investigation, it came to his knowledge

that accused Shilpa moved an application before the Court of JMIC, Gurdaspur for becoming approver in this case on 07.07.2001 vide Ex.PW21/F. She was informed that for this purpose that Court was not competent and directed to move the Court of CJM, Gurdaspur. In cross-examination, he deposed that he had recorded the statement of Sukhwinder Singh in the zimni on 20.05.2001. At that time he did not tell him anything about coming of the car or of anything. He had seen the statement of Sukhwinder Singh recorded by the previous I.O. in the case diary on 29.03.2001. There was nothing mentioned about coming of the car and its number. He had recorded his statement on 29.06.2001 at road side near the bus stand. He had called the persons to witness the recoveries but nobody came forward. However he had not stated this fact in the case diary. He was present in the Court of learned Magistrate at Pathankot on 07.07.2001 when the application Ex.PW21/F was presented. He did not know who had brought this application from the judicial lock up on 07.07.2001.

19. PW-22 Shilpa deposed that she knew the accused Sushil Kumar and Parmodh Kumar present in the Court. In year 1999, she was working in private concern. Accused Sushil Kumar came close to her as a friend during that year as shop of the accused was in the way where she was working in a private concern. In the year 2000, accused Sushil Kumar disclosed that he was under debt. He started asking her to contact the people to please them and to indulge in wrong doings. Accused took her to Mount View Hotel, Jassur in the year 2002, again said in the year 2001. He introduced her with some waiters namely Sharma and Satish. Waiters introduced her to Balwant Singh deceased. Balwant Singh took her in the room of the hotel Mount Fort. Balwant Singh after committing sexual intercourse paid her Rs.400/-.

She was again taken to Mount Fort Hotel at Jassur to see Balwant Singh. Balwant Singh committed sexual intercourse with her and paid Rs.500/-. On 19.03.2001 deceased Balwant Singh came at the shop of Sushil Kumar at about 10.00/10.30 AM, again said at 7.00 / 7.30 PM. Deceased Balwant Singh came to the shop of Sushil Kumar on her telephone call given to him as told by accused Sushil Kumar. Sushil Kumar asked Balwant Singh to have liquor but he refused. But he demanded chicken which was brought by some waiter on the order of Sushil Kumar from some hotel. In her presence, Sushil Kumar told to Balwant Singh that there was some beautiful girl at Dunera. They would arrange her for him. She was present at the shop of Sushil Kumar. Parmodh Kumar was working as servant at the shop of Sushil Kumar. Balwant Singh asked that Sushil Kumar may give a telephone call to him on the next day and they will proceed to Dunera. On 20.03.2001 Balwant Singh visited the shop of Sushil Kumar accused and stated that he was going to complete his work. She gave a telephone call to Balwant Singh on the directions of accused Sushil Kumar at about 02.30 P.M. At that time mobile of Balwant Singh was out of range. At about 06.30 P.M. she again gave a telephone call to Balwant Singh. Balwant Singh picked up the phone. Meeting point was settled near Gandhotra Hospital Mission Road, Pathankot. Accused Sushil Kumar and Parmodh Kumar purchased liquor from the liquor shop. They consumed the same. Three of them proceeded towards Gandhotra Hospital in an auto rickshaw. She again gave a call to Balwant Singh from nearby telephone booth. Balwant Singh in reply asked them to wait for 5/7 mintues. She purchased one Pepsi Cola from nearby shop and started waiting for Balwant Singh. Balwant Singh reached there within 5/7 minutes. He came in Maruti Zen car. Sushil Kumar

asked deceased Balwant Singh that he will drive the car. Balwant Singh refused. Balwant Singh himself started driving the car. Sushil Kumar was sitting with driver. She and Parmodh Kumar were sitting on the back seat. When they were on way to Dunera, Balwant Singh received a call from his house that someone is ill. Balwant Singh stopped the car and went to nearby STD to make a call to his house. Balwant Singh asked her to remain in the car when she tried to come out of the car. When they reached at Dunera, both the accused came out from the car and started searching for a girl. Both the accused again purchased liquor and consumed the same. Balwant Singh was also with them. Balwant Singh refused to take liquor. Then Sushil Kumar approached her while she was sitting in car. Sushil Kumar asked her as and when Balwant Singh will come inside the car, she would put a rope which was already in the car around the neck of Balwant Singh. After about 10/15 minutes, they started coming back to Pathankot in the same Zen car. Balwant Singh was driving the car. When they reached in the area of village Bhoond, Sushil Kumar gave her a signal to put rope around the neck of Balwant Singh. However, Balwant Singh saw her while she was taking rope from the back seat in the rear view mirror. He immediately came out from the car. Both the accused Sushil Kumar and Parmodh Kumar came out from the car. Both the accused caught hold of Balwant Singh. Parmodh Kumar gave 5/6 blows of a knife on the abdomen of Balwant Singh. Accused Parmodh Kumar was carrying the knife in the pocket of his pant. She came out from the car. The knife fell down on the ground. She picked up the knife from the ground. Balwant Singh snatched the knife from her. He gave the blow towards her but it missed the target. In the meantime, Sushil Kumar snatched the knife from the hand of Balwant Singh. Sushil Kumar again

gave another blow of knife which hit on the person of Balwant Singh. Balwant Singh fell down on the ground. Accused also gave blow with one big stone on the face of Balwant Singh. Balwant Singh was taken inside the car. Parmodh Kumar took off the clothes of deceased. The belongings of the deceased were removed. After going 2 kilometers towards Pathankot, they took out the dead body and threw the same in deep *khud* (rivulet). They parked the car at the back of Alishan Hotel at Pathankot. In her cross-examination she deposed that Sudhir Mahajan accompanied her when she went to CIA staff. She was interrogated at Dhar Kalan. Her signatures were obtained on some papers. She did not know the exact contents of the papers except that FIR number was mentioned. She was taken to learned Magistrate at Pathankot. He did not record her statement. She was brought in police Gypsy to Courts at Pathankot. She was told about the procedure of becoming approver by Sudhir Mahajan. The application which she gave to the Magistrate, was also dictated by Sudhir Mahajan. She was recalled for further cross-examination. She deposed that she had gone to Sudhir Mahajan since he was a local political leader. She knew him but she never met him. Sudhir Mahajan had got her introduced to the CID officer about 4/5 days before her arrest. She was served with a charge sheet under Section 302 IPC to which she pleaded not guilty to the charge and claimed trial.

20. PW-3 Dr. Surjit Singh conducted the post mortem examination on 22.03.2000 on the body of Balwant Singh. He noticed the following injuries on the body:-

- 1) *An elliptical penetrating stab wound 4 cm x 3 cm x 10 cm present on the frontal aspect, 5 inches below from the left nipple. Margins were reddish brown in colour and inverted and clotted blood present in the wound.*

On dissection: Haemorrhages present in the sub cutaneous tissue and underlying rib fractured and penetrating into the lower lobe of the left lung. Pleura ruptured. Penetrating stab wound present on the left ventricle, overlying pericardium also showed penetrating stab wound. Pericardial cavity and pleural cavity was full of blood. On probing wound was 10 cm deep.

2) *An elliptical penetrating stab wound 4 cm x 3 cm x 10 cm present on the frontal aspect of the chest on the left side 6 inches below and lateral from the left nipple. Margins were reddish brown in colour and inverted and clotted blood present in the wound.*

On probing, wound was 6 inches deep.

On dissection: Haemorrhages was present in the S/C tissue and underlying rib fractured and pleura was lacerated and lung surface was lacerated. Stab wound present on the lower costal lobe of the left lung through and through. Pericardium showed stab penetrating wound at the apex of the heart. Pleural and pericardial cavity was full of blood.

3) *An elliptical penetrating stab wound 4 cm x 3 cm x 8 cm present two in numbers, 3 ½ inches below and lateral side of the umbilicus.*

On dissection: Margins were reddish brown in colour with inverted margins. Clotted blood mixed with faecal matter present in the wound. Peritoneal cavity showed two penetrating stab wounds, underlying large intestine showed similar wounds. Faecal matter was present in the peritoneal similar wounds. Faecal matter was present in the peritoneal cavity mixed with semi clotted blood.

4) *An elliptical penetrating stab wound was present 4 cm x 3 cm x 5 cm just below the right arm pit. Clotted blood was present.*

5) *An elliptical penetrating stab wound 4 cm x 3 cm x 4.5 cm present in the middle of the outer aspect of right arm. Margins reddish brown with inverted margin.*

6) *An elliptical penetrating stab wound 4 cm x 3 cm x 3 cm in size with reddish brown inverted margins with clotted blood present in the middle of the ventral aspect of right forearm.*

7) *An elliptical penetrating stab wound 4 cm x 3 cm x 7 cm in size with reddish brown inverted margins present on the left side of L.I. vertebra with clotted blood.*

On dissection: S/C tissue showed haemorrhages. Lumbar spine was fractured. Lower lobe of left kidney showed the similar penetrating wound with dimensions 2 cm x 1 cm x 1.5 cm in size.

8) *Multiple abrasion reddish brown in colour present all over the chest and abdomen.*

Multiple abrasion grazing type present on the back of thorax, more marked over the scapular region back of shoulder, joints and over the occipital region of head (loss of hair present in this area).

9) *A big haematoma 10 cm x 8 cm in size was present over the right deltoid region.*

10) *Left shoulder joint fractured.*

11) *Right orbit depressed fractured present. Eye cavity depressed soft corneal abrasion present and blood in the anterior chamber present.”*

In his opinion, the cause of death was due to haemorrhage and shock due to injuries to the vital organs, i.e. heart, lung, intestine, kidney which was sufficient to cause death in this case in ordinary course of nature. The injuries were ante mortem in nature. Probable time that elapsed between injuries and death was immediate and between death and post-mortem was 24 to 48 hours. He proved the post-mortem report Ex.PF.

21. The case of the prosecution hinges on the statement made by PW-22 Shilpa after her statement was recorded by PW-15 Satvinder Singh Chahal, Additional District & Sessions Judge, Amritsar. PW-16 Sudhir Mahajan deposed that about 2¾ years back Shilpa had come to his house. She confessed that she along with her two companions had committed a murder. She named Sushil Kumar and Parmodh Kumar as her companions. She had illicit relations with Sushil Kumar. She narrated the manner in which Balwant Singh was killed by them on 20.03.2001. The dead body of Balwant Singh was thrown in rivulet after removing his belongings. In his cross-examination, he admitted that his shop was adjacent to the shop of Balwant Singh. He also admitted that on 06.07.2001 Shilpa came to him and he took her to the police for recording her statement. Prior to it, Shilpa never met him. He has also admitted towards the end of cross-examination that after the confession of Shilpa, he met Ankur in the market. PW-16 Sudhir Mahajan is not a man of authority. Thus there was no occasion for Shilpa to make confession before him. He was only a BJP leader as per his own statement. PW-16 Sudhir Mahajan has not stated that he had drafted the application, though PW-22 Shilpa has stated that the application was drafted by Sudhir Mahajan which she had presented before the Court on 07.07.2001. PW-18 SI Sukhdev Raj had admitted in his cross-examination that Inspector Gajinder Singh has not obtained signatures of Sudhir Mahajan and Abdul Kavi on the statement of Shilpa. The statement of PW-22 Shilpa was recorded by PW-15 Satvinder Singh Chahal as a Magistrate. He has admitted in his cross-examination that he had not disclosed the conditions enumerated in Sections 306, 307 Cr.PC before recording her statement though the trial Court has reproduced the order passed by PW-15

Satvinder Singh Chahal on 11.07.2001 in the judgment. Certified copy of the order was not placed on record by the prosecution. The statement of PW-22 Shilpa was recorded vide Ex.PW15/A on 11.07.2001. Her statement was also recorded under Section 313 Cr.P.C. on 05.08.2004 whereby she has specifically mentioned that she was tortured by the police. The statement of PW-22 Shilpa is a statement of approver. The same could be taken into consideration only if it was corroborated by other evidence. The prosecution has placed strong reliance on the statements of PW-5 Charanjit Verma and PW-6 Sukhwinder Singh. PW-5 Charanjit Verma has failed to identify the accused in the Court. Thus the statement is of no value to the prosecution. PW-6 Sukhwinder Singh deposed that on 20.03.2001 he had seen one girl, aged about 18/20 years and one boy aged about 22/23 years. They had stopped to purchase cold drink from him. He pointed towards accused Shilpa and Parmodh Kumar that they had come to the shop. Thereafter on 29.06.2001 he came to Gurdaspur for some work and he saw Shilpa in the bus. In his cross-examination he has admitted that he was called by the SHO Gajinder Singh when his statement was recorded. 100 people used to visit his shop daily. PW-21 Gajinder Singh deposed that he did not know Sukhwinder Singh before the case. On 20.05.2001 the investigation of the case was assigned to him. He had recorded his statement in the zimni on 20.05.2001. At that time he did not know anything about coming of the car. He read the previous case diaries when he took up the investigation of case on 20.05.2001. He noticed that I.O. had recorded the statement of Sukhwinder Singh in the case diary on 29.03.2001. He had not mentioned about coming of car and its number. He had recorded his statement on 29.06.2001 at road side near the bus stand. At that time

Sukhwinder Singh himself volunteered to make his statement to him. Thus the statement of PW-6 Sukhwinder Singh cannot be believed that Parmodh Kumar and Shilpa had come to his shop to buy cold drink or he had seen Shilpa on 29.06.2001 in the bus. Statement of PW-22 Shilpa is not corroborated by PW-5 Charanjit Verma and PW-6 Sukhwinder Singh. It has also come on record that previously police was investigating the matter on the line that Balwant Singh might have been killed due to business rivalry. The conduct of PW-4 Swaran Kanta and PW-7 Ankur Kumar is also unusual and unnatural. In case Balwant Singh had not come back at night they should have lodged the missing report or went out to search for him. They reached near the car and found blood stains in the car in the morning. PW-7 Ankur Kumar had not opened the car. He had seen from the window pane blood stains. It happened in the early morning but despite that he had not informed the police. Police was informed after 1.00 P.M. PW-16 Sudhir Mahajan admitted in his cross-examination that none of accused had made confession before him regarding murder of Mangal Dass Bhatia. He had also not told the police the fact regarding murder of Mangal Dass Bhatia having come to his knowledge. The recoveries were effected on the basis of disclosure statements made by accused. In most of the recoveries, independent witnesses were not associated. According to PW-18 SI Sukhdev Raj, they had gone to the house of Shilpa. However no independent witness was associated and no action was taken against the persons who had refused to join as witnesses. It is also not believable why one of the accused would keep valuables on the railway track which is accessible to the public. It was stated that accused Sushil Kumar disclosed that he had kept the gold *karra* in bushes. It is also not believable that the

gold *karra* could be concealed in the bushes. The extra judicial confession was made by PW-22 Shilpa before PW-16 Sudhir Mahajan. There is variance in the manner in which the crime was committed in the statements of PW-16 Sudhir Mahajan and PW-22 Shilpa. According to the prosecution, Parmodh had given knife blows to Balwant Sigh. The knife fell down and Shilpa picked up the knife and handed over the same to Sushil Kumar. Sushil Kumar gave 4/5 blows to Balwant Singh. However, when she appeared as PW-22 she deposed that accused came out of the car and both the accused caught hold of Balwant Singh. Parmodh Kumar gave 5/6 blows to the abdomen of Balwant Singh. Parmodh Kumar was carrying knife in his pocket. She came out of the car. The knife fell down on the ground. She picked up the same. Balwant Singh snatched the knife from her. He gave blow to her but it missed the target. Thereafter Sushil Kumar snatched the knife from the hand of Balwant Singh. Balwant Singh took her hand in his mouth. Then Sushil Kumar gave another blow of knife on Balwant Singh. It is not so stated by her while making confession before PW-16 Sudhir Mahajan. She has not told Sudhir Mahajan that knife fell down on the ground and she picked up the same from the ground and Balwant Singh has snatched the knife from her and Balwant singh has also tried to give her blow and thereafter knife was snatched by Sushil Kumar from Balwant Singh. The motive attributed to the appellants is robbery. It has come on record that Balwant Singh was known to all of them. PW-22 Shilpa had categorically deposed in her statement that Balwant Singh had committed sexual intercourse with her on two occasions. She was paid Rs.400/- and Rs.500/- in year 2001 in Mount Fort Hotel at Jassur. According to the prosecution, accused have used knife and stone to kill Balwant Singh.

Neither the knife nor the stone was recovered by the police from the accused. PW-16 Sudhir Mahajan, as discussed hereinabove, has categorically stated that he was known to PW-7 Ankur Kumar but has not told this fact of confession made by PW-22 Shilpa before him. In normal circumstances, he would have told PW-7 Ankur Kumar that PW-22 has confessed of the crime before him.

22. Their Lordships of the Hon'ble Supreme Court in ***Major E.G. Barsay vs. State of Bombay , AIR 1961 Supreme Court 1762*** have held that it cannot be laid down that the evidence of an approver and the corroborating pieces of evidence should be treated in two different compartments, that is to say, the court shall have first to consider the evidence of the approver *dehors* the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable, but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. In most of the cases the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. Their Lordships have held as under:-

“(38) Before we consider this argument in the context of the facts of the present case, we would like at the outset to make some general observations. This Court could not have intended to lay down that the evidence of an approver and the corroborating pieces of evidence should be treated in two different compartments, that is to say, the Court shall have first to consider the evidence

of the approver de hors the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable; but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. This Court did not lay down any such proposition. In that case it happened that the evidence of the approver was so thoroughly discrepant that the Court thought that he was a wholly unreliable witness. But in most of the cases the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. We must also make it clear that we are not equating the evidence of Lawrence with that of an approver; nor did the Special Judge or the High Court put him exactly on that footing. The learned Special Judge in his judgment observed thus:

"He (Lawrence) is obviously decoy or spy and agent provocateur and his evidence will have, therefore, to be approached with great caution and much weight cannot be attached to it unless it is corroborated by other independent evidence and circumstances in the case..... Not being tainted evidence, it would not suffer from a disability of being unworthy of acceptance without independent corroboration. But being interested evidence, caution requires that there should be corroboration from an independent source before its acceptance. To convict an accused on the tainted evidence of an accomplice is not illegal but it is imprudent; to convict an accused upon the partisan evidence of a person at whose instance a trap is laid by the police is neither illegal nor imprudent but

inadvisable therefore, be accepted and relied upon, only if it is corroborated by other independent evidence and circumstances in the case."

The learned Judges of the High Court practically adopted the same attitude in the manner of their approach to the evidence of Lawrence. The learned Judges observed:

"To convict an accused upon the partisan evidence of a person at whose instance a trap is laid by the police is neither illegal nor imprudent, because it is just possible that in some cases an accomplice may give evidence because he may have a feeling in his own mind that it is a condition of his pardon to give that evidence, but no such consideration obtains in the case of the evidence of a person who is not a guilty associate in crime but who invites the police to lay a trap. All the same, as the person who lodges information with the police for the purpose of laying a trap for another is a partisan witness interested in seeing that the trap succeeds, it would be necessary and advisable to look for corroboration to his evidence before accepting it. But the degree of corroboration in the case of a tainted evidence of an accomplice would be higher than that in the case of a partisan witness. In our opinion, all these decisions would clearly establish that it would not be safe to rely on the evidence of Lawrence who is admittedly a decoy or trap witness, without his testimony being corroborated from independent sources."

Even Mr. Amin, learned special counsel on behalf of the State asked the courts to proceed to examine the evidence of Lawrence on the basis that he was a decoy or trap witness."

23. Their Lordships of the Hon'ble Supreme Court in ***Bhiva Doulu Patil vs. State of Maharashtra, AIR 1963 Supreme Court 599*** have held

that the combined effect of Sections 133 and 114, illustration (b) may be stated as follows: According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. There should be corroboration of the approver in material particulars and qua each accused. Their Lordships have held as under:-

(4) The question that arises in the present case is whether the statement of the approver has been corroborated in material particulars and qua the appellant. The trial court convicted the appellant on the testimony of the approver and found corroboration for the approver's testimony in the statement of Nanu Sintu Sutar, P.W. 7 who had prepared the knife alleged to have been used for the offence on March 17, 1960, and his motive to commit the murder because of the suspicion he had about his wife having a liaison with the deceased. These facts according to the learned Judge were sufficient to convict the appellant. The High Court on appeal found corroboration in material particulars; from the evidence of Santu P.W. 6 brother of Deoba to whom Deoba had made a confession of his participation in the offence the discovery of the 'knife at the instance of accused No. 1 and the knife being found blood-stained and the unusual character of the knife which fitted in with the dimensions of the injuries caused to the deceased. From those facts the learned Judges came to the conclusion that the approver Deoba was giving a true version of the occurrence. With great respect to the

High Court we are unable to agree because without corroboration of the approver qua the appellant the conviction is unsustainable, the law being that there should be corroboration of the approver in material particulars and qua each accused.

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(7) *The combined effect of Ss. 133 and 114, illustration (b) may be stated as follows : According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. The law may be stated in the words of Lord Reading C. J. in R. v. Baskerville, 1916-2 KB 658 as follows:-*

"There is Do doubt that the uncorroborated evidence of an accomplice is admissible in law (R. v James Attwood, 1787, 1 Leach 464). But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the Judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence (R. v Stubbs, Dears 555 In re Heunier, 1894 2 Q.B. 415)".

24. Their Lordships of the Hon'ble Supreme Court in ***Sheshanna Bhumanna Yadav vs. State of Maharashtra, AIR 1970 Supreme Court 1330*** have laid down the principles in manner which the evidence of the approver and accomplice is to be considered. Their Lordships have held as

under:-

“12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114 illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and some one who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the time. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.

13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is Sarwan Singh v. State of Punjab, AIR 1957 SC 637 and the recent decision is Lachi Ram v. State of Punjab, AIR 1967 SC 792. In Sarwan Singh's

case, (supra) this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in Lachi Ram's case (supra) said that the first test of reliability of approver and accomplice evidence was for the court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime."

25. Their Lordships of the Hon'ble Supreme Court in ***Dagdu and others vs. State of Maharashtra, AIR 1977 Supreme Court 1579*** have held that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it. Their Lordships have held as under:-

"21. There is no antithesis between Sec.133 and Illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate, the particular accused in the commission

of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self confessed criminal, who, in so far as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

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28. Ganpat is an utterly worthless witness whose evidence has been rightly discarded by the High Court. His entire story is incredible and abounds in contradictions of the gravest kind. Accused No. 2 is a man of some means and was for some time the President of the Manwat Municipality. It is hardly likely that a person in his position would readily gulp the fantastic process prescribed by Ganpat for discovering the treasure trove Ganpat was interrogated by the police for nearly a month and a half after his arrest at Baramati and it was only at the end of that trying period that he trotted out some story to save his skin. It is common ground, and we see much more in that episode, that Ganpat struck his head against a wall while in police custody and sustained a head injury for which he was charge-sheeted for attempting to commit suicide. He admits in his evidence that he was driven to break his

head as a result of the torture inflicted upon him by the police. Though he implicated both accused Nos. 1 and 2 in the search for treasure trove, he admitted later that accused No.1 had never talked to him. in that behalf. He made several significant statements for the first time in the Court and though we agree that an approver has real incentive to speak out his mind after tender of pardon, it is impossible to reconcile his earlier statements with his later assertions. It is one thing to say as was said in Madan Mohan Lal v. State of Punjab, AIR 1970 SC 1006 that an approver's statement cannot be discarded for the mere reason that he did not disclose the entire story in his police statement and quite another to accept an approver in spite of contradictions which cast a veil of doubt over his involvement of others. Conceding the ratio of Tahsildar's case (AIR1959 SC 1012), on which Mr. Desai for the State Government relies, the conclusion seems to us inescapable that Ganpat has mixed a ton of falsehood with an ounce of truth. His evidence has therefore to be left out of consideration.”

26. Their Lordships of the Supreme Court in ***Renuka Bai alias Rinku alias Ratan and another vs. State of Maharashtra, (2006) 7 Supreme Court Cases 442*** have held that evidence of approver should be viewed with suspicion. Their Lordships have held as under:-

“31. The prosecution thus succeeded in proving that these appellants have committed a series of murders. The learned Counsel for the appellants strongly urged before us that the evidence of the approver should not have been accepted by the Court as it is a tainted evidence. It was argued that there is no satisfactory corroboration of the evidence of the approver and unless there is a corroboration, it should not have been acted upon. It is true that the evidence of the approver is always to be

viewed with suspicion especially when it is seriously suspected that he is suppressing some material facts. Here the approver's evidence was not fully accepted by the High Court. High Court was of the view that he had suppressed some material facts. We find that the observation made by the High Court was justified. The tenor of the evidence given by the approver Kiran Shinde is to the effect that he was only a silent spectator but all these heinous crimes were committed by the appellants and their mother Anjana Bai. It is difficult to believe that these women alone had committed all these crimes unless there is strong support from the approver Kiran Shinde. When the Court suspected the evidence of the approver, the pardon given to him itself could be withdrawn and he could be tried along with the other accused. But unfortunately the provisions contained in the Criminal Procedure Code do not enable the Court to take such a strong action.

32. *The approver was given pardon under Section 306 Cr.P.C. and thereafter he was examined as a witness for prosecution under Section 308 Cr.P.C. The procedure prescribes that if the approver is wilfully concealing anything essential or is giving false evidence or had not complied with the conditions on which the tender of pardon was made, the approver can be tried for the offence in respect of which he had been given pardon. In order to prosecute the approver, the public prosecutor has to give a certificate and he should express his opinion that the approver has either wilfully concealed anything essential or has given false evidence or has not complied with the conditions on which pardon has been made. The proviso to Section 308 also says that such person shall not be tried for the offence for giving false evidence except with the sanction of the High Court and the approver also would be entitled to plead that he had*

complied with the condition upon which such tender of pardon was made and that he had not given any false evidence or willfully suppressed anything. Thus, the Code of Criminal Procedure prescribes a procedure for prosecuting the approver who had given false evidence or wilfully suppressed anything.”

27. Their Lordships of the Hon'ble Supreme Court in ***Venkatesha vs. State of Karnataka, (2013) 12 Supreme Court Cases 99*** have held that the approver by his own admission is a criminal. His evidence has to be dealt with cautiously though he is a competent witness under Section 133 of the Evidence Act, 1872. Their Lordships have held as under:-

“16. Section 133 of the Evidence Act, makes an accomplice a competent witness against the accused person and declares that a conviction shall not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Even so, the established rule of practice evolved on the basis of human experience since times immemorial, is that it is unsafe to record a conviction on the testimony of an approver unless the same is corroborated in material particulars by some untainted and credible evidence. So consistent has been the commitment of the courts to that rule of practice, that the same is now treated as a rule of law. Courts, therefore, not only approach the evidence of an approver with caution, but insist on corroboration of his version before resting a verdict of guilt against the accused, on the basis of such a deposition. The juristic basis for that requirement is the fact that the approver is by his own admission a criminal, which by itself makes him unworthy of an implicit reliance by the Court, unless it is satisfied about the truthfulness of his story by evidence that is independent and supportive of the version given by him. That the approver's testimony

needs corroboration cannot, therefore, be doubted as a proposition of law. The question is whether any such corroboration is forthcoming from the evidence adduced by the prosecution in the present case.”

The learned Additional Chief Judicial Magistrate, Gurdaspur, has allowed application dated 07.07.2001 and the same has been reproduced in para 63 of the judgment but without the certified copy of order being placed on record.

28. Their Lordships of the Supreme Court in ***Lt. Commander Pascal Fernandes vs. State of Maharashtra and others, AIR 1968 Supreme Court 594*** have held that before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. It is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judge he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. Their Lordships have held as under:-

“(14) The next question is whether the Special Judge acted with due propriety in his jurisdiction. Here the interests of the accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider. Before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. What is

meant by public policy is illustrated by a case from Public Commission Court (Reg v. Robert Dunne, 5 Cox Cr. cases 507) in which Torrens, J. on behalf of himself and Perrin, J. observed as follows:

"From what I can see of this case, this witness Bryan, who has been admitted as an approver by the Crown is much the more criminal of the two on his own showing..... I regret that this witness, Bryan, has been admitted as evidence for the Crown and thus escaped being placed upon his trial. It is the duty of magistrates to be very cautious as to whom they admit to give evidence as approvers, and they should carefully inquire to what extent the approver is mixed up with the transaction, and if he be an accomplice, into the extent of his guilt....."

(15) In this case the Special Judge made no effort to find out what Jagasia had to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to 'offer no evidence and permit his acquittal, or (d) to enter a nolle prosequi. In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. Section 8(2) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several may be tendered pardon. But even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency. It is not for the

Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecuting joins tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favourably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon suo motu at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed."

This procedure was not followed by the learned Additional Chief Judicial Magistrate in this case.

29. Their Lordships of the Hon'ble Supreme Court in ***Ramprasad vs. State of Maharashtra, (1999) 5 Supreme Court Cases 30*** have held that

the approver's evidence must pass the test of reliability and secure adequate corroboration before the same can be acted upon. Their Lordships have held as under:-

“21. Shri V.B. Joshi, learned counsel for the State candidly admitted before us that there is no other evidence or material to corroborate the testimony of PW 2 regarding the involvement of A-1-Gopal Maharaj in the crime. No other circumstance has been brought to our notice. Nor is there any material to show that A.1-Gopal Maharaj did anything for bailing out any of the assailants, nor that he expended any money for the defence of the said persons at any stage.

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28. There is one circumstance which is reasonably sturdy to corroborate the evidence of PW 2-Anil Chaudhary regarding his accusation against A-4-Ram Prasad Yadao. Ext.170 is a police report showing that a petty case was registered by the police against A.4Ram Prasad Yadao and he was taken into custody by the police on 12.12.1987. PW 29 Head Constable testified that a person by name Vilas Mulatkar went to the police station with a complaint that A-4-Ram Prasad Yadao created unruly scene under the influence of alcohol in a public place, and that a case was registered against him under Section 151 of the Code and he was interned in the lock-up on 12.12.1987.

29. The fact that A-4 was so arrested on 12.12.1987 is not disputed. The contention is that A-4 was released on bail even prior to the incident in the case and hence his arrest is of no use in this case. That might be so, and we are not at the question whether he should have continued in jail till the occurrence was over. We are scrutinizing the evidence of PW 2, and ascertain the extent it has been corroborated by other evidence. In that scrutiny we

notice that the arrest of A-4 on 12.12.1987 is a circumstance which corroborates the testimony of PW 2.

30. Another item of evidence noticed as of corroborative value is the testimony of PW 3. He was a boy aged 17, who was then a student. He deposed that he too had connections with A-2-Ram Kishore Yadao. On 15.12.1987, at about 1.30 P.M. while he was standing at Duffarin bus stop along with A-5 and A-10, some others including A-4 and A-6 and then A-7 joined them and PW-2 also came later. A-4 was heard saying to them you carry out the work assigned and do not bother about consequences, and A-4 assured them that he would bear all the expenses. Next day of the occurrence, A-6-Anil Dhote sent PW 3-Sudir Pohokar to the house of A-4-Ram Prasad Yadao to collect some money. PW 3 went to A-4 and collected some money from him and then A-4 told him that the police was suspecting him and hence he would be able to supply further fund only later. This is the substance of what PW 3 said regarding the role of A-4-Ram Prasad.

31. The aforesaid evidence of PW 3 is a further item to lend assurance regarding the involvement of A-4-Ram Prasad in the murder case. Of course, this was not counted by the High Court but that does not matter much. We are now at the question as to what extent the evidence of PW 2-Anil Chaudhary can be acted on. We feel assured from the circumstances enumerated above that the evidence of PW 2 in so far as he implicated A-4-Ram Prasad with this murder can be accepted as true.”

30. Their Lordships of the Hon'ble Supreme Court in ***Narayan Chetanram Chaudhary and another vs. State of Maharashtra, (2000) 8 Supreme Court Cases 457*** have held that though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet

the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. Their Lordships have held as under:-

"35. This Court in Bhiva Doulu Patil v. State of Maharashtra held that the combined effect of Sections 133 and 114 illustration (b) of the Evidence Act was that an accomplice is competent to give evidence but it would be unsafe to convict the accused upon his testimony alone. Though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. In this regard the court in Bhiva Doulu Patil's case observed:

"In coming to the above conclusion we have not been unmindful of the provisions of Section 133 of the Evidence Act which reads:

'133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice'.

It cannot be doubted that under that section a conviction based merely on the uncorroborated testimony of an accomplice may not be illegal, the courts nevertheless cannot lose sight of the rule of prudence and practice which in the words of Martin B. in R v. Boyes, "has become so hallowed as to be deserving of respect" and the words of Lord Abinger "it deserves to have all the reverence of the law". This rule of guidance is to be found in illustration (b) to Section 114 of the Evidence Act which is as follows:

"The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."

Both sections are part of one subject and have to be considered together. The Privy Council in Bhuboni Sahu v. R., when its attention was drawn to the judgment of Madras High Court in B.K. Rajagopal where conviction was based upon the evidence of an accomplice supported by the statement of a co-accused, said as follows:

"Their Lordships..... would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue."

The combined effect of Ss.133 and 114, illustration (b) may be stated as follows:

According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. The law may be stated in the words of Lord Reading C.J. in R. v. Baskerville as follows:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law (R.

v. James Atwood). But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the Judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence (R. v. Stubbs, Meunier)."

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37. *For corroborative evidence the court must look at the broad spectrum of the Approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may be even in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable. Relying upon its earlier judgment in Suresh Chandra Bahri's case (supra) this Court in Niranjana Singh v. State of Punjab held that once the evidence of the Approver is held to be trustworthy, it must be shown that the story given by Approver so far as an accused is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and not merely a rule of law."*

31. The principles in manner which the pardon is to be granted have been explained by the learned single Judge in **Konajeti Rajababu vs. State of A.P. and another, 2002 Crl.L.J. 2990**, which are as under:-

"13. From the foregoing discussion with reference to the relevant provisions in the Code and the law laid down by the Apex Court, it can be summarised thus:

(1) The power to grant pardon enjoined under Sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court.

(2) The power of the Court is not circumscribed by any condition except the one, namely, that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in, or privy to, an offence.

(3) The Court has to proceed with great caution and on sufficient grounds recognising the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.

(4) The secrecy of the crime and paucity of evidence, solely for the apprehension of the other offenders, recovery of the incriminating objects and production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.

(5) The disclosure of the person seeking pardon must be complete.

(6) While tendering pardon, the Court should make an offer to the one least guilty among the several accused.

(7) The reasons for tendering pardon must be recorded and also about the factum of accepting of pardon by the concerned.

14. Ordinarily, it is for the prosecution to ask that a particular accused out of several may be tendered pardon. It is because the State may not desire that any accused be tendered pardon as it does not need approver's testimony, or it may not also like the tendering of pardon to a particular accused because he

may be the brain behind the crime or the worst offender. After all, the Court shall not be oblivious of the fact that the power which it exercises is not on its own behalf but on behalf of the prosecuting agency. Therefore, the power shall be exercised only when the prosecution joins in the request. This does not, however, preclude the accused from directly applying to the Court. When the accused directly applies to the Court, the Court must first refer the request of the accused to the prosecuting agency and ask for a statement from the prosecution on the request of the accused. If the prosecution thinks that the tender of pardon will be in the interests of successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it would indubitably agree to the tender of pardon, The Court should, therefore, embark upon such a procedure in the interests of justice.

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16. At this juncture, the learned senior counsel appearing for the revision petitioner contends that the prosecution has already gathered the evidence of an eye-witnesses to the occurrence, therefore, there is no need or necessity to tender pardon to one of the accused. So as to buttress his contention, the learned senior counsel seeks to place reliance upon a Judgment of the Punjab and Haryana High Court in Bhup Singh v. The State of Haryana(1986) 1 Crimes 432. The Court held in the said judgment that the power to grant pardon to an accomplice to become an approver should be exercised only in exceptional cases and one such case could be that but for the evidence of the accomplice it would otherwise not be possible to bring to guilt home to the other accused. That was a case where the prosecution was relying upon three eye-witnesses out of which two of them were the injured witnesses. At the stage of trial, one

of the six accused by name Tulsi Ram applied to the trial Judge for grant of pardon under Section 307 of the Code. Although initially when the application for grant of pardon filed by the accomplice had come up for consideration, the State did not oppose but at the stage of hearing the Revision Case filed impugning the order granting pardon to the accomplice, the State chose not to support the application. The main contention in the Revision Case was that the trial Judge did not exercise its discretion in a sound manner inasmuch as there was no necessity to grant pardon as three eye-witnesses were already examined by the prosecution. In those circumstances, the Court held that the discretion to grant pardon should be exercised in exceptional cases and one such exceptional case would be that but for the evidence of accomplice it would otherwise be not possible to bring the guilt home to the other accused. The necessity to examine an accomplice depends upon the facts of each case and no hard and fast rule can be prescribed therefor. Adequacy or otherwise of the evidence to bring home the guilt to the accused affords a reasonable ground so as to conclude whether the discretion conferred on the Court can be exercised or not, or affords a reason to support a judicious exercise of the discretion but the number of eye-witnesses cannot be the criterion. Here, in the instant case, the case of the prosecution mainly hinges upon a sole eye-witness whose statement had been recorded under Section 164 of the Code. Although there is no legal bar to base a conviction on the sole testimony of the witness, but before doing so the testimony shall be found to be credible and pass the test of judicial scrutiny. Even a semblance of reasonable doubt might warrant a benefit of doubt to be given in the case. Under such circumstances, it cannot legitimately be concluded that

the evidence gathered on the side of the prosecution so far is quite adequate. Therefore, in view of the peculiar facts in the instant case, it cannot legitimately be concluded that the discretion in this case has not been exercised in a judicious manner.

In view of the aforesaid observation, the appeal is allowed, judgment and order dated 02.12.2015 is set aside. The appellants are acquitted. The appellants be released forthwith. The Registry is directed to prepare the release warrants of the appellants.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

January 16, 2019.

Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No