
(2013) 06 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 441 of 2009

Ishwar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-06-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 24, 25, 73
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) 4 ABR 1015 : (2013) ALLMR(Cri) 2750 : (2013) 3 BomCR(Cri) 619 : (2013) CriLJ 3597

Hon'ble Judges : P.N. Deshmukh, J;B.R. Gavai, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; A.S. Sonare, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—The appellant takes exception to the judgment and order passed by the learned Sessions Judge, Gadchiroli dated 13.8.2009 thereby sentencing him to suffer imprisonment for life and to pay fine of Rs. 25,000/-. The prosecution case, in nutshell, is as under:

(i) The accused and the deceased are both the employees of State Reserve Police Force. They were members of S.R.P.F. Group No. 13 at Nagpur. They were deputed at "Jambiya Gatta" for Naxal Bandobast and camp security. One Santosh Bode was their in-charge. It is the prosecution case that Kiran, the wife of the accused, had illicit relations with the deceased. It is further the prosecution case that the deceased used to tease the appellant as impotent.

(ii) The prosecution case is that on 6.1.2006 the accused and the deceased were on duty at the Police Help Centre, Jambiya Gatta. It is the prosecution case that the appellant and the deceased were staying in the same room. At around 11.00 p.m. the inmates of the camp, heard sound of firing. The S.R.P.F. persons

treating the same to be the attack by the Naxals, they took their position. However, after sometime, they realized that there was no firing from the outside and during the discussion, when all assembled, the accused disclosed to his colleagues that he had killed Ganghadhar Thakare. On such disclosure, all the police personnels rushed to the barrack and noticed that Gangadhar Thakare was lying dead on his bed.

(iii) It is the prosecution case that, on being confronted, the accused told his superior that since deceased was teasing him as a person of third gender, impotent and teasing him on account of his wife, he had committed the murder of the deceased. Immediately thereafter Shri Bode, the head of R.P.F. Group, produced the accused before Police Station Officer Shri Rajankar. After lodging the necessary report by Shri Bode, the offence was registered by Shri Rajankar against the accused for the offence punishable u/s 302 of the Indian Penal Code. After completion of investigation, the charge-sheet came to be filed for the offence punishable u/s 302 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, order of conviction and sentence, as afore-stated, came to be passed by the learned Sessions Judge at Gadchiroli. Being aggrieved thereby the present appeal.

2. Shri Daga, learned counsel appearing on behalf of the appellant, submits that the conviction is based basically on the extra-judicial confessions to the superior officer as well as Madhukar. Learned counsel for the appellant submits that extra-judicial confession is very weak piece of evidence and unless there is some corroboration, conviction cannot be based on the same. Learned counsel submits that extra-judicial confessions, which have been relied upon by the learned trial judge in the present case, are not of such a nature, which would inspire confidence in the mind of the court. Learned counsel further submits that insofar as the circumstance, which is relied upon by the learned trial judge regarding the Chemical Analyser's report and the finding the blood stains on the clothes of the accused is concerned, the question regarding the same was not put to the accused u/s 313 of the Code of Criminal Procedure and as such said circumstance could not have been relied upon. Learned counsel for the appellant relies on the judgment of the apex court in the case of State of U.P. Vs. Mohd Iqram and Another, and Sahadevan and another Vs. State of Tamil Nadu, . Learned counsel for the appellant also relies on the judgment of the Division Bench of this Court in the case of Shri Dnyaneshwar " Deepak Vithal Khulpe Vs. State of Maharashtra, . Learned counsel for the appellant, therefore, submits that the impugned order of conviction is not sustainable in law.

3. Shri Sonare, learned Additional Public Prosecutor, on the contrary, submits that if extra-judicial confession is found to be trustful and reliable, conviction can be based on the basis of extra-judicial confession without there being any corroboration of the same. Learned Additional Public Prosecutor further submits that merely because a particular circumstance is not put to a accused, it cannot be a ground for interfering with the order of conviction. Learned Additional Public

Prosecutor submits that unless the prejudice is shown to have been caused to the accused by not putting such question, interference with the conviction would not be warranted. Learned Additional Public Prosecutor, in this respect, relies on the judgment of the apex court in the case of State (Delhi Administration) Vs. Dharampal, and the judgment of the Division Bench of this Court in the case of The State of Maharashtra Vs. Alister Anthony Pareira . Learned Additional Public Prosecutor further submits that from the perusal of the statement of the accused u/s 313 of the Code of Criminal Procedure, the relevant questions have been put to the accused and as such no prejudice can be said to have been caused to the accused. Learned Additional Public Prosecutor, therefore, submits that no interference would be warranted with the findings of the conviction.

4. With the assistance of the learned counsel for the appellant and learned Additional Public Prosecutor, we have scrutinized the material on the record. It can be seen that the present case is a case on the basis of circumstantial evidence. The prosecution as well as the learned trial judge has relied on the following circumstances:

- (i) extra judicial confession,
- (ii) presence of blood stains on the clothes of the accused,
- (iii) the position of the bed and the dead body in the barrack in room no. 3,
- (iv) use of the bullets which were allotted to the accused,
- (v) motive,
- (vi) falsity of statement of the accused.

5. We will deal with each of the circumstance, hereinafter:

(i) The first circumstance on which the prosecution relies is extra-judicial confession. The apex court, in a recent judgment in the case of Sahadevan and another Vs. State of Tamil Nadu, had an occasion to consider the issue regarding extra-judicial confession. It will be relevant to refer to paragraph nos. 15 and 16 of the aforesaid judgment.

15. Now, we may examine some judgments of this Court dealing with this aspect.

15.1 In Balwinder Singh Vs. State of Punjab , this Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

15.2 In Pakkirisamy Vs. State of T.N., , the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

15.3. Again in *Kavita Vs. State of Tamil Nadu*, , the Court stated the dictum that there is no doubt that convictions can be based on extra-judicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of *State of Rajasthan Vs. Raja Ram*, stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court further expressed the view that: such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

15.5. In the case of *Aloke Nath Dutta and Others Vs. State of West Bengal*, , the Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.

15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand Vs. State of Rajasthan*, held that:-

29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide *Thimma and Thimma Raju v. State of Mysore*, *Mulk Raj v. State of U.P.*, *Sivakumar v. State* (SCC paras 40 and 41 : AIR paras 41 & 42), *Shiva Karam Payaswami Tewari v. State of Maharashtra* and *Mohd. Azad v. State of W.B.*]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge,

and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872.

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of Rameshbhai Chandubhai Rathod Vs. State of Gujarat, , held as under:

53. It appears, therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. Sk. Yusuf Vs. State of West Bengal, and Pancho Vs. State of Haryana, .

The Principles:

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

6. It can thus clearly be seen that after considering the law on the question, the

apex court has in unequivocal terms held that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution. It should be made voluntarily and should be truthful. It has been further held that it should inspire confidence. The apex court has further held that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. The apex court further held that if the basis of conviction is an extra-judicial confession then it should not suffer from any material discrepancies and inherent improbabilities.

7. In the light of the above principles, we will have to examine extra-judicial confessions which are relied on by the prosecution in the present case.

8. The prosecution relies on the alleged extra-judicial confessions made by the appellant to PW 2 Antaram Dadu Kudo, PW 5 Madhukar Lawmayya Morla, PW 7 Santosh Raghoji Bode and PW 9 Investigating Officer Shri Yadavrao Narayanrao Rajankar. Insofar as the confession made to PW 9 Yadavrao Rajankar is concerned, the learned trial Judge has refused to rely on the same, since it has been made to the investigating officer. In view of the provision of Section 25 of the Indian Evidence Act, no fault could be found with the view taken by the learned trial judge in not taking into consideration the extra-judicial confession made to the investigating officer.

9. However, the learned trial Judge has accepted the alleged extra-judicial confession made to PW 2 Antaram Dadu Kudo, PW 5 Madhukar Lawmayya Morla and PW 7 Santosh Raghoji Bode. Insofar as PW2 Antaram is concerned, he is also working as Police Naik at the same camp. It will be relevant to refer to relevant part of his evidence. He, in his evidence, states that after the incident, the accused had come where all the police officers had gathered and he then told that deceased Thakare was teasing him as impotent and hence he killed him by fire. It is to be noted that the incident has taken place on 6.1.2006, however, the statement of the said witness has been recorded on 18.1.2006 i.e. 12 days after the alleged incident. It can thus be seen that the possibility of this witness implicating the accused after 12 days of the incident at the instance of the investigating officer, who is undisputedly his superior, cannot be ruled out. We, therefore, do not find that extra-judicial confession made to this witness is trustworthy or such which would inspire confidence.

10. The next one is the extra-judicial confession made to Madhukar, who was also working as Police Constable in the said camp. It will be relevant to refer to evidence of this witness, which reads thus:

PSO Bode then called all constables at one place. They asked us how there was a fire. At that time, accused Ishwar reported Shri Bode. Ishwar told Shri Bode that he had opened the fire and killed Thakare.

It can thus clearly be seen that this witness says that Ishwar told Shri Bode that he had open the fire and killed Thakare. It can thus be seen that alleged extra-

judicial confession is made to Shri Bode and not this witness. As such, we are of the view that the evidence of the said witness would also not be of assistance to the prosecution case.

11. The next is the evidence of PW 7 Santosh Raghoji Bode, who was immediate superior of the deceased as well as the present appellant. It will be relevant to refer to the evidence of this witness. It can be seen from the evidence of this witness that according to him when he was making inquiry, at that time, the present appellant is said to have told him that he had opened the fire and killed Thakare. It can further be seen that he had asked Ishwar, when he told the said witness that he was teasing him as an impotent and hence he killed Thakare. As held by the apex court that the disclosure of confession has to be voluntarily. From the evidence of this witness, it can be seen that alleged extra-judicial confession was not voluntarily, but all answers given in reply to the query made by his superior in an inquiry. In that view of the matter, we find that the said extra-judicial confession would also not be one which would fall within the parameters as laid down by the apex court in the aforesaid case.

12. Insofar as the reliance placed by the learned Additional Public Prosecutor on the judgment of the Division Bench of this court in the case of Shri Dnyaneshwar " Deepak Vithal Khulpe Vs. State of Maharashtra, is concerned, in the facts of the said case, the Division Bench found that extra-judicial confession made to witness Rekha was reliable and trustworthy. Furthermore, in the said case, this court found that the prosecution had established all other incriminating circumstances. Further held that the circumstantial evidence proved so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and that it was such as to show that within all human probability the act must have been done by the accused. In that view of the matter, the said judgment would not be applicable to the facts of the present case.

13. The next important circumstance would be regarding findings of the learned trial judge regarding presence of blood stains on the clothes of the accused i.e. pant and jerkin etc. It is not in dispute that a specific question with regard to this incriminating circumstance has not been put to the accused in his statement recorded u/s 313 of the Code of Criminal Procedure. The question nos. 32 and 34, which are relied on by the learned Additional Public Prosecutor, are general in nature. No specific query regarding the blood stains having been found on the clothes of the accused, has been put to the appellant.

14. The learned Additional Public Prosecutor has relied on the judgment of the apex court in the case of State (Delhi Administration) Vs. Dharampal, and the judgment of the Division Bench of this Court in the case of The State of Maharashtra Vs. Alister Anthony Pereira . No doubt, that the learned Additional Public Prosecutor is right in relying on the judgment of the apex court in the case of State (Delhi Administration). vs. Dharampal (supra), as the apex court has held in the said case, that not putting particular circumstance to the accused

would not be fatal to the prosecution case, if the accused is not in a position to say that any prejudice is caused to him. The Division Bench of this court in the case of State of Maharashtra. vs. Alister Anthony Pareira (supra), has also held that while complying with the provision of Section 313 of the Code of Criminal Procedure, the court is not expected to put every material to the accused. However, the Division Bench itself in the said case has held that it is necessary to put the circumstances appearing in the circumstantial evidence to the accused.

15. It is to be noted that the present case is a case of circumstantial evidence. In that view of the matter, every incriminating circumstance ought to have been put to the accused. We may also refer to a recent judgment of the apex court in the case of State of U.P. vs. Mohd. Iqram and another (supra). The apex court has observed thus:

No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. Section 313, Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination u/s 313, Cr.P.C. cannot be used against him and have to be excluded from consideration.

It can thus clearly be seen that the apex court has in unequivocal terms held that the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. It has been further held that the said provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminating appearing against him. The apex court has in unequivocal terms held that the circumstances which were not put to the accused in his examination u/s 313 of the Code of Criminal Procedure cannot be used against him and have to be excluded from consideration. In a case like present case which is a case of circumstantial evidence, finding of blood stains on the clothes of the accused is a very important incriminating circumstance. Even accepting the contention of the learned Additional Public Prosecutor, that unless prejudice is caused by not putting of such circumstance, the trial would not be fatal, it cannot be said that no prejudice is caused to the present appellant by not putting him such an important circumstance. In any case, the apex court has held that the circumstances which were not put to the accused in statement recorded u/s 313 of the Code of Criminal Procedure have to be more consideration. In our considered view, the learned trial court could not have

relied on the said circumstance for basing the conviction.

16. Insofar as the next circumstance relied on by the learned trial judge regarding the position of the bed and the dead body in the barrack in room no. 3 is concerned, the perusal of the judgment would reveal that though the learned trial judge found that the circumstances of the position of the bed and the dead body in the barrack in room no. 3 is the circumstance against the accused, there is no discussion regarding the same in the judgment.

17. Insofar as the fourth circumstance is concerned, the learned trial judge has come to the conclusion that the prosecution has proved that use of the bullets were from the rifle which was allotted to the accused. In this respect, it is to be noted that the prosecution though had earlier cited the ballistic expert as a witness, for the reasons best known to it, has not examined the said witness. The learned trial judge has relied on the report of the Chemical Analyser to arrive at a finding that the prosecution has proved that the rifle used was allotted to the appellant. It will be relevant to refer to the following observations in the Chemical Analyser report, which is at Exh. 65:

In absence of control sample the results of analysis in relevance to the detection of fired gunshot residues (lead, antimony, nitrite, barium) in Exhibit 4 and inconclusive.

It can thus be clearly seen that the Chemical Analyser has not given positive opinion and has given inconclusive report.

18. The apex court in the case of State of Himachal Pradesh Vs. Jai Lal and Others, has held that the report of an expert witness cannot be accepted as it is. It has further held by the apex court that unless an expert witness has been examined, the certificate cannot be read into evidence. In any case, in the present case, wherein the Chemical Analyser's report was inconclusive, the learned trial judge could not have come to a positive finding that the prosecution has established that the bullet injury was caused by rifle which was allotted to the accused-appellant. Unless the expert witness was examined, such a conclusion could not have been arrived at. In that view of the matter, we find that the learned trial judge has also erred in relying on the said circumstance.

19. The fifth circumstance, which according to the learned trial judge has been proved is "the motive". The learned trial judge for arriving at the finding that the prosecution has established the motive, has relied on the letters at Exh. 54 to 59. It appears that the said letters were referred to the handwriting expert. However, though the prosecution had sought time to tender the evidence of handwriting expert and though the handwriting expert was summoned and issued warrant, he had not appeared before the court, the learned trial Judge, taking recourse to Section 73 of the Indian Evidence Act, has come to the conclusion that the contents of the letters were written by the accused and can be exhibited and can be considered as evidence. We find that the findings recorded by the learned trial judge in this regard in paragraph no. 40 are on the

basis of conjectures and surmises.

20. The sixth circumstance, which is relied on by the learned trial judge, is regarding the falsity of the statement of the accused. We do not find it necessary to examine correctness of this finding, since it is the basic duty of the prosecution to prove the case beyond reasonable doubt. In the present case, we have discussed hereinabove, as to how, the circumstances which are relied on by the prosecution are not established beyond reasonable doubt.

21. In a case based on circumstantial evidence, the prosecution has to prove each and every circumstance beyond reasonable doubt and further prove that the circumstances so proved, are so interwoven to each other, that lead to no other conclusion than the guilt of the accused. We find that the prosecution has failed to do so. As such, we find that the learned trial judge has erred in convicting the accused. In the result, the Criminal Appeal is allowed. The order of conviction and sentence recorded by the learned trial Judge is quashed and set aside. The appellant is directed to be set at liberty forthwith, if not required in any other case.