

IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2)(b))

Description of Case

CRIMINAL APPEAL No. 349 OF 2001
(Old No. 2145 of 1986)

Diwan Singh S/o Shri Jaman Singh
R/o Vill. Durgai, Patti – Kanolichina
Tehsil Didihat District – Pithoragarh
At present R/o Gauri Niwas, Silthan,
Pithoragarh ...Appellant.

Vs

State of U.P. (Now Uttarakhand)Respondent.

Sri R.S. Sammal, learned counsel for the appellant.
Sri Nandan Arya, learned A.G.A. for the State.

Date of decision:- 28.02.2007

A.F.R. (Approved for Reporting)

Not Approved for reporting

Date :-28.02.2007

Initials of Judge

Note: Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

**IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL.
CRIMINAL APPEAL NO. 349 OF 2001.**

(Old No. 2145 of 1986)

Diwan Singh son of Jaman Singh, resident of village Durgai,
Patti Kanalicheena, Tehsil Didihat, district Pithoragarh.

.... Appellants.

Versus

State of Uttarakhand.

.....Respondent.

Sri R.S. Sammal, learned counsel for the appellant.
Sri Nandan Arya, Learned A.G.A. for the State.

HON'BLE DHARAM VEER, J.

1. Appellant Diwan Singh has filed this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity, hereinafter referred as Cr.P.C.) against the judgment and order dated 24.07.1986 passed by Sessions Judge, Pithoragarh in Sessions Trial No. 14 of 1986 State Vs. Diwan Singh whereby the learned Sessions Judge has convicted the appellant under section 435 of the Indian Penal Code, 1860 (for brevity, hereinafter referred as IPC) and sentenced him to two year's R.I. and a fine of Rs. 1000/- and in default of payment of fine, shall further undergo R.I. for a period of six months. The appellant is also convicted under section 436 read with Section 511 of the same Code and sentenced to two

years' R.I. and a fine of Rs. 1500/- and in default of payment of fine, shall further undergo R.I. for a period of six months. The appellant is also convicted under section 324 IPC and sentenced to rigorous imprisonment for a period of one year and a fine of Rs.500/- and in default of payment of fine, shall further undergo simple imprisonment for a period of three months. The learned Sessions Judge directed that all the substantive sentences shall run concurrently. The learned Sessions Judge also passed an order that out of the fine levied, Rs.1500/- shall be paid to the complainant Trilok Ram and Rs.500/- shall be paid to the injured Smt. Kalawati Devi.

2. In brief, the prosecution case is that Smt. Kalawati Devi (PW 5) is the wife of complainant Trilok Ram (PW 4) and Pooran Ram is the father of Trilok Ram. Originally they belong to village Kanku. They have no sufficient cultivation and other source of income to meet their livelihood, hence they left their native place in search of their livelihood. Ultimately they reached village Udama. They are the landless agricultural labours and also artisan. Hence they began a new life. They do the artisan work for the villagers in the village. After some time Bahadur Ram (PW 1) told them that accused/appellant Diwan Singh was intending to dispose of

his land situated at Natori Tok of Mitari Gaon with an old house. Pooran Ram contacted accused/appellant in this connection. Accused Diwan Singh was agreed to sell the land and the house for Rs. 6000/-. Pooran Ram immediately paid Rs. 5000/- on 10.09.1980 to accused with compromise to pay the balancer of Rs. 1000/- within a week. Accused Diwan Singh executed an agreement to sell (Ext.Ka.4) on that very day in his own hand writing in the present of villagers. Thereafter on 14.09.1980 Diwan Singh has also received the balance amount of Rs. 1000/- and made an endorsement to this effect in the agreement to sell. He gave possession of the land and house to Pooran Ram and his family. Pooran Ram, at his end, demolished the old house and remodeled according to his need and requirement and started cultivation on the land purchased by him from the accused Diwan Singh.

3. It is also alleged that after some time accused Diwan Singh has changed his mind. He refused to execute the sale deed in respect of transfer of the land in favour of Pooran Ram. He also planned to drive away Pooran Ram and his family from the village with a view to grab the land and house. For the abovesaid reason it is said that on 04.10.1984 at 11.00 a.m. in villae Mitarigaon, Patti Kanalicheena, Tehsil

Didihat, district Pithoragarh,.accused reached the field with a sword and lathi in his hand where Hansi Ram (PW 2) was ploughing the field of Pooran Ram on hire. He cut down the rope of the bullocks. He has threatened Hansi Ram to run away from the field. Hansi Ram, out of fear, run away and reached on the road. It is said that the accused thereafter set fire to 'LUTA' of Paral kept on the pear tree. When it was on fire he took a bundle of burning 'Paral' from it and threw it at the door of Pooran Ram with intention to set his house on fire. It is also alleged that when Smt. Kalawati (PW 5) tried to extinguish the fire of the bundle to save her house from the fire, accused Diwan Singh with intent to cause her death gave a blow of sword on her head which she saved with their hands and thereby she got the injury on the index finger of her right hand. It is said that the said incident was witnessed by Bahadur Ram (PW 1) and Hansi Ram (PW 2) also. On the shout raised by the injured Smt. Kalawati Devi and the witnesses the accused run away towards his house.

4. It has also stated that Trilok Ram son of Pooran Ram was working at the bridge of Samtada hence Pooran Ram went there to inform him about the said incident. Trilok Ram came to his house. His wife Smt. Kalawati also told him about the incident. He thereafter brought his wife to

Kanalicheena for medical treatment at about 4.00 p.m. By that time the P.H.C. was closed and the doctor had gone out. He then went to the Patwari headquarter and Qanungo circle. They too were out of their respective headquarters. By that time it has become very late, hence he returned back to his house. On the next day morning on 05.10.1984 he went to Pithoragarh where he got a complaint (Ext.Ka.2) prepared by a petition writer in the Collectorate compound.

5. The District Magistrate entrusted the complaint to Tehsildar, Didihat for necessary action. The Tehsildar, at his end, sent it to the Patwari for preparation of the FIR and for necessary action. The complainant Trilok Ram himself brought the complaint from the District Magistrate to Tehsildar and from Tehsildar to Patwari Sri Cahandra Shekhar Pant on 07.10.1984. The Patwari read over the complaint (Ext.Ka.2) to him, therefore, he gave another written report (Ext.Ka.3) to Patwari. On the basis of this written report (Ext.Ka.3) the Patwari prepared the chick FIR (Ext.Ka.5) and registered the case under section 435,447, 307,504 and 506 IPC against the accused Diwan Singh.

6. The Patwari then started the investigation himself, recorded the statement of the complainant then and there and directed him to go to his house. On the next day on

08.10.1984 he visited the scene of occurrence and at the instance of the witness Pooran Ram (PW 6) inspected the spot and prepared the site plan (Ext.Ka.6). In the course of the inspection of the scene of occurrence he took ashes therefrom in his possession , wrapped in a white cloth, sealed on the spot and prepared a memo (Ext.Ka.7). He also prepared a Khasra Khulasa (Ext.Ka.8) on the basis of the entries in the records. He has also recorded the statement of the witnesses Pooran Ram, Smt. Kalawati and Hansi Ram and then returned to his headquarter. On the next day on 09.10.1984 he went to the place of occurrence and recorded the statement of Bahadur Ram (PW1).

7. The Investigating Officer thereafter searched the accused in the village. It is said that the accused with a view to escape his arrest, absconded from the village. However, the accused was arrested by the Investigating Officer and during the course of his arrest the accused sustained certain injuries, therefore, he was medically examined in PHC, Didihat.

8. The Investigating Officer recorded the statement of Hansi Ram (PW 2) on 18.10.1984. He also inquired about the incident from other inhabitants of the village and after completing the investigation submitted charge sheet

(Ext.Ka.11) before the Court of Chief Judicial Magistrate, Pithoragarh. The Chief Judicial Magistrate, Pithoragarh has committed the case to the court of Sessions vide his order dated 05.05.1986 under sections 447,435,307,504 and 506 IPC. The learned Sessions Judge has framed the charge against the appellant/accused under section 435, 436 read with section 511 and 307 IPC on June 07,1986.

9. The accused denied the prosecution allegations, pleaded not guilty and claimed to be tried.

10. The prosecution, with a view to bring the guilt of the accused, examined as many as seven witnesses. PW 1 Bahadur Ram is cited as an eye witness. PW 2 Hansi Ram is also an eye witness. PW 3 Dr. B.S. Bisht who has examined Smt. Kalawati Devi medically and prepared his medical report (Ext.Ka.1). PW 4 Trilok Ram who is complainant of the case. PW 5 Smt. Kalawati Devi is an injured eye witness. PW 6 Pooran Ram is also said to be an eye witness and PW 7 Sri Chandra Shekhar Pant is the I.O. of the case, who has investigated the case and submitted the charge sheet (Ext.Ka.11).

11. The accused in his statement under section 313 Cr.P.C. has admitted that he is incapable of managing his entire holding spread over different TOKS of village Mitari and,

therefore, he employed Pooran Ram and his family to work on his field. In lieu of the service rendered by them he gave them 10 to 15 Nali of land for their cultivation and an old house to live. He has further stated that pooran Ram and his family worked to his satisfaction for about three years and thereafter they denied to work on his field. When he asked them to leave the house and the land they got fabricated a false case against him in collusion of the relative Supervisor Qanungo, Kanalicheena Sri Jagdish Prasad Tamta.

12. I have heard learned counsel for the appellant and learned A.G.A. for the State and perused the entire evidence on record.

13. The doctor examined Smt. Kalawati on 05.10.1984 at 9.30 a.m. He found the following injury on her person:

“Incised wound curved shaped ‘C’ (2cm in length X 3 cm gaping margins on sharp wound is skin deep, serums discharge coming out of wound. Wound is situated on the outer aspect of base of right index finger. Opinion- Nature- simple caused by sharp weapon. Duration- approximately 1 day.”

14. The prosecution relied on the evidence of Bahadur Ram (PW 1), Hansi Ram (PW 2, Smt. Kalawati (PW 5) and Pooran Ram (PW 6) to establish the factum of the incident. It

is alleged by the learned counsel for the appellant that all the witnesses, namely, Bahadur Ram, Hansi Ram, Smt. Kalawati and Pooran Ram are the concocted witnesses. They were not present at the time of the occurrence and have not seen the incident. The submission made by the learned counsel for the appellant seems to be substantial, reasonable and justified. The complainant Trilok Ram (PW 4) came to Pithoragarh with his wife Smt. Kalawati Devi. He got a written complaint prepared by some petition writer in the Collectorate compound and submitted the same to the District Magistrate for action. This complaint is Ext.Ka.2. He has admitted that this complaint was prepared by petition written on his dictation. A perusal of the complaint (Ext.Ka.2) would show that none of the witnesses named above have been cited as the eye witnesses of the incident. The complainant has specifically mentioned in the complaint (Ext.Ka.2) that on 04.10.1984 only reporter's wife Smt. Kalawati was present in the house. After wards he has stated that when he could know the infirmities in Ext.Ka.2, hence he gave a fresh written report (Ext.Ka.3) wherein the witnesses Bahadur Ram, Hansi Ram and Pooran have been cited as witnesses of the incident together with Smt. Kalawati Devi. The learned Sessions Judge has not believed the submission made by the learned

counsel for the defence on the ground that complainant had stated that on 07.10.1984 when he met Patwari, Kanalicheena, the Patwari read the complaint (Ext.Ka.2) to him. Then he came to know that he missed to mention that the appellant was armed with lathi and the same has not been written in the complaint (Ext.Ka.2), hence he gave another written report (Ext.Ka.3) in his own hand writing. He has not stated that earlier he missed to cite the name of the eye witnesses which he added in the report (Ext.Ka.3). Apart from this Bahadur Ram has stated that at the time of the incident he was going to village Saan and when he reached near the house of the complainant he saw the incident from the road. He has further stated that he did not got to see his sister Smt. Kalawati Devi even after the incident and straightway went to village Saan. The witness has admitted that Smt. Kalawati Devi is his real sister. The natural conduct of this witness on such occasion when real sister was injured would have been to go to his sister after the incident and render assistance, if any, she requires. The behaviour of Bahadur Ram instead of going to his sister and give her moral support and held her, straightway went to village Saan is peculiar and unnatural beahaviour. This behaviour of this witness shows that he was not present at the time of the

incident and had not seen the incident. It is also admitted by Pooran Ram (PW 6) that before the date of incident he never called Hansi Ram to plough his field on hire basis. He appears to be a chance witness. Pooran Ram (PW 6) is an old man. He has admitted that his vision is very poor for the last 5-6 years. Had he been at the house at the time of the incident the complainant must have mentioned that his wife and father Pooran Ram were at the house at the time of incident in Ext.Ka.2. Non-disclosure of his name in the complaint (Ext.Ka.2) as witness of the incident by the complainant also prove that he was not present at the scene of occurrence. In this way the learned Sessions Judge has also not relied upon the evidence of Bahadur Ram, Pooran Ram and Hansi Ram. I also agree with the view taken by the learned Sessions Judge for not relying the evidence given by Bahadur Ram, Pooran Ram and Hansi Ram. For the abovesaid reasons it is clear and well established that Bahadur Ram, Pooran Ram and Hansi Ram were not present at the time of occurrence abovesaid and the learned Sessions Judge has rightly not believed the statements of the abovesaid witnesses.

15. The learned Sessions Judge has relied upon the sole testimony of Smt. Kalawati (PW 5) and convicted the appellant in the abovenoted offences. The learned counsel for

the appellant has submitted that on the basis of the sole testimony of Smt. Kalawati Devi (PW 5) a conviction can not be made. In support of his argument he has submitted that no incident has taken place as said above and Diwan Singh was falsely implicated with the help of supervisor Qanungo Sri Jagdish Prasad Tamta. He has submitted that the evidence of PW 5 is not reliable and believable. He has submitted that the oral evidence of PW 5 Smt. Kalawati Devi is not supported by the medical evidence. For that he has submitted that the prosecution has examined PW 3 DR. B.S. Bisht who has examined Smt. Kalawati Devi on 05.10.1984 and found the injuries mentioned above in para No.13. In the cross-examination Dr. B.S. Bisht has stated, “उपरोक्त चोट दरांती से घास काटने से आ सकती है, तलवार से नहीं पहुँचायी गयी होगी।” The learned counsel counsel for the appellant has further submitted that Smt. Kalawati Devi has stated in her statement that the appellant Diwan Singh had come to his house with a sword in one hand and lathi in another hand and at that time Hansi Ram was ploughing the field and he asked Hansi Ram as to why he was ploughing the field. After that he had cut down the rope which were in the hand of Hansi Ram of the bullocks and he burnt LUTA of Paral which was on the pear

tree and the appellant has also tried to burn his house by way of burning LUTA of PAral. When the injured Smt. Kalawati tried to extinguish the fire when the appellant had attacked on her head by a sword. Then she had saved her head by raising her hands on the head. Due to this she got the injuries on the right index finger of the 'c' shape. The learned counsel for the appellant has submitted that if the appellant attacked on the injured by sword then this injury is not possible. The injury should come in the larger area of the hands. As per the learned counsel for the appellant this injury could not be caused by sword. On the other hand, he has submitted that this injury is only possible by sickle at the time of cutting the grass. Learned counsel for the appellant has also submitted that his argument is supported by statement of the doctor PW 3 Sri B.S. Bisht. He has also cited a judgment of the Apex Court reported in **2003 (1) Supreme Court Cases page 465- Joseph Vs State of Kerala**. On the basis of this judgment of the Apex Court he has submitted that if the prosecution case is based on solitary evidence, the evidence must be wholly reliable so as to record the conviction on that basis. He has also submitted that the evidence of Smt. Kalawati is not supported by the medical evidence, hence the statement of Smt. Kalawati Devi could not be believed. He has referred

para No. 13 of the abovesaid judgment of the Hon'ble Supreme Court which is reproduced as below:

“13. The our mind, it appears that the High Court did not follow the aforesaid standard but went on the analyse evidence as if the material before them was given for the first time and not in appeal. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable.”

16. The learned counsel for the appellant has also cited another judgment of Hon'ble Supreme Court reported in **(2003) 11 Supreme Court Cases page 231- Sadhu Ram and another Vs State of Rajasthan**. He has relied on para No.16 of the abovesaid judgment which is quoted below:

“16. It is no doubt true that the conviction of an accused can be based solely on the testimony of a solitary witness. However, in such a case the court must be satisfied that implicit reliance can be placed on the testimony of such a witness and that his testimony is so free of blemish that it can be acted upon without insisting upon corroboration. The testimony of the witness must be one, which inspires confidence and leaves no doubt in the mind of the court about the truthfulness of the witness. In the facts of this case the credibility of Mala Ram, PW 3 has been sufficiently impeached. We cannot say that Mala Ram is a witness on whom implicit reliance can be placed. He certainly does not come in the category of a witness on whom implicit reliance can be placed. In fact we are inclined to take the view that he is a wholly unreliable witness and no conviction can be based on the evidence of such an unreliable witness. Even if we place Mala Ram in the category of a partially reliable witness, we find no evidence to corroborate his testimony and, therefore, It is not safe to base a conviction on the testimony of such a witness. Moreover, we find that the medical evidence does not support his testimony.

According to Mala Ram the wife of Sadhu Ram had committed suicide. He is categoric in his assertion that the bodies were hanging when he saw them and their bodies were burnt thereafter. The medical evidence, which we find no reason to disregard, is clearly to the contrary. Dr. Sharma who was one for the doctors who conducted the postmortem examinations is clear and categoric in asserting that the injuries were ante-mortem and he was given good reasons to support his opinion. The medical evidence is consistent with the defence case that the deceased died of burning in an accidental fire, but the same is not consistent with the version given by Mala Ram, PW 3 that their dead bodies were set ablaze later. If it were so, the injuries found could not have be ante-mortem injuries, and the presence of sooty carbon particles would not have been found in larynx, trachea, pharyns and oesphagus.”

17. Learned counsel for the appellant has also submitted that Ext.Ka.2 is the first FIR and Ext.Ka.3 is the second FIR and on the basis of Ext.Ka.3 the investigation was done and charge sheet was submitted. The learned counsel for the appellant has submitted that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences is possible. He has specifically referred para No.20 of the judgment of the Hon’ble Apex Court reported in **(2001) 6 Supreme Court Cases page 181- T.T. Antony Vs State of Kerala and others which is quoted below:**

“20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident

giving rise to a cognizable offence or offences and on entering the FIR in the station house dairy, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provides in Section 173 CrPC.”

18. On the basis of the abovesaid legal and factual aspects discussed above “conviction on the basis of the solitary witness is only permissible in such a case where implicit reliance can be placed on the testimony of such witness and that his testimony is so free of blemish that it can be acted upon without insisting upon corroboration. Evidence of the solitary witness must be wholly reliable so as to record the conviction on that basis.” But on the basis of the arguments advanced by the learned counsel for the appellant and after perusing the evidence of PW 5 Smt. Kalawati Devi and the statement of PW 3 Dr. B.S. Bisht reliance can not be placed on the statement of Smt. Kalawati Devi and the statement of Smt. Kalawati Devi is not believable on the basis of the abovesaid circumstances. It also creates a doubt in the prosecution story when the oral evidence is not supported by the medical evidence and the injury which was sustained by the injured Smt. Kalawati Devi in her right index finger was not seems to occur in such a way as she has stated in her statement and due to the reason also the prosecution story

creates a doubt that doctor has stated that the injury is not possible by sword and it is possible by a sickle.

19. The learned counsel for the appellant has submitted that the incident is said to have been taken place on 04.10.1984 at 11.00 a.m. and the FIR was lodged before the Patwari on 07.10.1984 at 4.00 p.m. when the distance from the place of incident to the Patwari headquarter was only 4 Kms. The delay in the FIR is not explained. It also creates a doubt in the prosecution story. From the evidence discussed above it is clear that the delay in the FIR is not explained by a sufficient cause. Hence the delay in FIR also creates a doubt in the prosecution story. For that reason also the prosecution case has become doubtful and it has not been proved beyond reasonable doubt.

20. On the basis of the abovesaid discussion the prosecution has failed to prove the case against the appellant beyond reasonable doubt and no case is made out against the appellant for the offence punishable under section 324 IPC.

21. On the basis of the evidence of Smt. Kalawati Devi (PW 5) there is no burn, damage or loss in the residential house of Smt. Kalawati Devi or her husband/complainant Trilok Ram, so no case is made out against the appellant for

the offence punishable under section 436 read with section 511 IPC.

22. On the basis of the evidence of Smt. Kalawati Devi the cost of LUTA of Paral is Rs. 100 and more than Rs.100/- is also not proved. On the basis of the said facts and circumstances doubt is there on the whole of the prosecution story and it is a settled law that benefit of doubt will go to the appellant/accused if such infirmities are there in the statement of Smt. Kalawati Devi.

23. The learned Sessions Judge has convicted and sentenced the appellant only on the basis of the evidence of PW 5 Smt. Kalawati Devi, the solitary evidence which is not believable, trustworthy and reliable on the basis of the abovesaid circumstances and facts of the present case. It creates a doubt in the prosecution story.

24. In view of the aforesaid discussion the prosecution has utterly failed to prove any of the charges against the appellant under sections 324, 435, 436 read with section 511 IPC and the appellant deserves acquittal of the aforesaid charges. The appeal is liable to be allowed.

25. The appeal is allowed. The judgment and order dated 24.07.1986 passed by the Sessions Judge, Pithoragarh convicting and sentencing the appellant are hereby set-aside.

The appellant is acquitted of the charge punishable under sections 324, 435, 436 read with section 511 IPC levelled against him. The appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged. Let the record of the lower court be sent immediately.

(Dharam Veer, J)

Dated: 28.02.2007.
Negi.