

(1958) 09 MP CK 0019

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 366 of 1957

Bhagirath and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 12-09-1958

Acts Referred:

Evidence Act, 1872 — Section 159, 24, 25, 26, 27

Citation : AIR 1959 MP 17 : (1958) ILR (MP) 741 : (1958) 3 MPLJ 745

Hon'ble Judges : B.K. Chaturvedi, J

Bench : Single Bench

Advocate : R.S. Dabir and R.P. Sinha, for the Appellant; H.L. Khaskalam, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Seven appellants, Bhagirath S/o Param, Shobha S/o Param, Bhaggi alias Bhagirath S/o Paltu Lodhi, Halkai S/o Bhure, Bhagirath S/o Dolu, Mullu S/o Raghunath and Girdhari S/o Nanhoo Kachhi have been convicted by the Additional Sessions Judge, Damoh, u/s 395, Indian Penal Code, and each has been sentenced to five years" rigorous imprisonment.

The prosecution story is that a dacoity was committed in the Taparua colony near the suburbs of village Piparia-Mishar in the jurisdiction of Batiagarh Police Station on the night between 17th and 18th December 1956 in the houses of Ratansingh, Amansingh and Ganeshsing. On 18th December 1956 Purshottam Rao Sapre Patel of the neighbouring village Kutri sent a written report (Ex. P-I), through the kotwar Jalam (P. W. 13). A list of ornaments plundered from the three houses was also sent (Ex. P-3). During investigation it was found that the dacoits reside in villages Mangola and Kabirpur. The two villages are close to each other. Appellants Bhaggi and Mullu are residents of village Mangola, while the other appellants come from village Kabirpur.

The appellants all denied the charges and attributed their prosecution to enmity

with Hukum-lal (P. W. 32), Ramchandra (P. W. 38) and Babulal (P. W. 40) of village Mangola.

The conviction of the appellants is based on certain discovery of ornaments and on confessions of appellants Girdhari, Halkai and Bhaggi alias Bhagirath. Shri R.S. Dabir, learned Counsel for the appellants, strenuously argued that both the discovery and the confessions have been obtained by threats and by beating by the Sub-Inspector of Police. I have no doubt that this is true. The modus operandi of the Sub-Inspector has been described by Babulal" (P. W. 40) in Para 20 of his deposition. The witness states that the Sub-Inspector asked each villager whether he had committed the dacoity. On his answering the question in the negative, he was beaten; and then a question would be asked as to where the property was.

Then the victim would say that at such and such place the property was, whereupon he was taken to that place and the property was found. The witness added that appellant Bhagirath s/o Param was told that he would be acquitted and that appellant Mullu cannot see during night, as he is short-sighted, and he cannot walk without a Lathi and a lantern. The witness also stated that accused Buddha was so much beaten that he passed stools. On the basis of this evidence, which I believe to be true, Shri R.S. Dabir argues that the fact of discovery of the ornaments should not be believed and that the confessions must be held to be involuntary.

It is true that confessions caused by inducement, threat or promise are inadmissible u/s 24, Indian Evidence Act. But though they are inadmissible, they may lead to discovery of facts or of things in consequence of the information received from the accused in custody. When the statements made by accused persons in police custody are confirmed by the finding of the property or facts, those portions of the confessions that lead to the discovery cannot be held to be false. Section 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. Pulukuri Kottaya v. Emperor AIR 1947 PC 67 (A). In fact, Section 27 provides an exception to the prohibition imposed by Sections 24 to 26. The evidence relating to the discovery, in the instant case, will, therefore, be considered on its own merits. It is true that before the confessions were recorded, all the accused persons were beaten by the Sub-Inspector. The Sub-Inspector denies it; but I do not think he has any respect for truth, and it is difficult for me to place any reliance on his deposition.

There are three`are Girdha alias Girdhari, Bhaggi alias Bhagirath and Halkai. They were all arrested on 24-12-1956 at village Mangola and sent to Hatta Tahsil, 14 miles from their village. They were produced before P. W. 55, Shri R.P. Dube, Sub-Divisional Magistrate, Hatta, on 25-12-1956, who sent them to magisterial lock-up on that day, at 4 P.M. in the afternoon, and directed that they be produced next day i.e., on 26-12-1956 in the after-noon. They were

accordingly produced at 4 to 5 P.M. on 26-12-1956 when the Sub-Divisional Magistrate recorded their confessions.

Appellant Girdha alias Girdhari's confession is Ex. P-80; appellant Bhaggi alias Bhagirath's confession is Ex. P-81; and appellant Halkai's confession in Ex. P-82. Now, there is no doubt that, after their arrest, all the appellants were beaten and there was also some inducement given. When once the existence of improper inducement, threat or promise has been established so as to bring the case within the provisions of Section 24, there is a presumption of its continuance, and the prosecution has to prove that the impression caused by the original inducement, threat or promise was fully removed when the prisoner made the confession. Section 28 of the Indian Evidence Act lays down that :

"If such a confession as is referred to in Section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant."

The question is : Whether the impression caused by the threat and beating by the Sub-Inspector was fully removed before the confession was recorded by the Magistrate? Except for the bare statement that these appellants were sent to the magisterial lock-up, nothing has been proved in this respect. There is, moreover, nothing on record to indicate what sort of this magisterial lock-up it was i.e., whether it was under a peon or clerk of the Magistrate or the Magistrate himself, whether it was in the same compound which contained the Police lock-up or separate from it, and whether any precaution had been taken against the police going there and talking to the prisoners in the magisterial lock-up. Unless that is proved by the prosecution, it is difficult for me to accept that the impression caused by the beating given by the police in the beginning had been fully removed.

Under the circumstances of the case, a whisper or even a whistle from a police constable would mean much to the prisoners. The word "fully" in Section 28 is significant. It means "thoroughly," "completely," "entirely," so as not to leave any trace of the impression created by the torture of fear; for, a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape that no credit can be given to it. A free and voluntary confession is presumed to flow from the strongest sense of guilt and, therefore, it is admitted as proof of the crime. In my opinion, in the instant case, the impression created in the mind of the prisoners had not been removed in the short interval which elapsed between the beating given by the Sub-Inspector and the recording of the confession. Under these circumstances. I am disposed to discard the confessions altogether.

I have already observed above that the considerations that are applicable to confessions are not applicable to discoveries in consequence of the information given by the accused in police custody within the meaning of Section 27 of the Evidence Act. This view is, however, based on the wording of Section 27 itself.

The contention that if the discoveries are the result of compulsion, then Article 20(3) of the Constitution will come into play and will restrict the scope of Section 27 was not raised in the present case; and as it has not been argued before me. I do not think it proper to express any opinion on it or to refer to the views of the Allahabad High Court expressed in *Dhoom Singh Vs. The State*, and *Amin and Another Vs. The State*,

I think it better to confine my attention to Section 27 which is based on the theory of "Confirmation by Subsequent Facts." The theory is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material particulars, the possible influence which through caution had been attributed to the improper inducement is seen to be nil, and the confession may be accepted without hesitation.

Wigmore in his work "On Evidence" (Third Edn. Vol. III. Section 856) quotes Mr. Leach (Crown Law. 3rd Ed. 301, note) as saying :

"But it should seem, that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true."

Wigmore, then, in Section 857 comments upon it as follows :

"Now this falls something short of the logic of the case; for a confirmation on material points produces ample persuasion of the trustworthiness of the whole. It can hardly be supposed that at certain parts the possible fiction stopped and the truth began, and that by a marvellous coincidence the truthful parts are exactly those which a subsequent search (more or less controlled by chance) happened to confirm. Such a differentiation is purely artificial, and corresponds to no actual mental processes, either of the confessor or of the hearer. If we are to cease distrusting any part, we should cease distrusting all."

Most of the English Courts and several jurisdictions in America followed the limitation laid down by Mr. Leach and admitted that part only to which the confirming facts directly related. The Indian Law however differs in this respect from the English and American Law. Section 27 provides that

"so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved." The expression "whether it amounts to confession or not" was for sometimes responsible for the divergence of judicial opinion on the point, whether the statement of the accused, as a whole, can be admitted or not when it leads to some discovery of facts. It was held by majority of the Courts that the wholesome provisions in Section 25 and 26 are not to be whittled down in any way and that Only that portion of the statement or information, whether it amounts to confession or not which leads distinctly to the discovery of facts, is admissible; the other part

which does not lead to any discovery is to be excluded.

This proposition is no doubt very simple. The difficulty is, however, felt in its application to concrete cases. Naturally a good deal of case-law has accumulated round this point. I, however, feel that, so far as the instant case is concerned, I need not refer to those rulings in detail, as my purpose will be adequately served by reproducing the following relevant passages from an extract on pages 190-191 of Monk's "Principles and Digest of the Law of Evidence" (Vol. I, 1956 Edn.), where the case-law is succinctly summarized :

"Contrary to the modern English rule, and the rule prevailing in several jurisdictions in America the High Courts in India have unanimously held that that part of the statement in which the accused describes how he disposed of the material object is admissible under this section, in as much as the information as to how the accused dealt with or disposed of the material object may be said to have led to the subsequent discovery. Therefore, statements such as "I pawned the karas to Allah Din" "I buried the body of the deceased in such and such a place," "I put the bomb in R's office, "I have buried the gun in the ground near a cabin of Shikohabad Railway station," "I buried the ornaments in a field," "I have hidden the property which I am willing to produce," are admissible. Where the gist of the offence is possession, words such as "I hid," "I pledged," "I sold," "I gave" or "I have kept" are admissible on the ground that words are distinctly related to the fact discovered, though in the circumstances of the case they may amount to a confession."

This view has now the authority of the Supreme Court. In Balbir Singh Vs. State of Punjab, , it was observed that

"the statement of the accused that he had buried the earring was admissible in evidence u/s 27 and the High Court was right in holding that the recovery was a circumstance which connected the accused with the crime."

It is contended by the learned Government Advocate that in the instant case all the memos of discovery or the panchnamas exhibited do recite the words "I kept the ornaments in such and such place." In my opinion, this is not sufficient. There seems to be a general impression among the subordinate Courts and the Public Prosecutors that lists of discoveries or memoranda or panchnamas exhibited in criminal cases are themselves evidence. This is an erroneous view of the law.

These lists or memoranda or panchnamas can only be used by persons who signed them or prepared them to refresh their memory within the meaning of Section 159 of the Evidence Act. Whatever statement is attributed to an accused person in police custody giving information leading to the discovery must be proved by witnesses like any other fact. The evidence relating to the preparation of a Panchnama or a list of discovery or a memorandum should not be allowed to depend on the ingenuity of a police officer who may or may not like to write the statement in the exact words of the accused.

A little change in his words may prove fatal to his defence. The difference between "I have kept the ornaments inside that bush and the ornaments are kept or will be found inside that bush can well be realised. While the first sentence connotes that the accused had exclusive possession of the ornaments, at least for some time, after the theft, so that he was in a position to keep those ornaments inside "that bush;" the second sentence would only imply that the accused person somehow acquired the knowledge about their whereabouts and his case will then come within the dictum laid down in para 6 of *Trimbak Vs. The State of Madhya Pradesh*, and the discovery would not be regarded as conclusive proof that the accused was ever in possession of those ornaments. It is for this reason that a Division Bench of the Lahore High Court in *Harnam Singh v. Emperor* ILR 9 Lah 626 : (AIR 1928 Lab 308) (F) laid down that the information given by the accused should be proved in the precise terms in which it was given. In the seven Judges Full Bench case, *Sukhan v. The Crown* ILR 10 Lah 283 : (AIR 1929 Lab 344) (G) Sir Shadilal, C. J., delivering the leading judgment, however, observed at pages 296-297 (of ILR Lah) : (at p. 349 of AIR) :

"The information received from an accused Person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy. But it is not always possible to observe the salutary rule. If the witness to whom the statement was made has not reduced it to writing and does not remember the exact words used by the accused he can depose to it only in his own language."

This view is justified on the ground that Section 27 uses the word "information" and not the word "statement" which is used in all sections (Sections 17 to 31) of this group (see *Monir*, Vol. I, p. 197).

The Madras view is that if what a man says is to be used in evidence, his exact words must be used and not what a policeman or anyone else says he did. It should be recorded in the first person and should not be paraphrased. In *re Athappa Goundan and Others Vs. Emperor*, *In re, In Re: Kattameedi Chenna Reddi and Another*, and *In re In Re: Ravupalli Ramamurthy*, This view seems to have been approved by the Calcutta High Court in *Naresh Chandra Das and Another Vs. Emperor*, where it was stated that the statement conveying the information must be accused's own statement in his own language. The Nagpur High Court in AIR 1948 78 (Nagpur) observed that the investigating officer must record the words of the accused persons and it is not for him to make a selection. It is for the Court to consider the admissibility of the statement and in doing so it must not allow extensive statements unconnected with any fact discovered thereby to be tendered in evidence.

I have already observed above that Section 27 is enacted as a qualifying rule of evidence and the Courts should be jealous in safeguarding the purpose and object of the provisions embodied in Sections 25 and 26. It is the duty of the Courts to ascertain from the witness, who signed the memorandum, the exact words of the accused in which information was conveyed to the police officer

which led to any discovery and to find out if the investigating Officer had written the statement of the accused in the words of the accused or in his own words. In case there is any doubt on the point, the accused person will be entitled to its benefit.

Where, however, it is found that there has been a reign of batons and use of third degree methods prior to writing memoranda containing information attributed to the accused persons leading to the discovery, the documents written either by, or at the instance of, the Police Officers will have to be treated :as tainted with gross suspicion and such evidence will be required to prove the actual words of the accused persons, while giving information which must be unimpeachable and independent of the Police influence. In fact, the whole evidence relating to discovery will be rendered doubtful, if there is evidence of accused persons having been subjected to third degree methods prior to the discovery; and if the stolen property is recovered from a place not inside the house of an accused person but from some place outside it, the possibility that the police had planted it there and compelled the accused person under threat to point out that place will have to be excluded before any reliance can be placed upon it.

In the instant case, all the memoranda prepared by the Police containing the statements of the accused persons giving information leading to discovery of stolen articles are in the same words. In fact, the uniformity in recital in the eleven memoranda (Exhibits 4, 6, 8, 10, 14, 16, 19, 23, 27, 31 and 84) is itself suspicious. The two witnesses Ram Chand (P. W. 38) and Babulal (P. W. 40) do not at all support the recitals therein. They depose that appellant Bhagirath S/o Param was the first to be interrogated and whatever information he conveyed was not recorded at that time.

The appellant then searched a heap of stones in front of his house. Two attempts failed and it was in the third attempt that he could get some articles said to be stolen. Appellant Girdhoo alias Girdhari got one ornament from underneath tomatoe bush in front of his house; while appellant Muloo got some article from a dilapidated Khander belonging to his uncle. Appellant Bhaggi alias Bhagirath Lodhi had to put a ladder and climb the wall of the Malguzar's house to descend to a kulia (an extremely narrow lane) between his house and that of the Malguzar to bring some articles said to be stolen. Appellant Bhagirath s/o. Dallu got two ornaments from a pit under a place in the Bari of his house and a Tabiz from a niche outside his house.

Appellant Halkai got a pair of silver Bankin from a Bari adjoining his house. Appellant Shobha got a choora and a chandori from a heap of stones lying outside his house. All these discoveries from places, which are open and accessible to all, do not, in the least, inspire confidence and must be discarded.

Then, there is another case of discovery by appellant Shobha. It is urged that he had taken them to his house and from a place inside the house had brought a

sword (Art. W). This sword has been identified to be that of Raja Ram (P. W. 11) and had been taken away by the dacoits. Appellant Shobha does not admit any such discovery of any sword. It transpires that two swords had been seized and were shown as recovered from his house at his instance. Ram Chand (P. W. 38) deposes about the discovery of one sword. Babulal (P. W. 40) in para 15 of his deposition states that the sword was brought from the house by the Sub-Inspector and Ram Chand. He does not support Ram Chand that the sword was discovered at the instance of appellant Shobha or was brought out by him from his house. Thus, the evidence of discovery or recovery of a sword from appellant Shobha's house is discrepant and unreliable.

It will be manifest that there is no evidence in this case to sustain the conviction of any of the appellants.

I, therefore, allow the appeals of all the seven appellants, set aside the conviction and the sentence passed and order that they be acquitted in this case.