

(1987) 05 GAU CK 0004
In the Gauhati High Court

Akanman Bora (In Jail)

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 19-05-1987

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1973 (CrPC) — Section 164, 227, 228, 235, 239
Evidence Act, 1872 — Section 14, 24, 25, 6
Oaths Act, 1969 — Section 4
Penal Code, 1860 (IPC) — Section 21, 302

Citation : (1988) CriLJ 573

Hon'ble Judges : S. Haque, J;J. Sangma, J

Bench : Division Bench

Judgement

S. Haque J.

1. The Appellant Akanman Bora appeals from Jail against the judgment and order of conviction dated 16-6-1983 u/s 302, I.P.C. in Sessions Case No. 72(NL) of 1981 of the Court of Shri P. K. Deb, Sessions Judge, Lakhimpur.

2. The prosecution case was that accused Akanman Bora committed murder of Fatik Bora on 22-5-1981. The motive for murder was stated to be his implication in a dacoity case at the house of Fatik Bora about 2 months prior to this occurrence. There was no dispute on the fact of death of Fatik Bora in the night of 22-5-1981 as a result of cut injuries over head and neck.

3. There was no direct evidence of the occurrence. Learned Sessions Judge wholly relied on the confession of the Accused to convict him. However, prosecution adduced evidence of extra-judicial confession before the Village Defence Party. The points for consideration are; (1) What would be the legal value of a confession recorded by administering oath to the maker and the fate of the trial which solely depends on such confession; (2) Whether a confession before the Village Defence Party is hit by Section 25 of the Evidence Act.

4. The procedure for recording a confession has been prescribed in Section 164

of the Criminal P.C. A magistrate competent to record confession should strictly comply with the provisions of this Section. A confession is a statement of a suspect/accused of his complicity in a crime, made by him in the course of investigation and recorded by a Magistrate in accordance with the provision of Section 164 of the Criminal P.C. Schedule Form known as "Assam Schedule VIII to the Form No. 96" is prescribed as a model form for recording a confession u/s 164 of the Code of Criminal Procedure. The recording Officer should carefully read the contents of the paragraphs of the Form before he proceeds to comply with the instruction thereunder and to make the required entries at the appropriate places so as to make it clear on its face as to his satisfaction of recording the same on the voluntariness of the maker. The question is, what will be the effect if oath is administered to the maker before he makes the confessional statement.

5. Learned Counsel Mrs. M. Hazarika for the appellant submits that administering oath to the maker of a confession makes the proceeding of such recording illegal and such confession carries no legal value for application against the maker. Learned Public Prosecutor Mr. A. R. Pal Mazumder submits that administering the oath before recording a confession, when the recording Officer is satisfied as to the voluntariness of the maker, will not make it invalid and in no way demolishes its evidenciary value.

6. An accused is at liberty to make any statement or complain verbally or in writing to the arresting authority or to the magistrate before whom he is produced for the purpose of remand. His statement in writing or verbal, as to his complicity in a crime, made to police is inadmissible in evidence; whereas such statement before a Magistrate is admissible in evidence. If such verbal statement as to his complicity in a crime makes (sic) before a Magistrate or expresses to make it, then it is mandatory to the Magistrate to record the same after duly observing all formalities prescribed under the provision of Section 164 of the Criminal P.C. and by following the instructions given in the Schedule Form referred to above. Section 4(2) of the Oath Act prescribes administering of oath to a witness. This Act nowhere prescribes administration of oath to an accused at any stage of investigation, inquiry or trial. Exception to this general rule is to be made applicable under the provision of Section 315 of the Criminal P.C. when the accused offers himself as a defence witness. At such stage he is characterised not as an accused but as a competent witness. Administering oath is barred in the recording of confessional statement by the clear provision of Sub-section (5) of Section 164 of the Criminal P.C, which runs as:

Any statement (other than a confession) made under Sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

Confession should be recorded in the manner provided for recording statement of

an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character in so far the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Article 20 of the Constitution of India read with Sub-section (5) of Section 164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence.

7. This subject was dealt by a Division Bench of Karnataka High Court in Philips Vs. State of Karnataka, It was held that the manner of recording confession has provided u/s 281 for the purpose of memorandum as laid down by 164(4), there is no provision for administering oath to an accused making a confessional statement before a Magistrate. When such specific provision is made, the other provision of the Evidence Act etc., regarding recording statement, will not operate. Therefore, no question of administering oath arises and in fact if oath is administered, it will be contrary to the provision of Section 281. It is an illegality and as a such the confession statement loses its evidentiary value. The object behind Section 164(4) is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that, he would be incurring the wrath of law.

8. The Division Bench of Jammu & Kashmir High Court in State Vs. Suram Singh, it was held that a confessional statement recorded u/s 164 on solemn affirmation would be inadmissible in evidence as made under compulsion of oath. Per Justice Mufti, thought it does not violate Section 24 of the Evidence Act in its not having proceeded from threat, promise or inducement, it does violate Article 20(3) of the Constitution of India as made under compulsion of oath. However, Chief Justice Mr. Jaswant Singh expressed doubt if mere administration of oath would come in the perview of "compulsion" as contemplated by Clause (3) of Article 20 of the Constitution.

9. The confession of the accused-appellant Akanman Bora was recorded on 25-5-1981 by the Magistrate Shri Birupaksha Sarma after administering oath. The recording of the confession in that manner was illegal and inadmissible in evidence. Learned Sessions Judge ought to have been cautious in considering the confession as substantive piece of evidence for application against the appellant in murder charge. It appears that the learned Sessions Judge failed to read and scrutinise through the entries recorded in the Confessional Statement from, Ext. 1 in a trial of serious charge. This only exposes non-application of mind by the Session Judge at the proceeding of the trial. Either the learned Sessions Judge was ignorant of the law on the subject or superficially disposed of the trial of a serious charge. It reflects lack of legal equipment and merit of the trial Judge. Learned Sessions Judge committed illegality in convicting the accused-appellant

on the basis of an illegal and inadmissible confession.

10. A Judicial Magistrate should be conversant with the law, procedure and manner of recording a confession. Ignorance on the subject may lead to illegality and gross irregularity causing failure of justice. In the instant case, it appears that Judicial Magistrate Shri Birupaksha Sarma was not conversant with the law and procedure of recording confession. Act of recording confession is frequently done by Judicial Magistrates, they should observe with cautiousness in this duty, according to the law on the subject, to make it legal and admissible and that it is not rejected merely for the fault of the recording Magistrate.

11. In a criminal trial, an accused can be examined by Court at different stages under the provisions of Cr.P.C. and his statement can be recorded, such as, u/s 239 before the charge, Sections 240(2) and 251 at the framing of charge and stating particulars of the offence respectively, and Section 227/228 at the hearing and framing of charges and finally Section 313 after close of the evidence. The accused is also examined and his statement can be recorded u/s 248(2) and Section 235(2) at the trial on the question of sentence. The manner of examination and recording statement of an accused by Courts have also been prescribed u/s 281 Cr.P.C. At no stage, administering oath is required to be made to an accused. The accused is at liberty to make statement or complain before the Court at any stage of the trial and recording such statement need not require administering oath.

12. The Village Defence Party members P.W. 5 Prasad Saikia and P.W. 6 Padmaswar Bora intercepted the accused in the night of 22-5-1981. It is in their evidence that on quarry the accused disclosed to them that he committed murder of a person at Dhunaguri village. They took the accused to Bangalmara Police Post and handed him over to the Officer-in-Charge of that Post. Both the witnesses were independent and disinterested. They had no reason whatsoever to falsely manufacture the statement of extra-judicial confession of the accused to falsely implicate him. However, that extra-judicial confession suffers from infirmity, as there was no disclosure of the name of the victim. Extra-judicial confession is a weak piece of evidence. When it suffers infirmity, as in the instant case, it further loses its evidentiary value. Therefore, the type of extra-judicial confession narrated by P.Ws. 5 and 6 in no way helps the prosecution.

13. Learned Counsel Mrs. Hazarika submits that the members of the Village Defence Party are police personnels and therefore, a confession before them is hit by Section 25 of the Evidence Act. The Assam Village Defence Organisation had been constituted under The Village Defence Organisation Act, 1966 (hereinafter called as "Act") for assisting the Police in the maintenance of law and order, peace and tranquillity in the State of Assam. A member of a Village Defence Party means a person enrolled as a member of the Assam Village Defence Organisation in accordance with the provisions of the Act. The members of the organisation are not entitled to any remuneration but commendable service including welfare work done by any member may be suitably rewarded.

The administration and control of the Village Defence Organisation in the State shall be vested in the Chief Controller of the Organisation. A member of the Village Defence Party acting in the discharge of functions and duties of the organisation shall be deemed to be a public servant within the meaning of Section 21 of the I.P.C. A member may be removed from the Organisation or from Village Defence Party, As the case may be, by the Chief Controller of the District Village Defence Officer. As to the legal proceedings, prosecution of suit/ case shall not lie against a member in respect of anything done or purported to be done by him in exercise of the powers, duties and functions, or in carrying out any lawful order made under the Act or the Rules made thereunder except with the previous sanction of the District Village Defence Officer or the Chief Controller. Sub-section (3) of Section 6 of the Act empowers every member of the Village Defence Party to arrest any proclaimed offender or any person who in his view commits a non-bailable and cognizable offence; and any person so arrested shall without unnecessary delay be made over to a Police Officer, or in the absence of a Police Officer, he shall be taken or cause to be taken in custody to the nearest Police Station. Such power of arrest is in complete similarity with Sub-section (1) of Section 43 of the Criminal Procedure Code by which a private person is empowered to arrest any offender and handing over to police. On examining the provisions as to the powers, duties and functions of the members of the Village Defence Party, the aim and objection of the organisation, the members can in no way be regarded to be police personnels. The aim and object of the Organisation are to assist the Police in the maintenance of law and order, peace and tranquillity in the State of Assam. Empowering them to arrest a proclaimed offender or an accused of a non-bailable and cognizable offence or suspected offender and making over such person to a Police Officer, do not make them or equate to be the Police personnels. They are deemed to be public servants within the meaning of Section 21 of the Penal Code vide Section 14 of the Act and in view of their duties and functions they come within the category "Seventh" of Section 21. Public servant within the meaning of Section 21 of the Penal Code are not police personnels. Duties, functions and powers of the Police under the Police Act or under Criminal Procedure Code have not been extended to the members of the Village Defence Party so as to make them Police. Therefore, the village Defence Party members are not Police personnels. A confession made to a member of the Village Defence Party is not hit by Section 25 of the Indian Evidence Act and can be proved against the maker.

14. In the result this appeal is allowed. We set aside the impugned judgment and acquit appellant Akanman Bora of the charge of murder and set him at liberty forthwith.

J. Sangma, J.

15. While agreeing with the conclusion of my noble Senior brother Haque, J. in allowing the appeal, I like to give my own reasons. Akanmani Bora was prosecuted for alleged murder of Fatik Bora, by cutting with a dao, in the night of

22-5-81. He was arrested on 23-5-81 and Police produced him before Magistrate on 24-5-81 with a report that he was confessing. That day the Magistrate remanded him to hajat. The next day i.e. on 25-5-81 the Magistrate recorded his confession on oath (S/A.). When charge u/s 302 I.P.C. was framed he pleaded not guilty and retracted the confession.

16. There was no eye witness to the occurrence. The learned Sessions Judge found that he voluntarily made judicial confession before Magistrate on 25-5-81 and that has been corroborated by the seizure of a dao from his possession and by the extra-judicial confession before P.Ws. 5 and 6. The defence did not assail the point of Magistrate's administration of oath for the confession, before the trial court.

17. A Magistrate has to record the confession of accused in accordance with the provisions made in Sections 164 and 281 of the Code of Criminal Procedure. Those Sections, among other things, require a Magistrate to record the confession only after removing all fears from the mind of the accused and by explaining to him that he was not bound to confess and that, if he did so, it would be used as evidence against him. He must fully satisfy himself that the confession was made voluntarily. Sub-section (5) of Section 164 of the Code provides as follows : --

Any statement (other than a confession) made under Sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

18. It is clear from the words of this subsection that a Magistrate should not administer oath/solemn affirmation for recording the confession. Apparently this was considered necessary because the accused has the liberty to retract the confession either at that time itself or at the trial and the prosecution has to prove the confession by giving evidence that the accused had made it voluntarily. Oath is meant to bind down the maker of statement. Therefore if a Magistrate administered the oath before recording confession; it would not be open to the accused to retract at that time or even subsequently before the trial court, because in that case he would be subject to the consequences of his oath/solemn affirmation. So I share the opinion of my learned Senior brother Haque J., in holding that giving an oath solemn affirmation before recording confession of the appellant in this case has vitiated the confession and that has made it inadmissible in evidence.

19. The next point for determination is whether the corroborating evidence, viz. the seizure of a dao from the possession of the appellant and the evidence of P.Ws. 5 and 6 on extra-judicial confession, are sufficiently strong to bring home the charge that the appellant committed the murder of Fatik Bora. I agree that a member of V.D.P. is not Police Officer and the confession made before him does

not come u/s 25 of the Evidence Act. It is the prosecution case that the appellant and the dao were produced by 6 members of V.D.P., including P.Ws. 5 and 6, before the Pakistan Infiltration Post (P.I.P.) and there the P.W. 7, S.I. i/c of P.I.P., seized the dao by seizure list (Ext. 6) before the investigation started. There is no evidence that the dao was stained with blood and neither it was sent for chemical examination. So it cannot be said that this dao was used for cutting any person. P.Ws. 5 and 6 are the members of V.D.P.; their evidence showed that 6 members of V.D.P., including themselves, caught the appellant and at that time the appellant made extra-judicial confession by stating that he had killed a person with that dao; so their evidence do not show that the appellant had cut Fatik Bora. Prosecution did not examine the other 4 members of the V.D.P. who admittedly were present with P.Ws. 5 and 6 when the appellant made extra-judicial confession. Therefore if the confession recorded by Magistrate is inadmissible in evidence, the evidence on seizure of dao and the evidence of P.Ws. 5 and 6 on extra-judicial confession are not sufficient to prove that the appellant committed the murder of Fatik Bora by cutting with that dao. The appeal therefore must be allowed and conviction set aside.