
(2017) 01 GAU CK 0022
In the Gauhati High Court
Case No : Crl. Appeal No. 330 of 2015

Bishwajit Saha

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302

Citation : (2017) 2 GauLR 107

Hon'ble Judges : Mr. Ajit Singh, CJ. And Mr. Manojit Bhuyan, J.

Bench : Division Bench

Advocate : Mr. B.K. Mahajan and Mr. N.J. Das, Advocates, for the Appellant; Mr. M. Phukan, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Manojit Bhuyan, J.—The sole appellant Biswajit Saha has been convicted under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life with fine and default stipulations for causing the death of Diganta Mahela @ Niku, then aged about 18 years, by inflicting two wounds with the Injury No. 2 which proved to be fatal

2. Ejahar in the case was lodged by the mother of the deceased Smti Jyotsna Basumatari (PW-10) stating that on 04.10.1995 at around 12.30 P.M., the named accused persons, including the appellant, had stabbed her son with a dagger on the road near Dimasa Club. She learnt about the incident from persons named in the said ejahar, which also included the name of Smti Pranita Basumatari (PW-6). She stated that her son Diganta Mahela died at the hospital at around 2 P.M. on 05.10.1995. Investigation commenced, charge memos were drawn, statements of witnesses were recorded, autopsy was conducted on the dead body of Diganta and upon completion of investigation Charge Sheet was submitted against the appellant and two others for having committed offence under Section 302/34 IPC and the case was committed to trial.

3. During the trial, the prosecution examined as many as 11 (eleven) witnesses. The trial continued over a prolonged period and the appellant was examined under Section 313 CrPC in July 2015. Conviction of the appellant was based solely on the evidence adduced by Gaurav Bothra (PW-7), who deposed in the capacity of First Class Magistrate at Diphu as well as on the confessional statement made by the appellant before the said PW-7. Having regard to the foundation of conviction, discussion and findings are confined to the attending facts surrounding the making of the confessional statement, having regard to the mandatory provisions engrafted in Section 164 of the Code of Criminal Procedure, 1973.

4. The confessional statement of the appellant was recorded on 06.10.1995 by the Magistrate (PW-7). The same has been proved and exhibited as Exhibit-2.

5. Mr. B.K. Mahajan, learned counsel for the appellant submits that the recording of the confession of the appellant was utterly removed from the mandatory procedure prescribed under Section 164 CrPC, more particularly in respect of sub-section (4) thereof. Mr. Mahajan submits that the appellant was only provided with half-an-hour time as reflection time and all along he was under Police influence. To buttress his argument, Mr. Mahajan made reference to the testimony of the Magistrate (PW-7) and that of the Investigating Officer (PW-9), coupled with the law laid down by the Apex Court in a catena of decisions on the peremptory nature of Section 164 CrPC.

6. To test the arguments of Mr. Mahajan, notice is had firstly to the facts of the case as brought out in evidence. Exhibit-2 is the confessional statement of the appellant recorded on 06.10.1995 by Gaurav Bothra (PW-7) in his capacity as a First Class Magistrate. The said confessional statement records that the appellant, who had suffered from blood dysentery, was coming back from Diphu Civil Hospital on 04.10.1995 at around noon-time along with his brother Sanjoy Saha. When he reached Amlapatty, he met his sister Babita and Sujoy Saha who were on their way to see him at the hospital. He also met his mother on the way. Around that time he saw the deceased Niku Mahela @ Diganta Mahela trying to pull the hand and clothes of his sister Babita, whereupon he picked up a brick to beat Niku. He was confronted by Niku who delivered some karate kicks which hit the appellant on the wrist and right ankle. Thereupon, Niku took out a knife and tried to stab but the appellant caught hold of Niku's hand and the knife fell off the hand of Niku. The appellant picked it up and tried to stab Niku on his left hand. He confessed that he did not exactly know where he had stabbed and it was only from the Police he learnt that he had stabbed Niku on the left side near the abdomen. Niku then ran away and so also his brother and sister. As people gathered, the appellant hid himself in the house of one Sri S. Thiek, Secretary of KADC. Thereafter, the appellant surrendered before the Diphu Police Station. He also stated that he did not know where the knife fell.

7. At first glance, there is an admission of the guilt made by the appellant in his statement under Section 164 CrPC that he had caused injury to Diganta which

proved fatal. However, in order to ascertain whether there had been strict and faithful compliance with the mandate under Section 164 CrPC as to the evidentiary value of the confession and whether reliance could have been placed as the basis for convicting the appellant, recourse must be had to the other evidence on record. Gaurav Bothra (PW-7) deposed that the appellant was produced before him for recording the confessional statement and while recording the said confession he had observed all the formalities and the provisions prescribed under Section 164 CrPC. In cross, he stated that the appellant was produced before him by the Police and the appellant was given half-an-hour time for reflection before the recording of the confession. After the confession was recorded, the appellant was taken back by the Police personnel. He also deposed that when he had given half-an-hour time to the appellant for reflection, he was taken by the Police and after expiry of the half-an-hour period he was again produced by the Police personnel. In the evidence of Afsor Uddin Ahmed (PW-9), who deposed as the Investigating Officer in the case, stated that he had arrested the accused persons on 05.10.1995 at about 3.15 P.M. at the Police Station itself where they surrendered. The accused persons were interrogated and thereafter they were arrested and on the following day the accused persons were forwarded to the Court. He had also made a prayer for recording the statement of the appellant under Section 164 CrPC.

8. What is clearly discernible from the testimony of PW-7 and PW-9 is that the appellant had been produced for the recording of his statement under Section 164 CrPC before the PW-7 from Police Lock-up and not from judicial custody. Appellant was produced by Police personnel and even during the half-an-hour time when he was provided time for reflection, he was kept in the custody of the Police. Even after the confession was recorded he was taken back by the Police personnel. This is one vital aspect which would have a telling effect on the evidentiary value of the Exhibit-2 confession and the conviction so based on it. An additional aspect which the counsel for the appellant have vigorously stressed upon is with regard to the non-compliance of sub-Section (4) of Section 164 CrPC, where the Magistrate is required to make a memorandum at the foot of the confession record in the manner as given under the said sub-Section (4). Apparently, the confession Exhibit-2 do not disclose the making of such memorandum by the Magistrate (PW-7), as statutorily required.

9. On the above facts as brought out in evidence, recourse now be had to the views expressed by the Apex Court on the binding character of Section 164 CrPC. There can be no dispute that law peremptorily requires that after recording the confession of an accused, the Magistrate must append at the foot of the record a memorandum certifying that he believed that the confession was voluntarily made. Compliance of this mandatory requirement is for the purpose that it is only after hearing the confession and observing the demeanour of the person making it that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. Failure to do so would be fatal to the admissibility and use of the confession

against the accused at the trial. In the case in hand, no memorandum as mandatorily required under the law had been made by the Magistrate. Nor in his testimony any statement has been made expressing his satisfaction or belief as to the voluntary nature of the confession recorded by him, save and except a general statement that he had observed all the formalities and the provisions of Section 164 CrPC. The law laid down in this regard as to the mandatory requirement for making a memorandum at the foot of the record is best illustrated in the case of *Chandran v. State of Madras*, reported in AIR 1978 SC 1574.

10. There is no statutory provision in Section 164 CrPC as to how much time should be allowed to an accused person for reflection before recording his confession. It all depends on the circumstances of each case. The foremost object of giving such time for reflection to the accused is to ensure that he is completely free from Police influence. The Apex Court have held that an interval of 15 (fifteen) minutes between the preliminary questioning and the recording of confession was also sufficient where the Magistrate was satisfied that the confession had been made voluntarily and is preceded by judicial custody of 38 to 40 hours. This ratio was laid down in the case of *Shankaria v. State of Rajasthan*, reported in AIR 1978 SC 1248. The law of the land has been consistent and rigid that where a Magistrate proposes to record confession, he has to ensure that the confession is free from Police interference. The principles emerging from Section 164 CrPC was succinctly explained in the case of *Rabindra Kr. Pal alias Dara Singh v. Republic of India*, reported in (2011) 2 SCC 490. It was held that the provision of Section 164 CrPC must not only be complied in form but also in essence. It was also observed that non-compliance of Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession, rendering the confession unworthy of credence. In no uncertain words, the Apex Court held that during the time of reflection the accused should be completely out of Police influence. The Officer recording the confession is required to apply his mind to ascertain and satisfy his conscience that the statements of the accused is not on account of any extraneous influence on him.

11. As noticed above, the appellant was produced from Police custody for recording his confession. The said position is also admitted in the deposition of the Magistrate (PW-7) himself and in the deposition of the Investigating Officer (PW-9). The time granted for reflection was spent in the custody of the Police and even after the confession was recorded, the appellant was allowed to be taken back by the Police personnel. The entire event of the recording of the confession was in the conspicuous presence and influence of the Police personnel. It is not the case of the prosecution that the appellant had been produced from judicial custody. There can be no second opinion to the fact that the appellant was admittedly produced from Police Lock-up for recording his confession by PW-7.

12. The evidence on record comprehensively points to the failure on the part of

the prosecution to observe the safeguards and to comply with the provisions under Section 164 CrPC. The law as interpreted by the Apex Court in the decisions aforementioned with regard to the manner and method of recording confession has been blatantly violated. The failure on the part of the prosecution clearly goes to impair the evidentiary value of the confession made by the appellant and casts doubt on the nature and voluntariness of the confession, on which no reliance could have been placed for convicting the appellant.

13. For all the reasons stated above, we cannot find ourselves in agreement with the trial Judge. The testimony of the Magistrate (PW-7) coupled with the nature of the confession at Exhibit-2 could not have been made the basis for convicting the appellant. Resultantly, this appeal stands allowed by setting aside the conviction and sentence imposed upon the appellant. As a necessary corollary, the appellant is acquitted and ordered to be released forthwith, if not required "to be detained in any other case.

12. Registry to send back the Lower Court Records forthwith.