

Chinna Gowda

Vs

State of Mysore

Criminal Appeal Nos. 172 & 173 of 1961

(T. L. Venkatarama Ayyar, J. R. Mudholkar, K. C. Das Gupta JJ)

27.04.1962

JUDGMENT

MUDHOLKAR, J. –

The appellant, China Gowda, was tried along with six other persons for committing the murder of an entire family consisting of eight persons on the night intervening the 12th and 13th February, 1958, in Handigodu hamlet of the village Viavalli. The learned Sessions Judge convicted every one of them under s. 302, Indian Penal Code, and sentenced each of them to death. In appeal, the accused No. 2, Shivappa Naika and accused No. 7, Gunde Gowda were acquitted. The appeals of the remaining accused persons were dismissed. The High Court, however, confirmed the conviction and sentences only of the appellant Chinna Gowda and of Rame Gowda, appellant in Criminal Appeals Nos. 172 and 173 of 1961 and while affirming the conviction of the other three accused commuted the death sentences passed against them to imprisonment for life. The appellants in the two appeals were granted special leave by this Court under Art. 136 of the Constitution and that is how the appeals are now before us.

The facts as alleged by the prosecution are briefly these :

The deceased, Mariappa Gowda took up residence in Handigodu about eight or ten years prior to the murder. He was an industrious and thrifty person and soon became very prosperous. This aroused the envy and jealousy of the appellant, Chinna Gowda. In the course of years, numerous disputes over the boundaries of fields, trespasses on fields, the flow of water and so on arose between the two of them. For some time prior to the murders, the relationship between Mariappa Gowda (deceased) and the appellant as well as Rame Gowda, the appellant in the other appeal, became very strained. It may be mentioned that Rame Gowda was actually living with Mariappa Gowda for some time and Mariappa Gowda leased out some lands to him. Shortly thereafter, both of them fell out and Mariappa Gowda was anxious to evict Rame Gowda, from the leased lands. Mariappa Gowda was, therefore, reluctant to issue receipts for rent paid by Rame Gowda, to him. This annoyed the latter. Eventually, however, on the intervention of Chandiah Hegde, P.W. 67, Mariappa Gowda passed a receipt in favour of Rame Gowda. To his surprise, Rame Gowda, however, found that the receipt contained false recitals to the effect that he had surrendered the leased land to Mariappa Gowda. He, therefore, complained about this to Chandiah who promised to settle the matter. In the meanwhile, Rame Gowda's anger increased. One day, he actually stopped the bullock cart of Mariappa and challenged him to try and evict him from the leased lands. Sometime thereafter he complained to one

Singappagowda that Mariappa had cheated him and said "you will see what I will do to him in a few days." According to the prosecution, the remaining accused were the friends of the appellant, Chinna Gowda but it is not suggested that they had any personal grievance against Mariappa Gowda.

It is common ground that Mariappa's house is situated about a furlong and a half of the house of Chinna Gowda and that no other house than Chinna Gowda's is nearer Mariappa's house. Mariappa lived there with his wife Bellamma and six children. Since he was living in an isolated place, he had kept a dog. He also used to keep a light burning outside his house. Further, he had a gun which was usually kept loaded in the house. Few days before the incident, the dog had died but the cause of the death of the dog is not known.

Between 6.30 and 7.00 a.m. on the morning of February 13, 1958, P.W. 12 Narayan of Handigodu who was employed as a labourer by Mariappa Gowda, went, as usual to his master's house. He was horrified to find that all the doors of the house were open and the inmates of the house were lying on their beds in pools of blood, having been done to death by someone. Thereupon he went to the house of one Harithal Chandegowda, P.W. 31, and informed him of what he had seen. Both of them along with another man proceeded to the village Handigodu. Eventually, the first information was lodged with the police who commenced investigation. After investigation, the seven accused persons and P.W. 40, Venkappa Naika, who later turned an approver in the case, were arrested in connection with the murders. During the course of the investigation, P.W. 40, Venkappa Naika, accused No. 3 Manjappa Gowda, and accused No. 4, Manjappa Naika, made confessions. Venkappa Naika was tendered a conditional pardon on his agreeing to give evidence on behalf of the prosecution. At the committal stage, all the three persons retracted their confessions. However, all the alleged participants in the crime, except Venkappa Naika, were sent up for trial and were tried by the Additional Sessions Judge, Chikmagalur.

At that trial Venkappa Naika gave evidence for the prosecution on the lines of his confession, saying that he had retracted the confessions at the committal stage as the appellant, Chinna Gowda had threatened to kill him. The learned Additional Sessions Judge, relying mainly on the evidence of the approver, as corroborated by the retracted confessions of two of the accused persons, convicted and sentenced all the accused persons as already stated. In addition to the evidence of the approver, the prosecution has relied upon the evidence of two witnesses, P.W. 16, Dugamma, a neighbour of Chinna Gowda and P.W. 59 Mariappa, son of Rame Gowda, and agricultural servant of Chinna Gowda. The learned Additional Sessions Judge, as well as the High Court, believed their evidence and regarded it as affording some corroboration to the evidence of the approver. The prosecution further relied upon the fact that just prior to the date of the murders, Chinna Gowda, who has heavily pressed for money, had arranged to obtain a loan of Rs. 600/- for one T. Shivaiah alias T. Shivaswamy, P.W. 75, who had agreed to advance it to him on February 13, 1958. In spite of T. Shivaiah agreeing to advance the loan, Chinna Gowda did not go to his house on the appointed day. The suggestion is that after committing the murders, all the accused persons looted the cash and jewellery found in that house and the cash was retained by Chinna Gowda with himself. Finally, the courts below have relied upon the circumstance that the accused person, in particular the appellants in the two appeals before us, did not, like other innocent villagers, go to make enquiry about the incident or go to the hospital where the dead bodies were taken.

The evidence of P.W. 16, Dugamma and that of P.W. 59, Mariayappa does not afford corroboration to the evidence of the approver on material particulars and in fact two of the statements made by the latter contradict the evidence of the approver on some important points. The substantial material on

which the case rests is thus the evidence of the approver and the retracted confessions of two of the accused persons.

The question, therefore, is whether conviction of the appellants could be sustained on the basis of this material. There is no doubt that s. 133 of the Evidence Act does not debar the court from basing the conviction of an accused persons on the evidence of the approver alone but as has been observed in a large number of cases, including the decision of the Privy Council in *Bhuboni Sahu v. The King* [(1949) L.R. 76 I.A. 147] the Courts, as a matter of prudence, always require that the evidence of the approver should be corroborated in material particulars. This rule has been founded on s. 114(b) of the Evidence Act which enables the Court to presume that an accomplice is not worthy of credit unless he is corroborated in material particulars, The need for such corroboration would be all the more greater where, as here, the approver, apart from being a person of bad character by reason of his participation in a heinous crime, cannot be said to be a man of truth since he had resiled from his confession before the committing magistrate. This circumstance emphasizes, if emphasis was necessary, the need for requiring corroboration to his evidence in material particulars.

The substance of the evidence of the approver, Venkappa Naika, is this. On the day prior to the incident, the appellant Chinna Gowda met him at Thyavananda Angadi when both of them were returning to their village from Sringeri. Venkappa Naika, it may be mentioned, is a bootlegger. Chinna Gowda asked him whether he had any 'arrack' available and upon Venkappa Naika answering in the affirmative, Chinna Gowda gave him Rs. 5/- and asked him to take two bottles of arrack to his house the next evening as there was a party at his house. Accordingly, on the next day, i.e., on the day of the incident, Venkappa Naika went there in the evening carrying with him two bottles of arrack. He did not see Chinna Gowda but saw Manjappa Gowda, accused No. 3, grooming two bullocks in front of the house. He, therefore, enquired of him where Chinna Gowda was. On being told by Manjappa Gowda to go to the areca garden where Chinna Gowda would shortly be going, Venkappa Naika went there. He noticed three of the accused persons, Shivappa Naika, Rame Gowda (appellant in the other appeal) and Gunde Gowda sitting under a jack fruit tree. A little later Manjappa Naika who is accused No. 4 came there and was followed shortly after by Chinna Gowda and Ramappa Naika who is accused No. 5 in the case and Manijappa Gowda. The latter brought 'rotti' and chicken and curry. Thereafter, all the persons present were served with arrack. Then they had a meal consisting of chicken curry and rotti which was served by the Manjappa Gowda. After finishing their meals they again had a round of arrack. While they were having arrack, Chinna Gowda said, "Handigodu Mariappa Gowda is harassing me. We must go and finish him today". Thereupon, Shivappa Naika said, "work must be done carefully. Whatever punishment may be meted out, you should not open your mouth. I am there to see to the rest." After that, China Gowda took Shivappa to his house and left him there and returned alone to the garden. By that time it was midnight. All of them then got up and at the instance of Chinna Gowda went to the house of the deceased Mariappa Gowda. China Gowda, Manjappa Gowda, Manjappa Naika, Rame Gowda and the approver, Venkappa Naika each had a chopper with him. On the way, Chinna Gowda observed "We should not leave even a worm. You must do the work carefully."

On reaching the house of Mariappa Gowda they noticed a bed-lamp burning on the Jagali which was put out by Chinna Gowda. He, as well as Rame Gowda, had torches with them and they flashed them now and again. Then Rame Gowda struck on the neck of Mariappa Gowda who was sleeping on the jagali, with the chopper in his hand. Chinna Gowda dealt a similar blow on the neck of Bellamma who was sleeping close to Mariappa. The approver, himself struck Bellamma on her head. Rame Gowda next struck a male child on his neck with his chopper. It appears that the others were just looking on. Chinna Gowda looking at Manjappa Naika said, "Why are you looking on,

fool ?" Whereupon that person struck on the neck of Gunda, the eldest son of Mariappa Gowda with his chopper. Thereafter, Chinna Gowda, Manjappa Gowda and Rame Gowda went inside the house and murdered the four children of Mariappa Gowda who were sleeping there. Then Chinna Gowda re-lighted the bed lamp which had been blown out earlier, took out the bunch of keys from the waist of Mariappa Gowda, opened the lock of one of the rooms of the house and took out from it a trunk. He opened the lock of the trunk. This trunk contained a gold chain, a pair of bugudis, three gold rings and one gold flower. It also contained two bundles of currency notes. Chinna Gowda took possession of all these articles. In the meanwhile Rame Gowda removed the gold ear-rings from the ears of Bellamma as well as removed her 'mani-sara' which she was wearing on her neck and handed them over to Chinna Gowda. Chinna Gowda wrapped up the jewellery in a towel and handed it over to Ramappa Naika but he kept the currency notes with himself. Thereafter the party left the house of Mariappa. They went to a nala nearby and washed their hands as well as the choppers. On their way back to the houses of Chinna Gowda; the latter said, "Let the commotion be over. Thereafter let us distribute the gold and the money. Let no one demand it now. There is Shivappa Naika. We shall distribute it." Thereupon Manjappa Naika, Rame Gowda and Gunde Gowda went to their respective houses while Chinna Gowda, Manjappa Gowda and Ramappa Naika, went to the house of Chinna Gowda. The approver went along with them. After reaching the house, Chinna Gowda took the jewellery from Ramappa Naika which he kept inside the house. Chinna Gowda gave the approver a 'kambal' and asked him to sleep on the jagali. He, therefore, slept there along with Majappa Gowda and Manjappa Naika while Chinna Gowda himself slept inside the house. Early in the morning, the approver left Chinna Godwa's house and went to his own house.

What is first to be considered is the evidence of P.W. 16, Duggamma and that of P.W. 59, Maryappa, son of Rame Gowda. We have already indicated that it does not afford corroboration to the evidence of the approver. The former stated in his evidence that just when she was going to bed she heard Ramappa Naika saying, "Torch light fell." At that time, Chinna Gowda and Manjappa Gowda were with him and all the three of them were on the jagali. There is no reference whatsoever to the flashing of the torch in the evidence of the approve. All that could be said is that there is perhaps a partial corroboration to the statement of the approver that while some of the participants in the crime were sitting in the areca garden early in the evening, Chinna Gowda and Rammappa Naika came there together and were followed shortly after by Manjappa Gowda. But much importance cannot be attached to a partial corroboration. Later in her evidence, Duggamma stated that she woke up during the night and noticed torch light being flashed on her jagali. Just then Chinna Gowda came near the jagali. Thereupon she asked "who is it". On that, Chinna Gowda said : "No one. Have you not got sleep. Sleep on." Now, according to the approver, he was accompanying Chinna Gowda at that time, but there is no reference whatsoever to the incident in his evidence. In the circumstances, it cannot afford any corroboration to any part of the evidence of the approver.

Now, coming to the evidence of P.W. 59, Maryappa, son of Rame Gowda, who was a servant of Chinna Gowda, what he says is that on the evening of the date of the incident, the approver, Venkappa Naika came to his master's house and asked Manjappa Gowda where the appellant Chinna Gowda was. Thereupon Manjappa Gowda told him that Chinna Gowda was not at home, and perhaps had gone somewhere. After hearing this, Venkappa Naika went towards the garden at about 9.00 or 9.30 p.m. While the witness was sitting on his bed on the jagali of Chinna Gowda's house, Chinna Gowda and Ramappa Naika came to the house and had their meals. Thereafter Chinna Gowda, Manjappa Gowda and Ramappa Naika sat talking on the jagali. When they were chatting he saw a torch light being flashed on a tree near the house. Thereafter, all these three persons got up saying that they should go to the garden and accordingly went there. Five or ten minutes later, they came back to the house. Chinna Gowda warned the witness not to mention to any one about the

flashing of the torch. The witness then went to sleep and got up at 6.00 or 6.30 a.m. He then found Chinna Gowda and Ramappa Naika still in bed on the jagali.

Instead of affording any corroboration to the evidence of the approver, the evidence of this witness contradicts the approver on several points. Now according to the approver, he went to the garden of being told by Manjappa Gowda to do so, but that is not what the witness says. According to the witness, Chinna Gowda and Ramappa Naika had their food in the house and thereafter, after the torch light was flashed, they went inside the areca garden. According to the approver, all the participants in the crime had arrack as well as chicken curry and 'rotti' in the garden, that the whole party got up at mid-night, Chinna Gowda returned to the house with Shivappa, then came back to the garden after leaving him and then they all went towards the house of the deceased, Mariappa Gowda. According to the witness, not only Chinna Gowda and Ramappa Naika had their meals in the house but that they returned to the jagali five or ten minutes after they went to the garden and it was then 9.30 p.m. This is wholly inconsistent with an important part of the story as narrated by the approver. Finally, while according to the approver, Chinna Gowda slept inside the house on the night in question, the witness says that he slept on the jagali. Considering, therefore, the evidence of the witness as a whole, it must be said that far from affording corroboration to the evidence of the approver on material particulars, it contradicts the evidence of the approver at least with respect to one fact which is material and that is the entire party leaving the garden at midnight for the house of Mariappa Gowda. If the evidence of the witness is true it would seem that Chinna Gowda, instead of going to the house of Mariappa Gowda, along with others returned to his house and slept on his jagali. For, he does not say that after coming back from the garden at 9.30 p.m., Chinna Gowda again went there. No doubt, the approver said that before going to the house of Mariappa, Chinna Gowda went with Shivappa to his house and then returned immediately. But according to him it was midnight and not at 9.30 p.m. Thus, far from corroborating the evidence of the approver in so far as the participation of the appellant Chinna Gowda is concerned, the evidence of this witness tends to contradict it.

Then there is the corroboration, said to be afforded by the retracted confessions of the accused Manjappa Gowda and Manjappa Naika. We have not been taken through the confessions of these two persons but we will assume that these two persons tell the same story as the approver but the question is whether the confessions can safely be relied upon as affording corroboration to the evidence of the approver.

Since the appellants and the confessing accused persons, Manjappa Gowda and Manjappa Naika were tried jointly for the same series of offences, their confessions can be used against the appellants under s. 30 of the Evidence Act. But a confession cannot be regarded as a piece of satisfactory evidence because it is not made in the presence of the person or persons whom it incriminates and consequently cannot be tested by cross-examination. A confession, therefore, is a much weaker type of evidence than the evidence of the approver which is not subject to such an infirmity. No doubt, by virtue of s. 30 they can, as pointed out in Bhuboni Sahu's case (cit. sup.) can be taken into consideration by the Court and thereby treated as evidence upon which the court may act, but s. 30 does not say that the confession amounts to proof. In *Kashmira Singh v. State of Madhya Pradesh* [[1952] S.C.R. 526, 530] this Court has approved of the decision in Bhuboni Sahu's case and observed :

"But 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 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."

After making these observations this Court has pointed out the danger of using the testimony of one accomplice to corroborate another because for one thing evidence consisting of the confession of the accomplice cannot be tested by cross examination.

Relying upon illustration (b) to s. 114 of the Evidence Act it was contended on behalf of the Crown in Bhuboni Sahu's case [(1949) L.R. 76 I.A. 147] that where several participants in the alleged crime have in their separate confession implicated a particular person as being the culprit and there was no previous concert amongst the confessing accused, there was no reason to reject their confessions and that the evidence of the approver which, as here, was the primary evidence in the case should be regarded as being sufficiently corroborated by such confessions. The argument was rejected by the Privy Council on several grounds. One of the ground was that the confessing accused had been produced before the magistrate together for recording their confessions. Then they pointed out at p. 157 :

"..... whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused, given independently, and without an opportunity of previous consent, might be entitled to great weight (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 on 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 its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all details as to eight of them, but untrue as its the other two, whose names have been introduced because they are enemies of the approver."

It would appear from the record of these appeals that the confessions of the approver and Manjappa Gowda were recorded on the same day, i.e., March 27, 1958 by Mr. V. Revanna, Magistrate, First Class, Chikamagalur, while that of Manjappa Naika was recorded by another Magistrate on March 29, 1958. Mr. V. Revanna was examined as P.W. 41 in this case and he has stated in evidence that he received a requisition from the Deputy Superintendent of Police, Mr. Ramaswamy on March 22, 1958 for recording the confessional statements of Manjappa Gowda and the approver, Venkappa Naika and those persons were produced before him on that very day. He informed them that thereafter they would be removed from the police custody and then he remanded them to the judicial lock-up till March 24, 1958. He also told them that they were not bound to make any confessions. As, however, he was on casual leave from March 23, 1958 to March 26, 1958, they were produced before him on March 27, 1958. It would appear that these persons were in the police lock-up since their arrest till March 22, 1958 and were actually brought together to the magistrate's court. There is nothing to show that they were kept separate. In the circumstances there is no guarantee that the accounts which they have given of the incident in their confessions were independent and without previous concert. Therefore, apart from being a very weak type of evidence, there is an absence of intrinsic evidence in the confession of Manjappa Gowda which would go to provide an assurance that it is true in all its details. It may be that the general outline of

the incident given by Manjappa Gowda is correct but insofar as it implicates the appellants before us there is no guarantee about its truth. We cannot, therefore, regard that confession as affording corroboration to the evidence of the approver.

The defect which we have pointed out with respect to the confession of Manjappa Gowda does not appear to be present in Manjappa Naika's confession. He was first produced before a magistrate for recording his confession on March 27, 1958, and was then remanded by the Magistrate to judicial custody till March 29, 1958. It is possible that since this persons was arrested on March 15, 1958 by which date the approver and the other accused including Manjappa Gowda had presumably been arrested, they may have been in police custody together for some time. It is, however, not clear from the record whether they were kept in custody at the same place. The circumstance appearing in the Privy Council case may, therefore, not be present in so far as he is concerned. All the same we find that there is one grave infirmity in his confession. The record does not show that when Manjappa Naika was produced before a magistrate on March 27, 1958, and remanded by him to the judicial custody he was given due warning by the magistrate and told that he should reflect whether he should make any confession at all. In his examination as witness No. 44, the magistrate, Mr. K.S. Malle Gowda has stated as follows :

"On March 27, 1958, the Deputy Superintendent of police produced before me A-4 Manjappa Naika and gave me the requisition, Ext. P. 23, for recording his statement under s. 164, Cr. P.C. On that, I remanded A-4 Manjappa Naika to the judicial custody till March 29, 1958. Accordingly, on March 29, 1958, he was produced before me in my Court hall by the Sub-Jail authority at about 11.00 a.m."

Thereafter he said that he asked the usual preliminary questions and then recorded the statement of Manjappa Naika. No doubt, it would appear that on March 29, 1958, the Magistrate asked Manjappa Naika whether he wanted time to think over the matter to which the latter replied : "write", presumably meaning thereby that he did not want time. That, however, is not sufficient compliance with the requirements of law. It has been pointed out by this Court in *Sarwan Singh v. The State of Punjab* [[1957] S.C.R. 953] that when an accused person is produced by the investigating officer before the Magistrate for recording his confession, it is of the utmost importance that his mind should be completely free from any possible influence of the police and he must be sent to Jail custody and given adequate time to consider whether he should make a confession at all. It is true that here Manjappa Naika after being produced by the Investigating officer before a Magistrate for recording his confession the latter remanded him to the judicial custody upto March 29, 1958, i.e., for two days but it was necessary for the magistrate to make it clear to Manjappa Naika that he was not bound to make the confession and that if he made the confession, it was likely to be used against him and that, therefore he should reflect whether he should make an confession at all. It does not appear from the evidence of the Magistrate Mr. Malle Gowda that he brought these important matters to the notice of Manjappa Naika while remanding him to the judicial custody. In the circumstance, the confession is not upon which a Court can properly act.

That leaves for consideration only one circumstance on which the High Court has relied and that is the failure of the appellant, Chinna Gowda, not to go to the house of T. Shiviah alias T. Shivaswamy, P.W. 75, for receiving a loan on February 13, 1958. It is said that he did not do so because he had with him the booty collected from the house of the deceased Mariappa Gowda and, therefore, he no longer stood in need of raising the loan. There may be various reasons why Chinna Gowda did not keep his appointment but even assuming that he had come by some money and that this happened as a result of the incident which took place on the night between February 12 and 13,

1958, it would not be legitimate to conclude that he had himself participated in the murders.

Thus we are left only with the evidence of the approver. As already pointed out, his evidence suffers from two infirmities : on his own showing he is a man of bad character, and further in the court of the committing magistrate he went back upon his confession before Mr. Revanna, Magistrate First Class. Again he is a person whose business is to manufacture illicit liquor. Thus, apart from participating in the heinous crimes which were perpetrated on the night in question, he has been leading a life of a law-breaker. His evidence, standing by itself, cannot, therefore, carry conviction. Indeed neither the Sessions Judge nor the learned Judges of the High Court regarded his evidence as being sufficient to justify conviction of the various accused persons. In the circumstances we must hold that his evidence cannot safely be regarded as the sole basis for resting the conviction of the two appellants before us.

We, therefore, allow each of the two appeals, set aside the conviction and sentences passed against the appellants and direct that they be set at liberty.

Appeals allowed.

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