
(2019) 04 CAL CK 0059

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 259 Of 2006

Kamala Dogra & Anr

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 12-04-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 120B, 201, 302
Code Of Criminal Procedure, 1973 — Section 313, 437A

Citation : (2019) 04 CAL CK 0059

Hon'ble Judges : Joymalya Bagchi, J;Manojit Mandal, J

Bench : Division Bench

Advocate : Sumanta Chakraborty, Sukanta Chakraborty, Debjani Roy, Ranabir Roy, Mainak Gupta

Final Decision : Allowed

Judgement

Joymalya Bagchi, J

Appeal is directed against the judgment and order dated 27.02.2006 and 28.02.2006 passed by the learned Additional Sessions Judge, 3rd Court, Barasat, North 24 Paraganas, in Sessions Trial 1(9)1995 arising out of Sessions Case 6(2)1994 convicting the appellant no. 1 for the offence punishable under Section 302/109 of the Indian Penal Code and appellant no. 2 for the offence under Sections 302/120B/201/34 of the Indian Penal Code and sentencing appellant no. 1 to suffer imprisonment for life and to pay a fine of Rs.1,000/- in default further simple imprisonment for one month for the offence under Sections 302/34 of the Indian Penal Code and to suffer rigorous imprisonment for four year and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for a month for the offence punishable under Section 201 of the Indian Penal Code and sentencing appellant no. 2 to suffer imprisonment for life and to pay a fine of Rs.1,000/- in default to suffer further simple imprisonment for a month for the offence punishable under Section 302 of the Indian Penal Code read with Section 109 of the Indian Penal Code. No separate sentence was imposed on appellant

no. 2 for the offence under Section 120B of the Indian Penal Code with a further direction that all the sentences shall run concurrently.

Prosecution case as alleged against the appellants and one Biswanath Basfore, since deceased, is to the effect that the deceased Nandlal Dogra was the husband of appellant no. 1, Kamala and father of the appellant no. 2, Shyamal. There was matrimonial dispute between Nandlal and Kamala. He used to reside separately and occasionally visited the appellants. On 23.08.1993 at 5.30 p.m., he had come to the residence of the appellants after purchasing vegetables and other items. Thereafter he left the residence and on the following morning around 5.30 a.m. his dead body was found in a nearby tank with a towel (gamcha) tied around his neck. P.W. 1, Bimal Dogra, elder son of the deceased, lodged written complaint with regard to the murder of his father Nandlal resulting in registration of Noapara Police Station Case No. 218 dated 24.08.1993 under Sections 302/34 of the Indian Penal Code against the unknown accused persons. In the course of investigation, the appellants and other inmates of the family including P.W. 1, Bimal Dogra and P.W. 24, Mamata Chowdhury (Dogra), daughter of the deceased, were arrested. On the leading statement of the appellant no. 2 and Biswanath Basfore, 'hawai chappal' of the latter was recovered from the residence of P.W. 21, Debabrata Chakraborty. An empty jerrycan was also recovered from the residence of the appellant no. 2, Shyamal. Subsequently, the appellants were produced before the Judicial Magistrate (PW23) and they made confessions which, however, were subsequently retracted. In conclusion of investigation, charge-sheet was filed against the appellants and Biswanath Basfore and the case was committed to the court of sessions and transferred to the Court of Additional Sessions Judge, 3rd Court, Barasat, North 24-Parganas. Charges were framed under Sections 302/120B/201/34 of the Indian Penal Code against the appellants and Biswanath Basfore. The accused persons pleaded not guilty and claimed to be tried. It was their specific defence that they were subjected to torture in police custody and compelled to make judicial confessions which they had retracted. In the course of trial Biswanath Basfore expired and the case was abated against him. In the course of trial prosecution examined 27 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. In conclusion of trial, the learned trial judge by judgment and order dated 27.02.2006 and 28.02.2006 convicted and sentenced the appellants, as aforesaid.

During the pendency of the appeal an issue of juvenility was raised on behalf of the appellant no. 2, Shyamal Dogra. Relying on a transfer certificate issued by Ananda Mohan Bidyapith it was argued that appellant no. 2 was born on 10th November, 1975 and hence was aged 17 years 3 months at the time of incident. On this score, prayer was made for suspension of sentence of appellant no. 2. A co-ordinate Bench of this Court remanded the matter before the trial court for determination of age of appellant no. 2. In the course of enquiry ossification test was conducted and as per radiological report it was opined that appellant no. 2

was aged above 23 years but less than 33 years at the time of occurrence. Accordingly, the plea of juvenility was turned down by this Court vide order dated 08.12.2011. Matter was carried to the Hon'ble Apex Court in Special leave to appeal (criminal) 6440/6441 - 2012 wherein by order dated 22.03.2013 the Hon'ble Supreme Court requested this Court to examine the genuineness of a copy of the admission register of Session 1982 relied upon by the State wherein date of birth of appellant no 2 was stated 22.12.1975. Pursuant to such direction, this Court held enquiry into the matter. Original admission register was produced and the teacher-in-charge was examined. By order dated 04.12.2015 a co-ordinate Bench of this Court held that the admission register of the concerned school was not maintained properly. It observed as follows:-

"So far as the particulars of the appellant no. 2 is concerned, these are available from pages 31 and 32, if viewed in a composite manner. In page 31, the name of the appellant Shyamal Dogra appears against the last serial of that page which is 14th in the entry list, and in the column specified for recording the father's name of a student, it is written "Nandala Dogra". There is no description of occupation and address so far as father of the appellant no. 2 is concerned. The column meant for description of the individuals with whom the pupil lives has been left blank. In the column carrying the heading 'Date of Birth' according to the English calendar, it is recorded 10th November, 1975. Other columns, so far as appellant no. 2 is concerned, have been left blank. In annexure R1 to the counter affidavit of the State of West Bengal, we find the date of birth specified in respect of Shyamal Dogra is 22nd December, 1975. This date does not match with the entry against the column for recordal of date of birth in the admission register produced before us."

This Court, accordingly, concluded that the entry in annexure 'R/2' placed before the Hon'ble Supreme Court does not appear to be genuine. Ordinarily entry as to the date of birth made in the admission register of an educational institution where a child in conflict with law was first admitted would be the best evidence for determination of age. We have noted the entries made in the original admission register produced in this case. Entries in the register appear to have been made in a haphazard manner and the entry relating to the appellant no. 2 does not appear to be completed in all particulars as observed by the co-ordinate Bench in its order dated 04.12.2015. The situation is not improved by the oral deposition of the teacher-in-charge who claimed ignorance with regard to the aforesaid entry. Hence, I am not inclined to rely on the aforesaid entry made in the original admission register to come to a finding as to the age of the appellant no. 2. More so, ossification report of the appellant no. 2 shows that he was between 23 years to 33 years at the time of commission of offence. Hence, I hold that the appellant no. 2 was not a juvenile at the time of occurrence. Coming to the merits of the case, it has been argued that the prosecution case is essentially based on the juvenile confessions of the appellants and Biswanath Basfore, exhibits 14, 15 and 16 respectively. It was strenuously argued that the appellants and other inmates of the family were detained by the police in

connection with this case and the appellants were coerced to make confessions. Coercion upon the appellants is probalised not only by their retractions but also from the deposition of the prosecution witnesses viz. P.W 1 and P.W 24. Hence, it is argued on behalf of the appellants that the aforesaid confessions are a product of coercion and tutoring at the behest of the police and cannot be said to be voluntary. If the retracted confessions are ignored there is no evidence on record connecting the appellants with the alleged crime.

On the other hand, learned Counsel appearing for the State submits that there is nothing on record to show that the oath was administered to the appellants. The appellants were given time to reflect and thereafter statutory warnings were given to them and the confessions were recorded. Retraction was made belatedly and did not affect the truthfulness and voluntariness of the confessions. Hence the appeal is liable to be dismissed.

Conviction procured on a confession by an accused is a problematic matter. It harks back to the days of Star Chamber and inquisitorial proceedings in the Middle Ages where custodial torture and self incrimination was the main plank to bring home guilt against a suspect. Evolving dynamics of human rights and fundamental freedoms have shifted the basis of criminal prosecution from the pernicious over dependence on self-incrimination to a more fair regime of proof of culpability through independent evidence. It is from this perspective, I have chosen to examine the judicial confessions relied upon by the prosecution to prove the guilt against the appellants for the murder of the deceased, Nandalal.

Prosecution saga began upon the discovery of the dead body of the deceased, Nandalal in a pond in the early morning of 24.8.1993. He was found lying dead with a towel wrapped around his neck. His son P.W.1, Bimal Dogra reported the matter to the police setting the criminal law into motion. Inquest over the dead body of the victim was held by P.W.8, Kalipada Dalapati and thereafter post mortem was conducted by P.W.14, Dr. Nema Charan Pratihari.

P.W.14, Dr. Nema Charan Pratihari noted various injuries on the body of the victim and opined that the death of the victim was due strangulation, ante mortem and homicidal in nature. He also found whitish fluid with smell of alcohol approx. 15 ounce in the stomach of the deceased which according to him may have been consumed within 10 hours of his death.

As first information report was lodged against 'unknown accused', all the inmates of the family including P.W.1, Bimal Dogra (son of the victim), P.W.24, Mamata Choudhury (Dogra) (daughter of the victim) and P.W.21, Debabrata Chakraborty (son-in-law of the victim) were detained in police custody alongwith the appellants. It is claimed by P.W.27, Swadesh Kr. Dhar, Investigating Officer of the case that the appellants confessed their guilt on interrogation and were produced before the Magistrate for recording judicial confessions. Pursuant to their statement, Biswanath Bansfore (co-accused) was arrested and a pair of hawai chappal was recovered belonging to Biswanath from the house of Debabrata

Chakraborty following the identification by Shyamal Dogra and Biswanath Bansfore. Similarly, a jerrycan was seized from the house of Shyamal Dogra.

Forensic report with regard to the hawai chappal was obtained from P.W.22 and the confessional statements of appellants and Biswanath Bansfore before judicial Magistrate were exhibited as Exts.14, 15 and 16.

P.W.23, Partha Sarathi Das is the Judicial Magistrate who recorded the confessional statements of the appellants and Biswanath Bansfore. He deposed that Kamala was produced before him on 17.9.1993 and was sent for reflection to judicial custody till 18.9.1993. She was given statutory warning and thereafter her statement was recorded and marked as Ext.14. In similar manner, statement of Shyamal Dogra, Ext.16 was recorded by the Magistrate on 21.1.1993 and that of Biswanath Bansfore, Ext.15 was recorded on 20.9.1993.

In Ext.14, Kamala stated that she was married to deceased Nandalal who was an alcoholic. He used to mentally and physically torture her. Unable to bear such torture, she requested her younger son, Shyamal Dogra to find a solution so that they can live in peace. On 23.8.1993 at 5.30 P.M., her husband came along with Biswanath Bansfore to their residence. He had brought some items for cooking and asked her to cook. Thereafter both of them went out and around 7/7.30 P.M. they again returned with liquor in a polythene jerrycan. Shyamal Dogra, her son, was at home. Her daughter Mamata had gone to the neighbouring house to watch T.V. Biswanath Bansfore and her husband were drinking alcohol inside the room. She sent fish-fry through Shyamal to her husband. Thereafter, while she was cooking food in the kitchen, Shyamal rushed and informed that Nandalal was dead. She became perplexed and called her daughter. Thereafter, she went with her daughter to call her elder son. When she returned, she could not find the dead body of her husband. Shyamal was sitting in the room and told her that he and Biswanath had thrown the dead body in the doba near the house. Biswanath left behind his hawai chappal in the house.

Confessional statement of Biswanath Bansfore, (Ext.15) runs as follows :-He stated that 4/5 days prior to murder of Nandalal, Shyamal called him at 6.00 P.M. to their house. Shyamal's mother told him to do something about her husband as he was not paying any money. On 23.8.1993 Shyamal came to his house and asked him whether he was willing to go to Shyamnagar to meet his father. Biswanath initially declined to do so. Thereafter, he saw Shyamal and Nandalal near the pump house. He went to the pump house to work as labourer. Shyamal gave Rs.50/- to him and asked the latter to make his father to drink alcohol and bring to him to their house. Biswanath Bansfore and Nandalal consumed liquor in various shops till 5.00 P.M. Then he handed over Rs.50/- to Nandalal to purchase vegetables and other items. Thereafter, both of them went to the house of Shyamal. Shyamal's mother prepared fish fry. He went out with a white jerrycan and returned after purchasing more liquor. They again started consuming liquor. Shyamal's mother was cooking food in the verandah. Shyamal was inside the room. Nandalal became drunk and lay on the floor. Thereafter, he

and Shyamal strangled him with a gamcha. Shyamal's mother entered the room and told them to dispose of the dead body. Thereupon, they disposed of the dead body and he hurriedly left for Ichhapur station. He had kept his hawai chappal in the verandah when he left the place in a hurry.

Shyamal, appellant no.2 made the following confession (Ext.16):- He stated that his father was an alcoholic and used to ill-treat his mother. His father had broken her mother's hand and assaulted her on a number of times. His mother requested Biswanath Bansfore to kill his father. Biswanath Bansfore agreed but demanded Rs.10,000/- to do the job. On 23.8.1993, Shyamal went to the house of Biswanath and requested him to go to the office of his father as he had not visited them for three months. Biswanath did not go. He alone went to the office of his father and complained about the matter to the officer. Thereafter, Shyamal met his father on the way. He also met Biswanath Bansfore and handed Rs.50/- to him and told him to get his father drunk and bring him to their house. In the evening at 5/5.30 P.M. Biswanath and Nandalal came to his house along with some items. Thereafter, they again went out. They returned at 7.30 P.M. Shyamal gave money and white polythene jerrycan to his father. His father returned after some time with liquor. His father and Biswanath started consuming liquor. His father demanded fish fry which he handed over from the kitchen. His father became senseless after consuming liquor. Thereafter, he and Biswanath tied a gamcha around the neck of his father. Blood oozed out from his nose. He informed his mother that Biswanath had executed the job. Then he and Biswanath threw the body of the victim near a doba.

It has been argued on behalf of the prosecution that the aforesaid confessional statements of the appellants clearly establish their role in the murder of the deceased. It has also been argued that the confessional statements were recorded by the Magistrate after giving time to the accused persons to reflect and statutory warning had also been given to them. There is no doubt with regard to the voluntariness of the said statements. That apart, there are evidence on record which corroborate the said confessional statements. Confessional statements are, therefore, truthful and voluntary.

In Alope Nath Dutta and Ors. Vs. State, (2007) 12 SCC 230 at para 87, the Hon'ble Apex Court held that a confession can be the sole basis of conviction provided it satisfied the following tests:-

- a) voluntariness;
- b) truthfulness; and
- c) corroboration.

Coming to the issue of voluntariness, it appears that P.W.23 had given statutory warning and cautioned the appellants before recording the confessions. In response to such caution, appellants stated that no pressure had been exerted upon them by police and they were deposing voluntarily out of remorse.

Ordinarily, such response of the appellants would have satisfied our conscience with regard to voluntariness. However, the attending facts of the present case compel us to subject the confessions to a deeper scrutiny.

P.W.1, Bimal Dogra, elder son of the victim is the de-facto complainant in the instant case. He was not in the residence in the evening and upon returning home at 9 P.M., he was informed by the inmates of the house that his father had come in the afternoon to their house. As his father did not ordinarily reside and only occasionally visited them, such behaviour did not give rise any curiosity in him. However, in the following morning when dead body of his father was recovered from a nearby pond, he lodged complaint resulting in registration of criminal case upon unknown accused persons.

The said witness deposed that during investigation he along with Shyamal, his mother and sister were arrested. He and Shyamal were kept in the same lock-up whereas his mother and sister were kept in the female lock-up. He further deposed that Shyamal was threatened by police personnel to admit that he had killed their father. The police personnel told Shyamal if he did not admit his guilt, he would be entangled in several other crimes and might even be shot dead. Subsequently, they were also taken to higher police official at Bhawani Bhawan. Couple of days later, Shyamal was asked by police to become a witness in the case and admit his guilt. Police also obtained blank signatures from Shyamal. Subsequently, the said witness was released from custody along with his sister.

It is important to note that the aforesaid witness has not been declared hostile by the prosecution. His deposition finds corroboration from that of his sister P.W.24, Mamata Chowdhury (Dogra) who was also detained along with other inmates of the family.

P.W.24, Mamata Chowdhury (Dogra) however, has been declared hostile. In cross-examination she stated that she was pressurised to make statement before Magistrate as per instruction of police. She and her mother were detained in the police station in the same lock up while Shyamal and Biswanath Bansfore, friend of his father were kept detained in the lock up in front of their room. Pressure was put by police upon them. She filed petition in Court, Ext.A retracting her statement to Magistrate. Her mother also filed similar petition, Ext.B retracting the statements made by the appellants.

The aforesaid evidence of P.W.1 and P.W.24 finds corroboration from the evidence of P.W.21, Debabrata Chakraborty, son-in-law of the deceased. He was also detained in police custody in connection with this case and in cross-examination deposed that police threatened him with dire consequences while in custody and compelled him to make statement before Magistrate. It is apposite to note that the hawai chappal belonging to Biswanath Bansfore was recovered from the residence of the said witness and has been used as a corroborative piece of evidence to buttress the aforesaid confessions.

Evidence of P.W.21 and P.W.24, disclose a macabre picture where all the relations

of the deceased were detained in police custody during investigation and appears to have been subjected to threat and coercion to make statements before the Magistrate. P.W.1 categorically described the manner in which force and allurements were held out to Shyamal to falsely confess his guilt before the Magistrate. Similar evidence has come from the mouth of P.W.24. P.W.24 placed such facts on record by filing a petition before the Court, (Ext.A). Appellant no.1 also retracted the confessions recorded under coercion and threat by filing another petition, (Ext.B). The appellants have also retracted his confession during trial.

The aforesaid evidence on record runs counter to the responses made by the confessing accused before the magistrate. Should one rely on the empty words of voluntariness spoken by an accused produced before a magistrate as an assurance with regard to the voluntariness of confession when evidence is replete regarding oppressive coercion perpetrated upon him to procure such confession? In such situation, it would be the bounden duty of the court to go behind the facile words and test the voluntariness of such confession against the factual backdrop as appearing from the attending facts of the case. In the face of the unchallenged deposition of P.W 1 corroborated by other witnesses disclosing continuous threat and coercion upon the appellant to compel them to depose, I have no alternative but to come to a conclusion that their meek expression of voluntariness before the Magistrate was a mere surrender on their part to the sceptre of threat and coercion looming large on their minds when the confessional statements were recorded. In this factual backdrop it was essential for the Magistrate recording confession to assure the accused that they will not be put back to the custody and control of the police officers if they chose not to make such confession.

I have examined the statutory warnings given by the magistrate in the instant case and do not find any such assurance held out by him to create a sense of confidence in the mind of the confessing accuseds that he/she shall not be remanded to police custody if they chose not to depose.

It is settled law that a magistrate must create a sense of confidence in the mind of an accused and assure him that he shall not be remanded to police custody if he does not confess in order to insulate him from any apprehension of threat or coercion flowing from the police. [See Shivappa Vs. State Of Karnataka, (1995) 2 SCC 76 (para 8)]

The factual matrix of the instant case does not show that the fear and apprehension prevailing in the mind of an accused who was under constant threat and coercion while in police custody had been erased by assuring him that he shall not be remanded to police custody if he chose not to confess. Hence, the confessions recorded in the instant case cannot be said to be voluntary in nature. That apart the confessions were retracted as would appear from Ext. A and Ext. B as well as during the examination of the accused persons under section 313 Cr.P.C.

Retracted confessions vitiated by prior threats of false implication in criminal cases while in police custody cause indelible blots on their voluntariness and do not render sufficient assurance of reliability so as to justify conviction of the appellants on the strength of such acts of self incrimination.

It is also pertinent to note that no independent evidence has been led by the prosecution that the deceased and Biswanath had come to the residence of the appellants on the date of the incident. P.W 1 who returned at 9 p.m. had remained mum with regard to the presence of Biswanath in their house on that day. The Genesis of the incident as narrated in the confession also run counter to the broad probability of human conduct. In one part of the confession it is stated that Nandalal had inimical relation with his wife Kamala. Maintenance proceeding was pending between them. If that were so, it is most absurd that Nandalal would come and share a meal and drink at the residence of Kamala at the bidding of his friend Biswanath and give an opportunity to the appellants to conspire with Biswanath and commit his murder.

Hence, I am constrained to hold that the confessional statements suffer from severe infirmities and defects on the point of voluntariness as well as reliability and truthfulness. Accordingly, I am unwilling to rely on the such retracted confessions to convict the appellants.

Other pieces of evidence are woefully vague and flimsy. Recovery of 'Hawai chappal' of Biswanath pursuant to the statements of appellant no. 2 Shyamal Dogra and Biswanath as claimed by P.W 27 suffer a severe jolt from the deposition of P.W 21, Debabrata from whose house the footwear was recovered. The said witness had also been arrested in connection with this case and candidly admitted in cross examination that he had been compelled to make statement under coercion to the police to implicate the accused persons. As such the aforesaid recovery cannot be relied upon as an incriminating circumstance against appellant no. 2 to bring home the guilt against him. Recovery of jerry can from the residence of appellant no. 2 is also a very weak piece of evidence as availability of such an item is most probable in every household and cannot raise any suspicion far less justify proof of commission of murder by the said appellant.

In the light of the aforesaid discussion, I am of the opinion that the prosecution has failed to prove its case beyond doubt. Hence, I have no alternative but to acquit the appellants from the charges levelled against them.

Accordingly, the conviction and sentence of the appellants is set aside.

Appeal is allowed.

Appellants shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the learned trial court which shall remain in force for a period of six months in terms of section 437A Cr.P.C.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.