

(2000) 03 OHC CK 0026

In the Orissa High Court

Case No : Jail Criminal Appeal No. 25 of 1993

Jainarayan Naik alias Kamal Lochan Naik

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-03-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164

Evidence Act, 1872 — Section 24

Penal Code, 1860 (IPC) — Section 302

Citation : (2000) 1 OLR 529

Hon'ble Judges : P.K. Patra, J;C.R. Pal, J

Bench : Division Bench

Advocate : N.N. Mohapatra, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Patra, J.—The appellant has been convicted u/s 302, Indian Penal Code (for short "I.P.C.") and sentenced to undergo R.I. for life in S.T.No. 200 of 1991 by the Sessions Judge, Sambalpur vide his judgment dated 25.9.1992 which has been assailed in this appeal.

2. The prosecution case briefly stated, is that on 14.7.1991 at 5.30 p.m. the informant, Bimbadhar Sahoo while standing in front of his house, found Prakash Naik (P.W. 1), brother of the appellant crying and running towards the village and to his query informed that the appellant had killed his father by means of a tangia (axe). At that time Dukhabandhu Naik (P.W.4) (uncle of Prakash) arrived there and was informed about the above fact. P.Ws. 1,4 and the first informant accompanied by some other villagers went to the house of the deceased Sukhadev Naik and found his dead body lying on a charpoy with bleeding injury on his neck. They also found an axe, stained with blood, near the head of the deceased. It is alleged by the prosecution that the appellant who was found sitting on the outer verandah of his house was asked by the witnesses and he

made extra-judicial confession before them that the deceased had abused him in the afternoon on the same day which he could not tolerate and hence at about 4.00 p.m. while his father was asleep, he dealt a blow by means of an axe on the neck of the deceased and fled away. Thereafter the informant, Bimbadhar Sahoo. went to Mahulpali Police Station and orally reported the occurrence which was reduced to writing by Kandarpa Behera (P.W. 13). O.I.C. of the P.S. who registered the case and took up investigation. During investigation he examined the witnesses and seized the weapon of offence, i.e. axe (M.O.I.), blood stained earth from the spot, and a banian (M.O.II). a napkin (M.O.III) and a lungi (M.O.IV) belonging to the appellant, held inquest over the dead body and sent the same for post mortem examination. The I.O. arrested the appellant on 15.7.1991 at 9.00 a.m. and forwarded him to the Court in custody on 16.7.1991 and at 8.30 a.m. on his prayer. S.D.J.M., Kuchinda recorded the confessional statement of the appellant u/s 164, Cr.P.C. The Medical Officer (P.W.3) conducted autopsy over the dead body of the deceased and the medical officer (P.W.2) collected the nail clippings of the appellant. On his transfer from the police station, P.W. 13 handed over charge of investigation to P.W. 10-A. S.I. of the said police station who handed over charge to P.W. 11, the successor in office of P.W. 13 and after completion of the formalities of investigation, P.W. 11 submitted the charge-sheet against the appellant.

3. The plea of the appellant was one of denial. He denied to have made any extra-judicial or judicial confession before the witnesses and the Magistrate respectively.

4. In order to bring home the charge against the appellant, prosecution has examined thirteen witnesses. P.W. 1 is the son and P.W. 4 is the brother of the deceased. P.W. 2 is the medical officer who collected nail clippings of the appellant. P.W.3 is the medical officer who conducted the post mortem examination over the dead body of the deceased. P.W.5 is the daughter and P.W. 6 is the widow of the deceased. P.W.7 is a co-villager of the appellant. P.W.8 is the police habildar who took the dead body for post mortem examination. P.W. 9 is the Revenue Inspector who has prepared the spot map (Ext. 13). P.Ws. 10, 11 and 13 are the Investigating Officers. P.W. 12 is the S.D.J.M., Kuchinda who recorded the confessional statement of the appellant u/s 164, Cr.P.C. The first informant, Bimbadhar Sahoo has not been examined in this case.

5. P.Ws. 1, 4, 5, 6 and 7 turned hostile and did not support the prosecution case. The learned Sessions Judge placed reliance on the sole testimony of P.W. 12 who recorded the confessional statement (Bxl. 15) of the appellant and convicted the appellant.

6. The medical officer (P.W.3) who conducted the post mortem examination over the dead-body of the deceased and submitted the post mortem report (Ext. 3) opined that the injury on the deceased could have been caused by the seized axe (M.O.I.) as per his report, Ext. 4. The learned Sessions Judge has rightly come to the conclusion that the death of the deceased was homicidal. The Investigating

Officer (P.W. 13) has stated that he seized the axe (M.O.I.) from the spot as per the seizure list, Ext. 8, seized the blood stained and sample earth from the spot as per the seizure list, Ext. 7, arrested the accused on 15.7.1991 and seized the wearing apparels of the accused under the seizure list Ext. 9 and the wearing apparels of the deceased as per the seizure list Ext. 12. The nail clippings of the accused were also collected by the medical officer (P.W. 2). The other Investigating Officer (P.W. 1 I) has stated to have sent the material objects to the R.F.S.D., Sambalpur for chemical examination through the S.D.J.M., Kuchinda and Ext. 14 is the copy of the forwarding letter of S.D.J.M., Kuchinda. The chemical examination report has not been brought on record, probably due to non-receipt of the same from the Chemical Examiner. As such there is no evidence on record as to whether the nail clippings of the accused and his wearing apparels contained blood stains and if so, whether the blood was of the same group as that of the deceased.

7. In the facts and circumstances of this case as discussed above, it is to be examined whether the conviction of the appellant basing solely on the retracted judicial confession recorded by the S.D.J.M., can be legally sustained or not. There is no evidence on record regarding the extra-judicial confession of the appellant or any other corroboration.

8. Shri N.N.Mohapatra, learned counsel for the appellant contended that the conviction solely on the basis of the judicial confession without any corroboration, is legally unsustainable and is liable to be set aside inasmuch as in the present case no sufficient time was given to the appellant for cool reflection and the confession was not voluntarily.

In support of his contention, the learned counsel for the appellant placed reliance on the decision re : Mohammad Jasimuddin Ahmed Vs. State of Assam, wherein it has been held as follows :

"It is well-settled that when prosecution demands conviction of an accused primarily on the basis of his confession, the Court must apply double tests (i) whether the confession is perfectly voluntary, (ii) if so, whether it is true and trustworthy. Satisfaction of the first test is a sine qua non for its admissibility in evidence: and if the confession appears to the Court to have been caused by any inducement, threat or promise, such as mentioned in Section 24 of the Evidence Act, it must be excluded and rejected."

9. The learned Additional Government Advocate supported the impugned judgment contending that the conviction of the appellant solely basing on his judicial confession is legally justified. In support of his contention the learned Additional Government Advocate placed reliance on the decision re : Chandran Vs. The State of Tamil Nadu, in which it has been held as follows :

"To say that the accused was "in a position" or mood to give a voluntary statement, falls far short of vouching that upon questioning the accused, the Magistrate had "reason to believe that the confession is being voluntarily made",

which u/s 164 is a sine qua non for the exercise of jurisdiction to record the confession. But that section does not make it obligatory for the Magistrate to append at the end of the record of the preliminary questioning, a certificate as to the anticipated voluntariness of the confession about to be recorded. But the law does peremptorily requires that after recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he believes that the confession was voluntarily made. The reason for requiring compliance with this mandatory requirement at the close of the recording of the confession, appears to be 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. If, the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial."

10. In the light of the decisions referred to above, the statement of P.W. 12, S.D.J.M., Kuchinda, who has recorded the confession of the accused-appellant on 17.7.1991 requires close scrutiny. He has stated that the accused-appellant was produced before him at 2.00 p.m. and he warned him that he was not bound to make any confession and that if he did so, the same might go against him and he recorded the confession of the accused-appellant (Ext. 1 5) at 3.00 p.m. So according to P.W. 12 only the hour's time was given to the accused for cool reflection. He has not stated that his chamber, in which he recorded the confession of the accused, was made clear of the police personnel before recording the confession. He has also not stated that the accused was kept in custody of the Court peon during that period of one hour inside the Court, free from the influence of the police officers. On the contrary he has stated that the window of his chamber was open and was visible to the outside verandah. Besides, he has stated that he recorded the statements of six witnesses on the same date after recording the confession of the accused-appellant. P.W. 4 has stated that the Investigating Officer was present while he was brought before the Magistrate for recording his statement and that the statement of the accused was recorded first by the Magistrate and thereafter his statement was recorded in presence of the Investigating Officer in Court.

Law does not require any particular time to be given to the accused to make up his mind whether to confess or not. It depends upon the circumstances of the case. The whole purpose of giving time for reflection is to see that the confession is voluntary. However, as the Magistrate has to satisfy himself and make a memorandum to the effect that the confession is voluntary, it is necessary that sufficient time should be given to the accused.

Rule 49 under Chapter VIII of the General Rules and Circular Orders (Criminal-Vol. I) of the High Court of Judicature, Orissa provides the procedure for recording confessions of accused. Relevant portions of Rule 49 are quoted below for better appreciation.

"49. (i) The recording of the confession of an accused person immediately on his production by the police should be avoided. Ordinarily, he should be allowed a few hours for reflection, free from the influence of the police, before his statement is recorded. The police should not be allowed to be present when a confession is recorded.

(ii) Confession should be recorded in open Court and during the Court hours except when unusual circumstances require a different procedure as, for instance, when an open record would be detrimental to the public interest or when the recording of the confession in open Court is rendered impracticable by reason of the fact that the Court is closed for two or more successive days on account of holidays."

When only an hour's time for reflection was given to the accused and during that hour instead of keeping him segregated, he was kept in police lock up, the confession cannot be relied upon, as held in the case of Mohammad Jasimuddin Ahmed Vs. State of Assam,

11. In the present case the appellant was detained in police custody for about twenty-four hours and was produced before the Magistrate for recording his confession and only one hour's time was given to him for reflection and it is not known whether he was segregated or kept in police lock up during that period. P.W. 12 is silent on this score. It is evident that the Investigating Officer was present in Court with six witnesses for the purpose of recording their statements u/s 164, Cr.P.C. by the Magistrate and that the confession of the accused-appellant was recorded first and thereafter the statements of those six witnesses were recorded u/s 164, Cr.P.C. in presence of the Investigating Officer.

In the above circumstances it cannot be held that the Magistrate has given adequate time to the accused-appellant to remove completely the police influence from his mind and that he took all possible steps required by law with a genuine desire to know that the person was making a voluntary statement, as a result of repentance and contriteness. Hence the confession of the appellant recorded by the Magistrate in this case cannot be held to be voluntary. The satisfaction recorded by the learned S.D..I.M. in the certificate appended to the confession, that the confession was voluntary, is found to be erroneous and cannot be legally sustained. It is well settled principle of law that a conviction cannot be based solely on the retracted confession of an accused without corroboration. In the present case there is no corroboration to the confession of the appellant. In view of the discussions made above, the conviction of the accused-appellant based solely on the retracted confession which is not found to be voluntary, cannot be legally sustained and hence the same is liable to be set

aside.

12. In the result, the appeal is allowed and the conviction of the appellant u/s 302, IPC and the sentence of R.I. for life, are set aside and the appellant is acquitted of the charge u/s 302, IPC. The appellant be set at liberty forthwith, if his detention is not required in any other case.

Accordingly, the appeal is allowed.

C.R. Pal, J.

13. I agree.