

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1050 OF 2005

PANCHO

...

APPELLANT

Versus

STATE OF HARYANA

...

RESPONDENT

WITH

CRIMINAL APPEAL NO.1222 OF 2005

PRATHAM

...

APPELLANT

Versus

STATE OF HARYANA

...

RESPONDENT

JUDGMENT

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. These two appeals, by special leave, can be disposed of by a common judgment as they arise out of the same facts and challenge the same judgment and order dated 3/5/2005 of the Punjab and Haryana High Court. Criminal Appeal

No.1050 of 2005 is filed by original accused 2 – Pancho and Criminal Appeal No.1222 of 2005 is filed by original accused 1 – Pratham. For the sake of convenience, original accused 1 - Pratham is referred to as "A1-Pratham", original accused 2 – Pancho is referred to as "A2-Pancho" and original accused 3 – Gajraj is referred to as "A3-Gajraj".

2. A1-Pratham, A2-Pancho and A3-Gajraj were tried by the Additional Sessions Judge, Faridabad in Sessions Case No.40 of 11.12.2002 / 30.11.1999 for offence punishable under Section 396 of the Indian Penal Code (for short, "**the IPC**"). According to the prosecution, two more persons were involved in the offence in question viz. Shishu Ram @ Shishu, who expired after the charge was framed and one Bhago, who is absconding. He is declared absconder.

3. Shortly stated the case of the prosecution is that PW-1 Jagat Singh, brother of deceased Kartar Singh lodged FIR (Ex-PA) on 8/2/1999 at 8.40 a.m. with PW-12 ASI Keshav Ram at Sadar Palwal, Faridabad. PW-1 Jagat Singh

reported that on 7/2/1999 deceased Kartar Singh had left their house for the Sugar Mill, Palwal. He drove his own tractor. He was to bring back two trolleys of sugar cane which were already parked outside the Sugar Mill. PW-1 Jagat Singh further reported that on 8/2/1999 at about 7.00 a.m., they were informed that the dead body of Kartar Singh was lying in a pool of blood at a distance of 10 feet from the road in the field of PW-1 Jagat Singh, a resident of Gopalgarh. Both the trolleys were parked on the road side but the tractor was not at the spot. PW-1 Jagat Singh further reported that some unknown persons opened fire at deceased Kartar Singh due to which he sustained injuries on his waist and succumbed to the said injuries. PW-1 Jagat Singh further reported that the said unknown persons had taken away the tractor.

4. It appears that till 31/7/1999, the investigating agency did not make any progress. According to the prosecution, on 31/7/1999, A1-Pratham approached PW-4 Nathi Singh, Ex-Member of Panchayat and told him that on 5/2/1999

when he, accused-Shishu and A3-Gajraj were sitting in the house of A1-Pratham, A3-Gajraj told them that they were in need of money. A2-Pancho told them that he had a country made pistol. They discussed about the Sugar Mill at Bamnikhera where some farmers came with new tractors. They planned a robbery. They went on a truck to Bamnikhera at 7.00 p.m. where A3-Gajraj and accused-Shishu had a conversation with deceased Kartar Singh. When the tractor was unloaded, both of them accompanied deceased Kartar Singh in his tractor. Accused-Shishu and A1-Pratham were standing outside. When the tractor traveled a distance of two killas, A3-Gajraj gave a signal to A2-Pancho, who fired a shot at deceased Kartar Singh from his country made pistol. A3-Gajraj stopped the tractor, removed the dead body of deceased Kartar Singh and threw it in a wheat field. They left the tractor trolley at the spot and ran away with the tractor so as to reach Paramendra via Barsana. A1-Pratham is further stated to have told PW-4 Nathi Singh that they took the tractor to accused-Bhago and

narrated the entire incident to him and asked him to sell the tractor and thereafter they went back to their house. A1-Pratham is further stated to have told PW-4 Nathi Singh that they came back after a couple of days and came to know that the tractor could not be sold. Therefore, they removed some parts of the tractor and left it on the road near Bharatpur. As desired by A1-Pratham, he was produced before PW-24 Inspector Raghbir Singh on 31/7/1999 by PW-4 Nathi Singh. PW-24 Inspector Raghbir Singh arrested A1-Pratham and interrogated him. According to PW-24 Raghbir Singh, during interrogation, A1-Pratham told him that about 3-4 months back, he along with accused Shishu and other accused had snatched a tractor, shot the driver of that tractor, thrown his body in the field and taken the tractor with them. On the same day, accused-Shishu was arrested by PW-24 Raghbir Singh.

5. According to the prosecution, on 1/8/1999, A1-Pratham disclosed that he had left the tractor on the road near Bharatpur, concealed some parts, which had come to his

share i.e. the seat cover, one thin rod along with bumper in his field. In pursuance to this disclosure statement, the said articles were recovered at the instance of A1-Pratham. A battery box with one tool box is stated to have been recovered at the instance of accused-Shishu. On 16/8/1999, PW-24 Inspector Raghbir Singh arrested A2-Pancho near Dabchick on the basis of suspicion. His personal search led to recovery of a country made pistol of .315 bore (Ex-P12) which was taken into possession vide recovery memo (Ex-PL). It was attested by PW-15 Samunder Singh, brother of deceased Kartar Singh and one Hardev. On a statement made by A2-Pancho, the police also discovered an iron pipe and three pieces of rope from under stones at Village Barsana which were identified by PW-15 Samunder Singh to be that of their tractor. They were taken into possession vide recovery memo (Ex-PM/1). On 25/9/1999, A3-Gajraj was arrested and at his instance, three pieces of ropes are stated to have been recovered.

6. Though the accused were charged under Section 396 of the IPC, learned Sessions Judge was of the view that conviction of the three accused cannot be recorded under Section 396 of the IPC as only four persons had participated in the crime. Learned Sessions Judge was of the view further that A2-Pancho could be convicted under Section 302 of the IPC simplicitor and A1-Pratham and A3-Gajraj could be convicted under Section 302 read with Section 34 of the IPC. According to him, all the accused were also liable to be convicted under Section 392 of the IPC. So far as A2-Pancho is concerned, learned Sessions Judge sentenced him to death for offence under Section 302 of the IPC as according to him, it was a heinous crime which would have wide ramification on the life of agricultural community. He sentenced A1-Pratham and A3-Gajraj to undergo imprisonment for life under Section 302 read with Section 34 of the IPC. All the accused were sentenced to undergo rigorous imprisonment for 10 years for the offence under Section 392 of the IPC.

7. While dealing with the reference under Section 366 of the Criminal Procedure Code (for short, "**the Code**") and the criminal appeal filed by A1-Pratham and A3-Gajraj, the High Court commuted the sentence of death imposed on A2-Pancho to imprisonment for life. The High Court confirmed the sentence of life imprisonment imposed on A1-Pratham and A3-Gajraj. The High Court maintained the sentence imposed on the accused for offence under Section 392 of the IPC.

8. We have heard counsel for the parties. We also requested Mr. Lalit, learned senior counsel to assist us. In deference to our request, Mr. Lalit has, as usual, ably assisted us.

9. There is no dispute about the fact that deceased Kartar Singh died on account of firearm injuries. Evidence of PW-17 Dr. Jagmohan Mittal, who did the postmortem on the dead body of deceased Kartar Singh is clear on that point.

10. Extra-judicial confession made by A1-Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In **Gopal Sah v. State of Bihar**¹, this court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether extra-judicial confession of A1-Pratham inspires confidence and then find out whether there are other cogent circumstances on record, to support it.

11. We have already referred to the evidence of PW-4 Nathi Singh before whom A1-Pratham is stated to have confessed that A2-Pancho had shot dead deceased Kartar Singh with country made pistol. PW-24 Inspector Raghbir Singh has

¹ (2008) 17 SCC 128

stated that A1-Pratham confessed that they had shot dead deceased Kartar Singh. He does not say that A1-Pratham told him that A2-Pancho had fired at deceased Kartar Singh. The incident is stated to have occurred in the night intervening 7/2/1999 and 8/2/1999. About five months later, on 31/7/1999, A1-Pratham is stated to have made a confession. This delay creates a doubt about its credibility. Besides, in his evidence PW-4 Nathi Singh has stated that his village is about 35 to 40 k.m. from the village of A1-Pratham and none of his relatives stay in that village. He has stated that he knew A1-Pratham; that he had come to his village at about 7.30 to 8.00 a.m. and stayed with him for 2.00 to 2.30 hours. It does not stand to reason that A1-Pratham would go voluntarily to PW-4 Nathi Singh, who stayed in another village which is about 35 to 40 k.m. away from his village and make a confessional statement to him. The prosecution evidence does not indicate that A1-Pratham and PW-4 Nathi Singh knew each other intimately. It is, therefore, difficult to accept the prosecution case that A1-

Pratham made any extra-judicial confession to PW-4 Nathi Singh. It may be stated here that in his statement recorded under Section 313 of the Code, A1-Pratham has denied that he made any such statement. This retraction further makes a dent in the alleged extra-judicial confession.

12. A2-Pancho was arrested on 16/8/1999 near Dabchick Modale. According to the prosecution, his search resulted in recovery of a country made pistol (Ex-P/12) of .315 bore. The recovery of country made pistol is made more than about six months after the date of incident. It is true that the report of FSL (Ex-PT) states that the country made pistol marked W/1 was test fired and that bullet marked BC/1 taken out from the body of deceased Kartar Singh had been fired from the said country made pistol. The report also states that the holes on the clothes of deceased Kartar Singh which were sent for examination, had been caused by bullet projectiles. We are, however, of the opinion that, on the basis of this report, it is difficult to come to a conclusion that A2-Pancho was responsible for the firearm injury caused to

deceased Kartar Singh. The prosecution has not led any evidence to show as to in whose custody this pistol was during the period of six months after the incident. In his statement recorded under Section 313 of the Code, A2-Pancho has denied that any such recovery was made from him. Even assuming that the recovery is proved, we are unable to hold in the absence of any other cogent evidence that it is sufficient to establish that A2-Pancho caused the fatal firearm injury to deceased Kartar Singh with the said pistol.

13. Apart from the pistol which is stated to have been recovered from A2-Pancho, the prosecution has relied on certain other discoveries made at the instance of the accused. On 1/8/1999, pursuant to the statement made by A1-Pratham, one bumper, one patli and one seat cover are stated to have been discovered. PW-15 Samunder Singh, brother of the deceased identified the said articles to be that of their tractor. On 16/8/1999 at the instance of A1-Pancho, three pieces of ropes along with an iron pipe are stated to

have been discovered. PW-15 Samunder Singh identified them as parts of their tractor. These discoveries are made five months after the incident and significantly, PW-15 Samunder Singh, who is the brother of the deceased, is stated to be present when the discoveries were effected and all articles are identified by him. Pertinently, he has signed the discovery statements of all the accused. Articles which are stated to have been discovered are easily available in the market. There is nothing special about them. Belated discovery of these articles raises a question about their intrinsic evidentiary value. Besides, if as contended by the prosecution, the accused wanted to sell parts of the tractor, it is difficult to believe that they would preserve them till 1/8/1999. The evidence relating to discovery of these articles must, therefore, be rejected.

14. As against A2-Pancho, the prosecution is relying mainly on the extra-judicial confessional statement of A1-Pratham. The question which needs to be considered is what is the evidentiary value of a retracted confession of a co-accused?

15. The law on this point is well settled by catena of judgments of this court. We may, however, refer to only two judgments to which our attention is drawn by Mr. Lalit, learned senior counsel. In **Kashmira Singh v. The State of Madhya Pradesh**,² referring to the judgment of the Privy Council in **Bhuboni Sahu v. The King**,³ and observations of Sir Lawrence Jenkins in **Emperor v. Lalit Mohan Chukerbuttery**,⁴ this court observed that proper way to approach a case involving confession of a co-accused is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid. This court further noted that cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in

² AIR 1952 SC 159

³ 76 Indian Appeals 147

⁴ 38 Cal. 559

aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept.

16. In ***Haricharan Kurmi v. State Bihar***,⁵ the Constitution Bench of this court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as

⁵ AIR 1964 SC 1184

strictly defined by Section 3 of the Evidence Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. This court further observed that Section 30 merely enables the court to take the confession into account. It is, not obligatory on the court to take the confession into account. This court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right. This Court clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the

Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

17. Applying the above principles to the case on hand, we find that so far as A2-Pancho is concerned, except the evidence of alleged belated discovery of certain articles at his instance, which we have already found to be doubtful, there is no other evidence on record to connect him to the offence in question. When there is no other evidence of sterling quality on record establishing his involvement, he cannot be convicted on the basis of the alleged extra-judicial confession of the co-accused A1-Pratham, which in our

opinion, is also not credible. Once A1-Pratham's extra-judicial confession is obliterated and kept out of consideration, his conviction also cannot be sustained because we have come to the conclusion that the alleged discovery of articles at his instance cannot be relied upon. There is thus, no credible evidence to persuade us to uphold the conviction of A1-Pratham.

18. In view of the above, we set aside the impugned judgment and order. A1-Pratham and A2-Pancho are on bail. Their bail bonds stand discharged.

19. Appeals are disposed of in the aforesaid terms.

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
OCTOBER 20, 2011.