
(2012) 02 GAU CK 0004
In the Gauhati High Court
Case No : Criminal Appeal No. 102 of 2004

Abdul Alim (Md.)	Vs	APPELLANT
State of Assam		RESPONDENT

Date of Decision : 04-02-2012

Acts Referred:

Criminal Procedure Code, 1973 — Section 164(4)
Criminal Procedure Code, 1973 (CrPC) — Section 164(4)
Penal Code, 1860 — Section 304 PartII
Penal Code, 1860 (IPC) — Section 304 PartII

Citation : (2012) 6 GLR 268 : (2012) 2 GLT 236

Hon'ble Judges : S.Talapatra, J

Bench : Single Bench

Advocate : Mrs. S. D. Choudhury & Amicus Curie, Advocate appeared for the Respondent: PP, Assam, Advocates appearing for Parties

Judgement

S. Talapatra, J.—This appeal is directed against the judgment and order dated 11.03.2004 as passed in Sessions Case No. 77 (J)/2000 by the learned Sessions Judge, Bongaigaon, convicting the appellant under Section 304 Part II and sentencing him to suffer five years rigorous imprisonment and fine Rs. 500/, in default of payment to undergo another period of rigorous imprisonment for three months.

2. The prosecution case as gathered from the records is that on 25.04.1994 the appellant, namely, Abdul Alim had assaulted his younger brother Abdul Aziz having inflicted an injury by means of sharp weapon causing injuries. Another brother of the appellant namely, Haider Ali took the injured to the Chalontapara hospital and thereafter to Bongaigaon hospital. From Bongaigaon hospital the injured was taken to Goalpara Civil Hospital, where he succumbed to the injuries on 26.04.1994. After death, a First Information Report was lodged by the said brother of the appellant. During investigation, the police seized a knife as allegedly shown by the appellant in presence of witnesses. The inquest was conducted on the dead body in the hospital and accordingly report was prepared

in presence of the witnesses. The police also produced the appellant for recording the confessional statement before the learned Judicial Magistrate during investigation. On completion of the investigation police submitted charge sheet against the appellant under Section 302 of IPC. Since the offence was exclusively triable by the Court of Sessions, the learned Judicial Magistrate at Abhayapuri committed the case for trial to that Court. On receipt of the case on commitment and duly registering the same in the Sessions Court the charge under Section 302 IPC was framed to which the appellant pleaded not guilty and claimed to be tried.

3. The prosecution examined as many as 10 (ten) witnesses including the Medical Officer who carried out autopsy and the prosecution also admitted some documents viz. seizure list, post mortem report, inquest report etc. On closure of the prosecution evidence statement of the appellant were recorded under Section 317 CrPC where he retracted from the purported Confessional statement. Since no other witnesses except the I.O. deposed anything against the appellant, he did not contradict their statement but denied the statement of the Investigating Officer implicating him. One Defence witness was also examined. The said witness stated that there was quarrel between the appellant and one Noor Islam. Abdul Aziz also got entangled in some point of time. But the said witness also did not state categorically who assaulted Abdul Aziz.

4. The learned counsel appearing for the appellant as well as the learned Addl.PP. representing the State admitted that the PW 1 Hametaon Bewa, PW 2 Haidar Ali, PW 3 Aziz Uddin @ Amiz Uddin, PW 4 Abdul Monaf, PW 5 Hasmat Ali, PW 7 Noor Islam, P W 8 Jalal Uddin did not state anything against the appellant in respect of his involvement in assaulting the deceased. Only PW 7 Noor Islam stated that he heard from his paternal uncle Mula police that a marpit between Abdul Aziz and Abdul Alim took place and as a result Abdul Aziz sustained injury and died consequently. The said paternal uncle was also not examined by the prosecution. PW 9 Sri. Kusum Ranjan Nath is the Investigating Officer. He stated that having learnt about the cause of the death from Haider Ali (PW 2) he proceeded to Goalpara Hospital where he found the dead body and thereafter he held inquest and the report is the Exbt. 2. He arranged for post mortem examination and collected the report from the PW 6. He also seized a knife by preparing a seizure list, at Exbt. 4, whereas the seized knife is the material Exbt. No.1. He also stated that he forwarded the accused for recording the confessional statement from the police station. After collecting the confessional statement and post mortem examination he submitted the chargesheet. He also denied the suggestion that information given by the accused person has led him to discovery of the material Exbt. No.1. It is pertinent to point to point that the PW 9 namely, Sri Kusum Ranjan Nath had not brought on evidence any statement as recorded for discovery of the material Exbt. No.1. In the cross examination, PW 9 also stated that in the seizure list there is no description of the place from where the knife was recovered. PW 10, namely, Dr. Syedur Rahman conducted the autopsy over the dead body and prepared the post mortem report. He stated

regarding the injuries on the deceased as follows:

"A male healthy dead body about 26 years age lying supping, rigor mortis present in the upper and lower extrimities, mouth, eyes are closed and pale. There s a longitudinal incision mark on the right side of abdomen abot 2.5 cm from the midline, therew is a haemotoma on left side on the back, with skin intact, also there is an abrasion on the upper part of the right shoulder joint.

There is a penetration injury mark about 2.5 cm on the right from the midline and just above umbilicus, size 2.5 cm, each injury extended above and below by opeartion sruinges tube on the left lower part of abdomen. Penetration injury present deep to the external injury. Otherwise healthy and deep to it contains blood. Also there is a penetration injury on the postenor wall of peritoneumon the back about 2 cm size with bleeding. Stomach and its contents healthy and empty. Small intestine and its contentspenetration injury present in the jejunur and its three place about 45 cm distance from each other. This part was resorted and anaestomosis done with catgent and silk. Large intestine and its contentsone penetrating injury present in descending colon, repassed by silk. Otherwise healthy and contains faecal matters.

The penetrating injury through the anterior abdominal wall injured jejurum, in three places with injury to mesentry causing severe bleeding also it injured descending colon in one place then it enters retroperitonal space just below the left kidney with collection of blood in retropisitoneal space."

According to PW 10, the cause of death was shock and haemorrhage as result of the penetrating injury in the abdomen which is antemortem in nature.

5. The appellant was produced before the learned Judicial Magistrate 1st Class on 12.05.1994 for recording his confessional statement from police custody as stated by P W 9. Learned SDJM, Abhoyapuri recorded the confessional statement (Exbt. 3) on the same day. From the statement of the said Judicial Magistrate, PW 6, it appears that when the appellantaccused was produced before him, he asked whether he would make any confession admitting his offence. Response being affirmative, the PW 6 explained to him implications of such confession and thereafter he allowed the appellant "three hours time" for reflection in a Chamber under the case of his peon. After expiry of that three hours, PW 6 again explained to the appellant that he was not a police officer but a Magistrate and the appellant was not bound to make any confession and if he made any confession the same would be against him. Even thereafter, when the appellant showed his inclination to make his statement, the statement was recorded, which is Exbt. 3. After recording the confessional statement the same was read over to the appellant and thereafter he put his thumb impression thereon and finally the Judicial Magistrate put his signature under the purported certificate. During crossexamination, the PW 6 categorically admitted that nowhere he mentioned the time for reflection. The appellant stated in Assamese, verbatim translation (Exbt. 3)., which runs as under:

"Around 9.00 p.m. a few days back I had a quarrel with my brother Abdul Aziz. I then stabbed him in the abdomen with a dagger. My brother dies later. My elder brother Hazar Ali informed me of Abdul Aziz's death."

6. Section 164 (4) of CrPC, 1973 provides that any such confession shall be recorded in the manner provided in Section 181 of the Evidence Act for recording the examination of an accused person and shall be signed by the person making the confession and the Magistrate shall make a memorandum at the foot of such record to the following effect:

"I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it admitted by him to be correct and it contains a full and true account of the statement made by him."

7. On examination of the said confessional statement as recorded by PW 6, I find no such memorandum appended at the bottom of the statement so recorded by PW 6. Certification by such memorandum is not a mere ritual but it contains some vital components to establish voluntariness and the true account of the statement as made by the accused. The confession as made is at Exbt. 3 is no doubt in the answer and question form and in column No.1 the accused has stated that he was brought by one Head Constable before the Court and thereafter nowhere it is available how much time the appellant was provided with to reflect before making any statement. No such record was found except the oral statement as made by the Judicial Magistrate.

8. On perusal of the Exbt. 3, it further appears that it is a printed form being Form No. (M) 84 in Assam Schedule VIII, Form No. 96 and the learned Magistrate had only filled up the blank portion one after another and put his signature and even a certificate was made overlapping the printed part. Be that as it may, solely on the basis of the said statement the appellant has been convicted under Section 304 PartII, IPC.

9. It is now required to be examined whether the confessional statement has been recorded as per procedure laid down in Section 164 of CrPC or not and whether the statement can be said to have been voluntarily on the face of retraction as made by the appellant during his cross-examination under Section 313 of CrPC.

10. It is evident from the confessional statement that the appellant only stated that he stabbed the deceased on the abdomen. But from the post mortem report and from the deposition of the PW 10, it appears there were several injuries antemortem in nature on the person of the deceased. Even the learned Sessions Judge has recorded para9 of the judgment that from the evidence of Doctor (PW 10) and from the post mortem report (Exbt.6), it becomes clear that there were several penetrating injuries on the body particularly on the right from the midline

and just above umbilicus and the doctor has ascribed the cause of death as shock and haemorrhage resulting from those antemortem injury in the abdomen. But the appellant in the retracted confessional statement had only stated that he stabbed only on the abdomen. As such, the confessional statement cannot be treated as a true account of the occurrence. Apart that, no other evidence is available against the appellant corroborating that he committed the assault on the deceased. The Investigating Officer, PW 9, implanted the story of leading to discovery which has been correctly discarded by the learned Sessions Judge, holding that in absence of proof of any discovery statement the discovery of material Exbt. 1 cannot sustain in law. As such the said evidence also did not survive the test of Section 27 of the Evidence Act.

11. On careful consideration of the statement of DW 1 it can be simply said that DW 1 did not make any statement involving the appellant in the assault on the deceased. Now the question that remains unanswered whether only on the basis of the retracted confessional statement the conviction of the appellant can be sustained or not. It is well settled if the Court gets assurance from the confessional statement even in absence of any corroborative evidence, conviction can be sustained but in this case in the manner the confessional statement has been recorded it creates serious doubt whether the said statement was made voluntarily or not. There is hardly any description of any occurrence appearing in the statement. Abruptly the appellant confessed his guilt that he stabbed the deceased. Apart that, it looms large on the records that no sufficient time was given to the appellant when he was produced by the police for reflection before making the inculpatory statement in the form of confession. It is also not available from the record whether after recording of the statement the appellant was sent to the police custody or to the judicial custody. In absence of such records, it is difficult to presume that the appellant was free from influence of the police while making the statement of confession. Rather, it is evident from the record that the police brought the appellant from their custody for recording of the statement and there was no scope for cool reflection before making the confessional statement. In this regard, a catena of decision of Supreme Court held that for lack of such reflection, the voluntariness of the statement comes under cloud and such statement is liable to be rejected.

12. In *Bhagwan Singh & Ors. Vs. State of M.P.* as reported (2003) 3 SCC 21, the Apex Court held:

"30. It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntarily and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntarily and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial

confession. (See Shankaria Vs. State of Rajasthan, 6 SCC para 23.)"

13. In Bheru Singh Vs. State of Rajasthan as reported in 1992(2) SCC 467 the Apex Court illustrated how to appropriate the retracted confessional statement. The relevant parts are recorded.

"20. Before proceeding further, it would at this stage be also proper to deal with the confessional statement of the appellant recorded under Section 164 CrPC, Ex.P2 on June 14,1988. In this connection, before adverting the analysis of the statement made by the appellant Ex.P2, it would be desirable to examine the statement of the learned Judicial Magistrate who recorded the confessional statement Ex. P2. Shri Tara Chand Soni, Judicial Magistrate recorded the confessional statement under Section 164 CrPC. Appearing as PW 1, he stated that on June 8, 1988 while he was posted as Munsiff and Judicial Magistrate First Class, Surajmal Constable submitted an application before him to record the statement of the appellant under Section 164 CrPC. The application was produced at the residence of the learned Magistrate since the duty hours of the Court were over. The learned Magistrate affixed the case for June 9, 1988 in the Court and directed the police to produce the production warrant of the appellant to show that he was in judicial custody. On June 9,1988, the appellant was remanded to judicial custody and directed to kept seperately from other accused persons and the case was fixed for June 13, 1988, on which date the appellant appeared in this Court and stated that he wanted to make a statement. PW 1 went on to depose that he disclosed his status as First Class Magistrate and cautioned the appellant that" he is free to give or not to give the statement and in case he gives the statement, it may be read against him". The appellant was also told that his statement would be recorded only if he wanted to make it voluntarily and of his own free will. The appellant was given 24 hours" time and the Jailor was directed in writing by the Magistrate that .the appellant may be allowed to stay in the jail in a place of his own choice so as to enable him to reflect and give a cool thought as to whether he wanted to make a confession or not. He assured the appellant that he would not be sent to the police custody in case he did not want to make the statement. The appellant was produced before him on June 14, 1988 and on being asked by the Magistrate, the appellant expressed his desire to make the statement. The learned Magistrate took all steps to remove any trace of fear from the appellant and observed the formalities envisaged by Section 164 (3) CrPC before recording the statement Ex. P2 under Section 164 CrPC. The Magistrate went on to depose that the statement was given by the appellant voluntarily and in Hindi and that Ex. P2 was recorded in the manner given by the appellant.

21. In the confessional statement Ex. P2 the record reveals that before it was recorded, certain specific questions were put to the appellant to assure him that he was making the statement before a First Class Magistrate and that he need not be afraid of anyone and that he was at liberty to give the statement without any fear. He was asked whether he was under threat from anyone to make the

statement and the appellant replied in the negative. He was cautioned that he is not bound to make any confessional statement but that if did make one, it could be read against him. Thereafter, he made the statement which revealed the manner in which he was taken from his house well in the jeep along with Ram Bilas Mahajan and Girraj and the conversation which he had with them at the well. He went on to add that during the conversation "Girraj told me pointing his men, I have given them Rs. 50,000 to kill you and your family. So if you want to save your life you yourself kill the members of your family....I agreed to kill my children. Girraj also told me, you have to say in the Court that your wife was bad character. ..." He went on to add that, thereafter, he killed his wife and children with the sword which belonged to him. He stated that he first murdered his wife and thereafter the children and then went to the police station and after giving the information regarding commission of murders, produced the sword before the police, with which murders had been committed by him.

22. The High Court relied upon the confessional statement recorded under Section 164 CrPC and found that the same was voluntary and had been made by the appellant without any threat or fear and that it contained a full confession of the crime and also disclosed the manner in which the crime had been committed. The High Court also relied upon the report of the Serologist Shri V.N. Mathur, who had stated in the chemical report that the seized articles including the bloodstained sword produced by the appellant and the clothes of the appellant were stained with human blood of "B" group, which tallied with the blood group with which the clothes of the deceased persons were stained. The High Court treated this as sufficient corroboration of the retracted confessional statement Ex. P2 and further relying upon the testimony of the sisterinlaw of the appellant PW 11, as well as other material on the record, found that the retracted confession of the appellant had received ample corroboration both from direct and other circumstantial evidence and agreeing with the Sessions Judge, upheld the conviction of the appellant for the offence under Section 302 IPC.

23. We have considered the retracted judicial confession of the appellant carefully and analysed the statement of the learned Judicial Magistrate Shri Tara Chand Soni PW 1. We have referred to the confessional statement in some details in the earlier part of this judgment. We are satisfied that the learned Magistrate had taken all necessary precautions to ensure that the appellant had sufficient time to reflect before he made his confessional statement and that he was under no fear or threat or allurements before appearing in the Court to make the statement. The various questions put by the learned Magistrate to the appellant indicate that he had taken all reasonable precautions to remove any trace of fear from the appellant before he made the confessional statement. The caution envisaged by Section 164 CrPC was properly administered to him and he was told in no uncertain terms that he was not bound to make the statement and that if he did one, it could be used against him. Learned counsel for the appellant was unable to point out any circumstance from which it could be inferred that the confessional statement Ex. P2 was not a voluntary one. No infirmity whatsoever

was pointed out either in the manner in which the statement was recorded or in the statement itself. Report of the Serologist Shri V.N. Mathur which established that the sword belonging to and produced by the appellant as well as the clothes of the accused were stained with blood of "B" group, which tallied with the blood group of the deceased persons which remained unchallenged lends sufficient corroboration to the confessional statement which the appellant tried to retract at the trial. Nothing has been pointed out to doubt the ownership and recovery of the bloodstained sword from the appellant at the police station by Shri Durga Shankar Sharma, PW 17. Seizures made during the investigation have also not been doubted.

24. The testimony of the sisterinlaw of the appellant, Smt. Ratnabai PW 11 who was subjected to repeated and lengthy crossexamination in the trial Court has remained unshaken. Her statement has impressed us and in our opinion she had no reason to falsely implicate the appellant with such a heinous offence. Jor Singh PW 12 and Bhanwar Singh PW 13 have lent sufficient corroboration to her testimony as well as to the confessional statement of the appellant. The only discrepancy pointed out with regard to the statement of PW 11 is that whereas in her statement under Section 161 CrPC she had named Hansabai as the child whom she herself saw being murdered, but at the trial she had given the name of that child as Manraj. She satisfactorily explained the discrepancy when the question was put to her and even otherwise one cannot lose sight of the fact that the witness had seen the most gruesome type of murder by her brotherinlaw of his own wife and children. Therefore, this minor discrepancy of the name of the child would place into insignificance particularly when both Hansa and Manraj were murdered by the appellant along with the others. We find that PW 11 Ratnabai is a reliable witness and her testimony provides sufficient corroboration to the confessional statement of the appellant in all material particulars."

But the Sessions Court did not follow procedure germane to what has been illustrated else the Court would not have returned the judgment of conviction.

14. Apart that, the statement in Exbt. 3 does not disclose anything why the appellant had made such statement which is the important component of voluntariness. No memorandum as prescribed under subsection 4 of Section 164 is also not available. Even though, a certificate has been attached which contains some part of the prescribed memorandum. It is part of the printed form. Any mechanical attestation at Exbt.3 is bound to create suspicion. Such statement does not give any assurance to this Court to base a conviction solely on the basis of the Exbt. 3. This Court finds that there was no time for appellant before making the confessional statement. The oral statement made by the recording judicial magistrate to fill that vital part is inadmissible in evidence. Considering and reading that part of the oral statement, the learned Sessions Court has committed serious infraction of law. The appellant was produced before the judicial magistrate for recording the statement of confession from the police custody and there is no evidence the appellant was provided with adequate time

to reflect dispelling the police influence.

15. The Apex Court approving *Kashmira Singh Vs. State of M.P.* as reported in AIR 1952 SC 159 held in *Chandra Kanta Chimanlal Desai Vs. State of Gujarat* as reported in (1992) 1SCC 473.

"5. The confession of accused 1 was retracted at the time when the accused was questioned under Section 313. In considering the reliability of this confessional statement the High Court had not kept in view the observations of this Court in *Kashmira Singh Vs. State of M.P.*¹. In this decision the Supreme Court had observed: (AIR p. 159)

The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. 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."

6. The High Court has on the other hand made this confessional statement as the basis and has then gone in search for corroboration. It concluded that the confessional statement is corroborated in material particulars by prosecution witness without first considering and marshalling the evidence against the accused excluding the confession altogether from consideration. As held in the decision cited above only if on such consideration on the evidence available, other than the confession a conviction can safely be based then only the confession could be used to support that belief or conclusion. The trial Court has given cogent reasons for not accepting the evidence of PWs 7, 8 and 11 and rightly so. The High Court has not given any convincing reasons as to why PWs 7, 8 and 11 who were discarded by the trial Court should be relied on. The only evidence which calls for comment is that of PW 6, Noorbibi, who is said to have seen accused 1 with the child around 7 p.m. On this aspect the trial Court pointed out that in spite of the fact that the missing of the child was widely talked about in the village and she was also stated to be aware of it she had not informed the police regarding this incident and that in fact neither she nor her husband to whom she had told the fact had informed this incident to anybody in the village. Further her husband has not been examined as a witness. The trial Court also pointed out that this witness even after the dead body of Tinu was found out had not told anybody regarding the above incident. For this and other reasons the trial Court had disbelieved PW 6 and the High Court had not traversed this aspect. On the other hand the High Court observed that she had

disclosed this fact to the parents of the deceased next morning, a statement which is far from accurate if we examine her evidence carefully. The trial Court had rightly brushed it aside by the High Court did not analyse this part of the prosecution evidence. The trial Court had also analysed the evidence of PWs 7, 8 and 11 and had discarded their evidence on number of grounds. In fact, the High Court has also not relied on the evidence of PWs 7, 8 and 11. The whole approach of the High Court was to make confessional statement the basis and then find out if the facts stated therein were corroborated in material particulars by other evidence, instead of analysis the evidence first and trying to find out whether the evidence is reliable and the facts established are consistent with the guilt of the accused. With respect, the High Court failed to realise that there were statements in the confessional statement which provided intrinsic evidence of police interference for otherwise how could accused I have mentioned about having seen Noorbibi when he must have seen several others also. The trial Court had critically examined the recording of the confessional statement and held that the Magistrate had not taken sufficient precautions before recording the evidence in order to ensure that the statement was voluntary. In fact the trial Court was of the view that the confessional statement was in the hands of police even before the same was recorded by the Magistrate. Even the Investigating Officer's evidence was not relied on by the trial Court and the High Court had not said anything on that aspect. We have also gone into the evidence carefully and we cannot say that the Magistrate was far wrong in discarding the confessional statement. The reliance by the High Court on the evidence available that on August 27, 1977 around 8.30 p.m. both the accused were seen together, that both of them knew each other, that late in the night on the day of occurrence accused 2 was seen in the temple of Kalka Devi situate at Prantij along with a sadhu who was not traced are all minor and flimsy circumstances which do not go to establish a chain of events pointing to the guilt of the accused. PW 17's evidence that on the night when he saw accused 2 in the temple he appeared to be little frightened was not accepted by the trial Court on the ground that there was enmity between accused 2 and the witness. There was no reason why the High Court should have discarded this reason and accepted the evidence of PW 17 in this regard. Besides such evidence is neither her nor there. The recoveries relating to grain of rice at the place of occurrence and the same type of rice at the house of accused 2 do not show any involvement of the accused in the commission of the crime. The rice is not as such a distinguishable article being one commonly found in houses and that could not be treated as any incriminating circumstance. The trial Court had carefully considered the recovery of the rice as also the alleged recoveries of anket and half pant worn by the accused on the information given by accused 1. Since we are agreeing with the trial Court reasoning in preference to that of High Court we do not consider it necessary to catalogue all the reasons given by the trial Court. We think the consideration by the trial Court was more reasonable and conclusion more acceptable. We agree with the trial Court that the prosecution has not established beyond reasonable doubts the involvement in the crime or

commission of offence by the accused appellants."

16. Irresistibly it surfaces that the trial has committed palpable illegality by returning a judgment of conviction solely on the basis of Exbt. 3, which was recorded without ensuring that whether the appellant was in a state of mind to make voluntary statement confessing the guilt.

17. Situated thus, the impugned judgment and order interfered with and set aside. The appeal being thus allowed, the appellant is set at liberty. Sureties are discharged from their liability.