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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **CRITICAL ANALYSIS OF HISTORICAL EVOLUTION OF APPROVER'S EVIDENCE**

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## **ABSTRACT**

The article analyses the historical evolution of evidentiary value of approver's testimony. Starting from the English Common law in the times of King Henry I from where the concept of informers and approvers can be found to have roots and being treated as officers of justice due to paucity of private prosecutions, their testimony was treated as sufficient evidence against the accused and matters were decided by duels between the approvers and the persons against whom he appealed to the present times, where courts have universally developed a practice of caution in accepting the testimony of the accomplice at its face value. Thus, as a rule of prudence, testimony of approvers are corroborated in material particulars and the incentive of pardon tendered to them is based on fulfilling of certain conditions as provided under section 306 of The Code of Criminal Procedure. The article also analyses the new developments brought in by the amendment in the criminal laws in 2023.

## **I. INTRODUCTION**

### ***A. Historical Background***

The law or practice of approver can be traced to have its roots in the early human society where the captured criminal generally attempted to attenuate his punishment by informing on his accomplices. Though Roman law or civil law did not accept the testimony of such an accuser, the English Common law converted him into an officer of justice. The Crown employed an approver to serve the king by ensuring the conviction of those who disrupted the king's peace. During the medieval era, individuals accused of treason or a crime could confess and testify against their accomplices in a process known as approvement. If successful in securing convictions for all their accomplices, they would be granted freedom; however, failure in even one case resulted in death by hanging. The concept of



Approvement emerged during King Henry I's reign in around 1130. The authority to allow a criminal to become an approver was a right held by the king or the leaders of royal privileges. It entailed the confessed criminal accusing their associates, in order to save themselves. A coroner was appointed by the court to record their confession and accusations, and a request for a writ of approvement was made to the king<sup>1</sup>

In ancient times, societies relied heavily on the system of approver's evidence to uncover criminal activities and bring justice to the offender. The use of approver's evidence can be traced back to ancient times, where societies relied on informants to uncover criminal activities and bring justice to the offender. During the medieval period, violence was prevalent among the population, and emerging states employed extreme force to maintain control and suppress it. Trials during this time focused more on determining guilt rather than the nature of the offense<sup>2</sup> (Glaeser & Shleifer, 2002). The level of violence during medieval times was only rivaled by the force exerted by emerging states. During this period, the guilt of an offender was considered more important than the nature of their offense. Once guilt was established, the question was not whether an execution should take place, but rather how dramatic it should be.

Approvers were introduced in Indian criminal law during the colonial era, with the establishment of the Thuggee and Dacoity Department in 1835, the British recruited a band of approvers, informers and former accomplices to eradicate the Thuggees.<sup>3</sup>

Throughout history, the use of approver's evidence has been a method employed to uncover criminal activities and bring justice to offenders. In ancient times and during the medieval period, this approach relied heavily on informants and the confession and testimony of the accused. The concept of using informants to uncover criminal activities still holds relevance in contemporary society. In modern legal systems, witness testimony and the cooperation of informants continue to play a crucial role in solving crimes and holding offenders accountable.

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<sup>1</sup>Frederick C. Hamil, "The King's Approvers: A Chapter in the History of English Criminal Law", 11(2), *Speculum* 238 (1936).

<sup>2</sup>Edward L. Glaeser and Andrei Sheifer, "Legal Origins", 4, *The Quarterly Journal of Economics* 117, (2002).

<sup>3</sup>Roshan Abbas, "Thuggee and the complex history of a mysterious criminal underworld", *Frontline*, September 23, 2023.



However, as societies have progressed, the methods of uncovering criminal activities have evolved. In contemporary society, the emphasis on due process, evidence gathering, and fair treatment of both the accused and the victim has transformed the method of uncovering criminal activities. While the approach to justice has evolved significantly, the underlying principle of seeking the truth and delivering justice remains constant. The transition from the medieval system of approver's evidence to the modern practice of King's evidence reflects the changes in the justice system to adapt to the societal progress and values<sup>4</sup>. The extreme force exerted in medieval times has given way to a more systematic approach to justice.

## II. RELEVANT LEGAL PROVISIONS

### A. *Tender of Pardon to Accomplice*

The Supreme Court of India in *R. K. Dalmia v. Delhi Admn.*<sup>5</sup>, defined the term accomplice to mean as someone who takes part in commission of a crime that an accused person is charged with. The court observed that such person has to be a *participes criminis*, however, the court also recognised two exceptions to the rule of participant of crime first being, receivers of stolen property and second, “accomplices in previous similar offences committed by the accused on trial are deemed to be accomplices in the offence for which the accused is on trial”. The courts in India can obtain evidence of such an accomplice after commitment of a case but before the judgment is passed and in turn tender a pardon to such accused on the condition that he makes full and true disclosure of the circumstances relative to the crime and to every other concerned person. Every person who accepts such a pardon is examined as a witness.<sup>6</sup> This provision incentivizes the accomplice to provide truthful and valuable information, ensuring that their evidence is reliable and of probative value.

### B. *Corroboration in Material Particulars*

The testimony of the accomplice as a competent witness against the accused is provided under section 133 of The Evidence Act, 1872. It also further provides that conviction based on uncorroborated testimony of an accomplice is not illegal, however, section 114 illustration (b) of the Act<sup>7</sup> provides as a rule of caution that the credibility of an accomplice is questionable and his testimony must be

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<sup>4</sup>*Supra* note 1 at 257

<sup>5</sup>AIR 1962 SC 1821

<sup>6</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 306, 307.

<sup>7</sup> The Evidence Act, 1872 (Act 1 of 1872).

corroborated in material particulars. As a rule, courts should hesitate to deviate from the principle of caution, rooted in extensive experience, which demands some independent evidence linking the specific accused. The risk of relying on accomplice testimony is not only that the accomplice has admitted to being a person of questionable character who participated in the crime and then betrayed his former associates to save himself, placing himself in a position where he would naturally be biased toward favouring the prosecution; but also, that he may tell a mostly true story and easily incorporate untrue elements into it<sup>8</sup>.

As per the interpretation given by the Supreme Court, the combined effect of section 133 and section 114 illustration (b) is that the former is a rule of law as per which accomplice is competent to give evidence whereas the latter is a rule of prudence and a rule of practice as it is unsafe to convict upon his testimony alone.<sup>9</sup> This reflects the cautious approach taken by Indian law towards the evidence of an accomplice, recognizing that such evidence may be prone to bias or fabrication. To ensure the reliability and credibility of the accomplice's evidence, Indian law requires corroboration in material particulars.

There is a universal practice to refrain from convicting based only on the testimony of an accomplice unless it is supported by other material evidence. The testimony of an accomplice differs from that of any other witness in one specific aspect that the evidence of an accomplice is deemed ab initio open to great suspicion. If this suspicion is not dispelled, the accomplice's evidence is not to be relied upon without corroboration; however, if this suspicion is alleviated, then their evidence may be used even without corroboration to establish the guilt of the accused.<sup>10</sup> This corroboration can come from independent evidence that supports and confirms the accomplice's testimony. This may include forensic evidence, eyewitness testimony, or other circumstantial evidence that strengthens the case against the accused<sup>11</sup> (V.R, 2015). The evidence should link the accused to the offence. This evidence can be either direct or circumstantial. It is not required for the evidence to confirm all details of the crime; confirmation of key aspects is enough.<sup>12</sup> However, one accomplice's testimony cannot serve as corroboration for another accomplice's testimony.<sup>13</sup>

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<sup>8</sup> *Bhuboni Sahu v. King*, 76 IA 147.

<sup>9</sup> *Bhiva Doulu Patil v. State of Maharashtra*, AIR 1963 SC 599.

<sup>10</sup> *Mrinal Das & Ors. v. State of Tripura*, (2011) 9 SCC 479.

<sup>11</sup> V. R. Dinkar, "Forensic Scientific Evidence: Problems and Pitfalls in India", 3(2) *IJFP* (2015)

<sup>12</sup> *Mohd. Husain Umar Kochra v. K.S. Dalipsinghji*, (1969) 3 SCC 429

<sup>13</sup> *Bhuboni Sahu v. R.*, (1948-49) 76 IA 147

The Apex Court while explaining the nature of corroboration in *Sheshanna Bhumanna Yadav case*<sup>14</sup> observed that the essence of corroboration is that it serves as supporting evidence and can be in the form of testimony from another witness or circumstances such as the behaviour of the person being accused. Corroboration must establish a connection between the accused and the crime. When it is stated that corroborative evidence must involve the accused in important details, this means that simply confirming part of a testimony is not sufficient. The evidence must confirm those parts of the testimony which indicate that the accused committed the crime. Further, the court by giving an example explained that if a witness claims that both he and the accused stole sheep and put their skins in a specific location, finding these skins at said place would not provide corroboration against the accused. However, discovering them at the accused's house would provide corroboration because it supports the claim that he was involved in the theft.

### *C. Credibility of Evidence*

An accomplice is certainly a competent witness according to the Evidence Act, 1872. However, there's no denying that his involvement in the crime casts doubt on his testimony, and courts are understandably hesitant to rely solely on such tainted evidence unless it is backed up by other independent sources. It wouldn't be fair to expect complete corroboration covering every detail of the prosecution story, yet relying solely on minor corroborated details doesn't provide enough assurance about the truthfulness of the main story disclosed by the approver. Before considering whether an approver's testimony is adequately corroborated or not, it's crucial for the court to first determine if this accomplice can be considered a reliable witness at all. If he isn't deemed reliable as an accomplice witness, then there would be no need for further consideration regarding corroboration. In essence, the Supreme Court of India in *Sarwan Singh case*<sup>15</sup> observed that evaluating an approver's testimony must meet a dual requirement i.e., first, showing reliability of accomplice as a witness (a common test for all witnesses) and second, receiving sufficient corroboration due to its weak or tainted nature.

The Hon'ble Supreme Court of India in *Ravinder Singh v. State of Haryana*<sup>16</sup> further elucidated that an accomplice can be an untrustworthy ally and must demonstrate their credibility in court. The court devised the test of credibility and it is fulfilled, first, if their account of the crime involves

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<sup>14</sup> *Sheshanna Bhumanna Yadav v. State of Maharashtra*, (1970) 2 SCC 122

<sup>15</sup> *Sarwan Singh v. State of Punjab*, AIR 1957 SC 637

<sup>16</sup> (1975) 3 SCC 742



him in the felony and it should appear plausible and consistent with reality and as a natural catalogue of events that had taken place, supported by specific details. Furthermore, it must implicate the accused in a manner that proves his guilt beyond reasonable doubt. In most cases, corroboration from other credible evidence linking the crime to the defendant is necessary for conviction based solely on an accomplice's testimony, however, in certain circumstances of a particular case conviction based solely on the testimony of the approver is permissible if the said statement of the approver is confidently held to be true and reliable by the court.

Sir John Beaumont, delivering the judgment in *Bhuboni Sahu case*<sup>17</sup>, pointed out that apart from an accomplice being inherently biased towards protecting himself by incriminating others and having a questionable character due to involvement in criminal activities, there exists genuine danger posed by potentially mixing true details with false ones when providing their account. Therefore, requiring independent evidence implicating each accused to some extent serves as a crucial safeguard against unjustly condemning innocent individuals alongside those who are guilty.

The sources provided help to explain the categorization and roles of individuals involved in criminal activities, such as principals, accomplices, and accessories. These sources can provide insight into the dynamics of criminal networks and the potential motivations and actions of individuals within them. They also highlight the importance of circumstantial evidence in demonstrating an individual's state of mind or proving the elements of a crime. Furthermore, it is important to be aware of the potential biases and influences that can affect witness testimony. The inclusion of an approver's testimony as evidence in a criminal trial should be done cautiously and with thorough corroborating evidence. The sources provided offer valuable insights into the criteria for assessing evidence in the criminal justice system, the roles and liabilities of individuals involved in criminal activities, and the potential challenges and considerations when evaluating an approver's testimony. In summary, the sources provided offer information on the categorization and roles of individuals in criminal activities, the importance of circumstantial evidence, potential biases in witness testimony, and the criteria for assessing evidence in the criminal justice system. The sources provided can help build a stronger case by providing a framework for understanding the roles and responsibilities of individuals involved in criminal activities. Furthermore, they shed light on the potential challenges and

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<sup>17</sup> *Supra* note 13

considerations when evaluating an approver's testimony, including the need for corroboration due to its weak or tainted nature.

#### **D. Latest Development in Criminal Laws**

The Parliament by amending three criminal laws, brought the new evidence act namely, The Bharatiya Sakshya Adhiniyam, 2023<sup>18</sup>. The provision regarding testimony of accomplice has been provided under section 138 of the Act which states that:

*“138. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.”*

This new section has been inserted in place of section 133 of the old act<sup>19</sup>, however, the legislature has omitted the word ‘merely’ from the new provision and has also replaced the term ‘uncorroborated’ with ‘corroborated’ testimony of an accomplice. This shows a paradigm shift from the draconian colonial law which provided for conviction based on the uncorroborated testimony of accomplice not being illegal to a more prudent law incorporating the universal practice that the courts have been following of late of corroborating the statement of the accomplice in material particulars either with direct or indirect evidence in the form of independent evidence, witness testimony, etc. The legislature by introducing this change has emphasized on due process, evidence gathering and fair treatment of the accused and the victims.

The legislature by introducing the term ‘corroborated testimony’ in section 138 of the new legislation has made it clear that moving forward on the uncorroborated testimony of the accomplice is no more legal and has removed the dichotomy between old section 133 and section 114 illustration (b) of the Evidence Act, 1872 as per which relying on the uncorroborated testimony of accomplice was not illegal however, accomplice by his very nature being unworthy of credit was required to be corroborated in material particulars. But, with the new legislation no such dichotomy is sustained and the law is now clear that corroboration of accomplice testimony is mandatory.

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<sup>18</sup> The Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023), available at: [https://cdtihyd.gov.in/static/download/LatestLaws/amended\\_criminal\\_laws.pdf](https://cdtihyd.gov.in/static/download/LatestLaws/amended_criminal_laws.pdf)

<sup>19</sup> *Supra* note 7

### III. CONCLUSION

The use of approver's evidence is governed by relevant legal provisions in different jurisdictions, including laws regarding witness protection, rules for granting immunity or leniency to the approver in exchange for their cooperation, and regulations for the admissibility and weight given to such evidence in court proceedings. The practice of approver can be said to be a practice of carrot and stick, however, the nature of carrot and stick has changed. In ancient times, during the 12th and 13th centuries in England, if the approver was successful in securing conviction of all the accused he was set free and allowed to live freely in the realm, however, if he failed to secure conviction of even one of the accused, the approver was hanged. Extreme measures were adopted by the king and the decision was based wholly on the discretion of the judge.

In contemporary society, with the development of the principle of rule of law, human rights and fair treatment of the stakeholders in a criminal trial, the courts did not proceed with conviction on the sole testimony of approvers. The nature of carrot and stick also changed as with regard to carrot, accomplices were given the incentive to give evidence against other accused by being tendered pardon and in case of stick, the condition for pardon was that the accomplice shall narrate full and true facts of the case that were in his knowledge relating to the offence and all the accused persons concerned and in case he failed to do so, his testimony as prosecution is not considered and is then tried as an accused. The drastic step of hanging the approver in medieval times is done away by the modern criminal justice system by recognising the rights of accused.

The Evidence Act, 1872 allows accomplice testimony but with caution. Thus, courts recognising the dubious nature of an approver, being a person of bad character, have as a universal practice and as a rule of prudence, stopped relying on the uncorroborated testimony of an accomplice. Though, not every detail of his testimony needs to be corroborated it must be as a rule of caution be corroborated in major particulars with direct or indirect evidence. The nature of corroboration involves supporting evidence that connects the accused to essential details of the crime, not just a part of it.

The courts through a myriad of judgements tried to settle the dichotomy between sections 133 and 114 illustration (b) of The Evidence Act, 1872 elucidating that the former is a rule of law and the former a rule of prudence. But, the new legislation namely, The Bharatiya Sakshya Adhiniyam, 2023, removes any such dichotomy and straight away provides for the competency of accomplice evidence if it is proceeded upon his corroborated testimony. This is a welcome shift from the colonial laws to a more rule-based law.