PETITIONER:
SUKHWANT SINGH

Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT28/03/1995

BENCH:
MANOHAR SUJATA V. (J)
BENCH:
MANOHAR SUJATA V. (J)
AGRAWAL, S.C. (J)
HANSARIA B.L. (J)

CITATION:
1995 AIR 1380 1995 SCC Supl. (2) 262
JT 1995 (3) 506 1995 SCALE (2)496

ACT:

HEADNOTE:

JUDGMENT:
DR. ANAND, J.:
1. The appellant was tried for an offence under Section 302 IPC in connection with the murder of one Ajmer Singh on 11.7.1984 at about 7.30 p.m. The learned Judge Special Court, Ferozepur convicted him for the said offence and sentenced him to suffer life imprisonment. Through this appeal, under Section 14 of the Terrorists Affected Areas (Special Courts) Act, 1984, the appellant has challenged his conviction and sentence.
2. According to the prosecution case, the appellant is married to the sister of Pal Singh. An engagement had been brought about through the instrumentality of the appellant between the daughter of Pal Singh and Lakhmir Singh son of Kashmir Singh. The deceased, Ajmer Singh and his brother, Gurmej Singh PW 3 were on friendly terms with Kashmir Singh but for some reason or the other, that engagement was snapped and Lakhmir Singh was married to some other girl about 3 days prior to the occurrence. The appellant suspected that Ajmer Singh deceased and his brother Gurmej Singh PW were responsible for the snapping of the engagement. On 11.7.1984 at about 7.30 p.m., Gurmej Singh, PW 3 accompanied by Ajmer Singh, deceased and Raghbir Singh, PW4 were going to the fields to answer the call of nature and when they reached near the bridge on the village pond, the appellant came from the opposite side wearing the robes of a Nihang and exhorted that he would teach them a lesson for getting the engagement snapped. Immediately thereafter the appellant took out a pistol from underneath the chola (robes) that he was wearing and fired a shot at Ajmer Singh. On alarm being raised by Ajmer Singh, PW3 and PW4, the appellant fled away alongwith the pistol. One Major Singh, PW5 who was also present in the nearby field also witnessed the occurrence. Ajmer Singh was removed to the haveli and while he was being shifted to the Hospital at Malout, in the

tractor trolley of Kashmir Singh, he expired. On reaching the hospital, the doctor pronounced Ajmer Singh dead. On information being sent by Dr. Sant Singh, Ex. P-5 about the arrival of Ajmer Singh deceased at the hospital to the police station, Shri Raghubir Singh, ASI PW6 proceeded to the hospital and recorded the statement of Gurmej Singh, Ex. P-4 at about 11.45 p.m. The statement was sent to the police station for registration of a case and on its basis formal FIR Ex.P-4/B was drawn up. A case under Section 302 IPC and Section 25 Arms Act was registered at 12.10 a.m. on 12.7.1984.: A copy of the special report was sent to the Ilaqa magistrate and was received by him on 12.7.1984 at about 6.30
499
a.m. After preparing the inquest report Ex.P-2, the dead body was dispatched for postmortem which was performed by Dr. Sant Parkash Singh, Sr. Medical Officer PW1 on July 12, 1984 at about 11.00 a.m. The doctor found fire arm injuries on the deceased and opined that the death had been caused due to shock and haemorrhage as a result of injury No. 1, which was found to be sufficient in the ordinary course of nature to cause death. During the investigation by ASI Raghubir Singh, PW6the rough site plan of the place of occurrence was prepared. From the spot, blood stained earth as well as an empty were collected vide memo Ex. P-8. The same were secured in separate sealed parcels. The appellant was arrested on 8.8.1984 and at the time of his arrest, he was found to be carrying with him a pistol and 7 live car-tridges which were seized by the police.

3. At the trial, the prosecution examined Dr. Sant Parkash Singh, PW1 Draughtsman Ajit Sharma, PW2, Gurmej Singh, PW3 and Raghubir Singh, ASI PW6. Raghubir Singh PW4 and Major Singh PW5, the two other eye witnesses were tendered for cross examination only. The appellant denied the prosecution allegations against him in his statement under Section 313 Cr.P.C. The appellant was thereafter, convicted and sentenced for the offence under Section 302 IPC. The case under Section 25 Arms Act was separately tried.

4. Learned counsel for the appellant submitted that the solitary eyewitness examined at the trial by the prosecution Gurmej Singh, PW3 could not be relied upon, as not only he being the brother of the deceased was interested in the prosecution case but also because his evidence stood belied by the medical evidence which showed that the stomach and the bladder of the deceased were empty thereby sug-gesting that the injuries had been received by the deceased after he had answered the call of nature and not before as suggested by Gurmej Singh, PW3. Learned counsel also submitted that in Rukka Ex. P-5 which was sent by the doctor to the police station, it was recorded that the dead body had been brought to the hospital by Raghbir Singh and Major Singh and the name of Gurmej Singh was conspicuous by its absence which went to show that Gurmej Singh PW3 was not present at the time of occurrence or when the deceased was removed to the hospital. According to the learned counsel, the non-examination of Raghbir Singh, PW 4 and Major Singh, PW5 by the prosecution, who were only tendered for cross-examination, is a serious infirmity in the prosecution case and renders it unsafe to uphold the conviction of the appellant on the basis of the uncorroborated testimony of Gurmej Singh, PW3.

5.Gurmej Singh, PW3, is the elder brother of the deceased. lie is the solitary eye witness examined by the prosecution. The absence of his name from rukka Ex. P-5, sent by the doctor to the police station immediately after the arrival

of the dead body in the hospital creates some doubt about the presence of Gurmej Singh at the place of occurrence at the time when the deceased would have accompanied the injured to the hospital. The identification of the deceased by Gurmej Singh and Major Singh PWs at the time of postmortem examination of the deceased which has been relied upon by learned counsel for the State, can not cure the defect of the absence of the name of PW3 from Ruqqa
500
Ex.P-5 because the postmortem examination was conducted the next day on 12-71984 at 11.00 a.m. There is no explanation available on the record, nor has any been offered before us to explain the absence of the name of PW3 from Ruqqa Ex.P-5 in which it was recorded that Raghbir Singh and Major Singh had brought the deceased to the hospital.

6. That the deceased died as a result of fire arm injuries is not disputed but what has been challenged is whether the occurrence took place in the manner described by Gurmej Singh PW3 and whether Gurmej Singh PW3 is an eye witness. The first information report was recorded by Raghubir Singh PW6 on the basis of the statement of Gurmej Singh, Ex.P-4 which was recorded at the hospital at about 11.45 p.m. on 11.7.1984. The possibility that Gurmej Singh PW3 might have arrived at the hospital later on after learning about the removal of his deceased brother to the hospital by Raghbir Singh and Major Singh cannot be ruled out. Moreover, we find that the special report reached the Ilaqa magistrate on the next day at 6.30 a.m. There is no explanation, available on the record about the delay in receipt of the special report by the Ilaqa Magistrate. When admittedly the court of the Ilaqa Magistrate and the police station are quite close to each other. The fact that at thetimeof postmortem examination the stomach and the bladder were found empty, though suggestive of the position that contrary to what Gurmej Singh, PW3 deposed, the deceased had answered the call of nature before he was shot at, but cannot be conclusive of it, as the possibility that the deceased might have defalcated and urinated after the receipt of injuries and before his death cannot ruled out.

7.The prosecution in this case came up with a positive case that besides Gurmej Singh, PW3, Raghbir Singh PW4 and Major Singh PW5 had also witnessed the occurrence. The names of these two witnesses are also mentioned in the rukka Ex. P-5 as the persons who had brought the dead body to the hospital. Their evidence in the circumstance of the case was essential for unfolding of the prosecution case. The prosecution however did not examine them and tendered them for cross-examination by the accused at the trial but they were not cross-examined by the accused. From the record of the trial court we find that both PW4 and PW5 had been tendered for cross examination "in the light of the observations of the Supreme Court in the case of Jaggo AIR 197 1, SC 1586. " We are at a loss to appreciate how a witness could be cross-examined, when he has not been examined in chief that is to say, when there is nothing in relation to which he could be cross-examined.

8.It will be pertment at this stage to refer to Section 138 of the Evidence Act which provides :

> "138. Order of examinations. Witnesses shall be first examined-chief then (if the adverse party, so desires) crossexamined, then (if the party calling him so desires) re-examined.
> The exmination and cross-examination must relateto relevant facts but the cross-examination need not be confined to the facts

> to which the witness testified on his examination-in chief.
>
> Direction for re-examination. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of Court, introduced in re-exami-
>
> 501
>
> nation, the adverse part), may further cross-examine upon that matter.

9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined in chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is, in our opinion, no meaning in tendering a witness for cross examination only. 'rendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief however, the practice of tendering witness for cross-examination in Session Trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898. The reason behind taking recourse to such a practice, which undoubtedly is inconsistent with Section 138 (supra), is not for to seek. Under that Code as it stood prior to its amendment by Act 26 of 1955 a full-fledged magisterial enquiry was to be held, in a case which was triable exclusively by the Court of Sessions or the High Court, in accordance with the procedure laid down in Chapter XVIII thereof and in that enquiry prosecution was required to examine all its witnesses. Under Section 288 of that Code the evidence of the witnesses so recorded by the Committing Magistrate could be treated, at the discretion of the Session Judge, as substantive evidence at the trial. More often than not, the prosecution tak ing advantage of the above provision, use to asks for and obtain leave of the Sessions Court to treat the depositions of thesr witnesses whom they did not intend to examine afresh, recorded in the committal enquiry as its evidence in the trial and then tender them for cross-examination. In other words, the prosecution brought on record of the trial court and relied upon the testimonies of some of the witnesses recorded at its instance before the Committing Magistrate as its evidence during the trial and then tendered them for cross-examination by the defences. It will be pertinent to mention here that Act 26 of 1955 which amended the Code of 1898 restricted the examination of prosecution witnesses in the committal enquiry in respect of cases instituted on police report only to those who were to give an ocular version of the incident only.

10.The question as to whether such a practice was legal and valid in view of Section 138 (supra) and, if so to what extent and in what manner it could be adopted came up for consideration by different High Courts.

11. In Veera Koravan and others v. Emperor [AIR 1929 Madras, 906] a Division Bench of the Madras High Court opined that merely tendering of a prosecution witness for cross-examination is not a practice which should be encouraged specially in a murder case as the procedure would be unfair to an accused.

12. In Sadeppa Cireppa Mutgi and others v. Emperor (AIR 1942 Bombay, 37) Beaumont, C.J. speaking for the Division Bench of the Bombay High Court opined :

> "'The other Kakeri witness is Shambu, (Ex. 34), and a very irregular course was adopted with regard to him. He way tendered for

cross-examination. The practice of tendering witnesses for cross-examination which is no doubt often adopted, is inconsistent with S.138, Evidence Act, which says that witness shall be first examined-in-chief and then, if ad-

502

verse party so desires, cross-examined, and if, the party calling him so desire, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But, I think, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower Court, is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness." Emphasis supplied)

13.A Full Bench of the Bombay High Court in Emperor v. Kasamally Mirzalli (AIR 1942 Bombay, 71) approved the opinion of Beaumont, C.J. (supra) and " condemned" the practice of tendering a witness for cross-examination in no uncertain terms.

14.A Division Bench of the Punjab High Court in Kesar Singh and another v. the State (AIR 1954 Punjab, 286) after analysing the provisions of Sections 137 and 138 of the Evidence Act, followed the law laid down by the Full Bench of the Bombay High Court in Kasamalli's case (supra) and observed :

"The other witness of this fact is Jai Ram P.W.21 who was tendered for cross-examination, but he was not cross-examined. That again in my opinion is no evidence. The law in regard to examination of witnesses is contained in Section 137 and 138, Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practice is opposed to S. 138 of the Act. " (Emphasis ours)

15. In Dhirendra Nath v. State (AIR 1952 Calcutta, 621), a Division Bench of the Calcutta High Court held:

"There is a type of case where witnesses of a secondary importance who have been examined before the Committing Magistrate arc not called before the Sessions Court, because the

> prosecution considers that it has already had a sufficient body of evidence on the poin t concerned and then in fairness to the defence, it those witnesses for cross-examination. But the fact that the witness is tendered for cross-examination means and implies that there has been some examination-in-chief. As far as I can see, the only Practical way in which a witness can be tendered for cross-examination is by asking him generally, may be bya single question, in the sessions court as to whether the statements made by him before the committing Magistrate were true and on his answering in the affirmative, tendering the evidence given in the committing Magistrate's court which would then serve as the examination-in-chief. Unless the examination-in-chief is brought on the record in that fashion, I cannot understand on what the defence will cross-examine the witness tendered for cross-ex-
> 503
> amination. It does not appear from the record in this case that the evidence of the witness before the Committing Magistrate was brought on the record at all. In these circumstances, tendering for cross-examination seems to me to have been almost meaningless."

16. In Chotta Singh v. State (AIR 196 Punjab, 120), the Punjab High Court held:

> "Tendering a witness for cross-examination. is almost tantamount to giving up a witness. There is nothing in law that justifies such a course. The trial courts adopt this manner of examining witnesses simply to lighten their burden, but it is not realised that in a serious case like the present murder case when the learned trial Judge failed to examine Wazira P.W.5, he was very seriously remiss in his duty."

17. A Division Bench of the Kerala High Court in Thazhathethil Hamsa v. State Kerala (AIR 1967 Kerala, 16) observed:

> "In this connection we wish to clarify the mistaken impression which the teamed Judge seems to have entertained about the propriety of the procedure adopted by the prosecution in tendering eye-witnesses for cross-examination. PW10 who had given evidence in the Committing Court as an eye-witness was tendered for cross-examination in the Sessions Court after he made a bald statement that he has correctly stated all he knew about the incident in the enquiry, Court. The learned Judge has evidently relied on an observation made by the Patna High Court in Manzurul Haque v. State of Bihar, AIR 1958 Pat 422 to find that such a procedure is proper. But it is really not. The very decision relied on by the learned Judge started by enunciating the principle thus :
> " The practice of tendering witnesses leads to considerable confusion and is to be deprecated. A material witness should not be

> merely tendered but should be sworn and asked to give evidence by the prosecution. Tendering if at all should be confined to witnesses of secondary importance. "

18. Thus, it is seen that the Bombay Kerala, Calcutta, Madras and Punjab High Courts have notwithstanding the provisions of Sections 288 of the Code of 1898 consistently taken the view that there is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross examined. The practice of tendering a witness for cross-examination has been consistently discouraged and even condemned by those High Courts and in our opinion rightly. Our attention has not been drawn to any judgment of any other High Court which may have taken the contrary view.

19.In the State of U.P. and another v. Jaggo alias Jagdish and others (AIR 1971 SC, 1586) which has been referred to and relied upon by the prosecution and the trial court for adopting the procedure of tendering PW4 and PW5 for cross examination only in our opinion, has not been properly appreciated and has been misapplied. That judgment cannot be read to lay down, as a matter of legal preposition, that a witness can be "tendered" for cross-examination even without there being any examination in chief If there is some earlier statement of the witness recorded by a competent court or an affidavit filed in the trial court and the witness testifies to the correctness of that earlier statement at the trial, it (in certain cases of witnesses of a formal nature) as noticed earlier be per-

504

missible to tender him for cross-examination after he is sworn to the correctness of the earlier statement, because in thateventhat earlier statement is treated as the examination-in-chief of the witness but that is not the same thing as tendering a witness for cross-examination only, without there being any cxamination-in-chief on the record. In Jaggo’s case (supra) a Bench of this court was considering the question whether the mere presentation of an application by the prosecution to the effect that a certain witness had been "won over" was conclusive of the allegation that he had been so "won over" and the prosecution was therefore relieved of its obligation to examine him at the trial. The preposition was negatived and it was in that context, that this court observed :

> "On behalf of the appellant it was said that Ramesh Chand wa won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In.such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were entillwd to test his evidence particularly when Lalu was alleged to be talking with Rames

h

> at the time of the occurrence."
>
> (Emphasis ours)

20. The Division Bench, therefore was considering a peculiar fact situation in that case and even in that context it was observed that the witness "could have been produced for cross-examination by the accused" and that "the

accused were entitled to test his evidence." The observations of the Division Bench in Jaggo's case, therefore, do not support the view that a material witness can be "tendered" for cross-examination only. The observations from a judgment of this Court cannot be read in isolation and divorced from the context in which the same were made and it is improper for any Court to take out a sentence from the judgment of this Court, divorced from the context in which it was given, and treat such an isolated sentence as the complete enunciation of law by this Court. The judgment in Jaggo.v (supra) has in our opinion been misappreciated and that judgment cannot beinterprcted as a sanction from the Supreme Court to the prosecution to adopt the practice of tcndering a witness for cross-examination only, without there being any examinationin-chief, inrelation to which the witness has to be cross-examined. All that the judgment In Jaggo's case (supra) emphasises is that the mere ipsi dixat of the prosecutor that a particular witness has been won over is not conclusive of that allegation and the Court should not accept the same mechanically and relieve the prosecutor o his obligation to examine such a witness. It was for this reason suggested by the Bench that where the prosecution makes such an allegation, it must keep the witness in attendance and produce him to enable the defence to cross examine such a witness to test his evidence as well as the allegations of the prosecution and bring out the truth on the record. After the coming into force of the Criminal Procedure Code, 1973, which replaced the Code of 1998, recording of evidence in commitment proceedings have been totally dispensed with and section 299 of that Code has been emitted. Consequently, the course suggested by some of the High Courts in the earlier quoted judgments

505

regarding tendering of a witness for cross-examination who had been examined in the committal court, is also no more relevant or available. The Jaggo's case, which was decided when the Code of 1898 was operating in the field could not, therefore, be pressed into service by the trial court while dealing with the instant case tried according to the Code of 1973. Thus, considered it is obvious that the trial court, wrongly permitted the prosecution to tender PW4 and PW5 for cross-examination only. Both PW4 and PW5 were, according to the prosecution case itself, eye witnesses of the occurrence and had removed the deceased to the hospital. Their evidence was, of a material nature which was necessary for the unfolding of the prosecution story. The effect of their being tendered only for cross examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination, in our opinion, seriously affects the credibility of the prosecution case and detracts materially from its reliability.

21. There is yet another infirmity in this case. We find that whereas an empty had been recovered by PW6, ASI Raghubir Singh from the spot and a pistol alongwith some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty and the seized pistol to the ballistic expert for the examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us. It hardly needs to be emphasised that in cases where injuries are caused by fire arms, the opinion of the

Ballistic Expert. is of a considerable importance where both the fire arm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.

22.From a critical analysis of the material on the record, we find that it would not be safe to rely upon the sole testimony of PW3 Gurmej Singh, the brother of the deceased, without independent corroboration in view of the infirmities pointed out by us above which render his testimony as not wholly reliable and since in the present case no such independent corroboration is available on the record, it would be unsafe to rely upon the testimony of PW3 only to uphold the conviction of the appellant. The prosecution has not been able to establish the case against the appellant beyond a reasonable doubt. The trial court, therefore, fell in error in convicting and sentencing the appellant. His conviction and sentence cannot be sustained. This appeal consequently succeeds and is allowed. The conviction and sentence of the appellant is set aside. The appellant is on bail. His bail bonds shall stand discharged.

507