

(1987) 03 PAT CK 0010
In the Patna High Court
Case No : Criminal Appeal No. 58 of 1984

Kare Jha, @ Kare Missir

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 06-03-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (1987) PLJR 951

Hon'ble Judges : S.H.S. Abidi, J; P.S. Mishra, J

Bench : Division Bench

Advocate : Rash Bihari Singh and Rajeeva Roy, for the Appellant; K.P. Gupta, for the Respondent

Final Decision : Allowed

Judgement

P.S. Mishra and S.H.S. Abidi, JJ.—The appellant has been convicted u/s 302 of the Indian Penal Code (in short the "Code") by the 2nd Additional Sessions Judge, Purnea, and sentenced to undergo rigorous imprisonment for life. The alleged occurrence took place on 11.4.1979 at about sun set when Udhapi Mandal alias Udhai Mandal had gone to ease himself and to bring his bullocks from the bamboo grove of the appellant. Villagers heard soon thereafter the appellant shouting Mardiya-Mardiya Chor Ko Mardiya (killed the thief). The informant (P. W. 8), Nunu Mandal, and other villagers went rushing to the bamboo grove and found Udhai Mandal in injured condition; although restless Udhai told them that the appellant had assaulted him. Soon thereafter his voice choked and although water was offered to him, he died.

2. On the following day at about I P. M. the informant along with other witnesses went to Forbesganj police station and lodged information. After completing investigation the police submitted charge-sheet. In the eventual trial the appellant has been convicted and sentenced as above..

3. The prosecution has examined 11 witnesses including the Investigating Officer (P. W. 11), the Doctor who held the post mortem examination (P. W. 10) and the formal witnesses namely P. W. 1, who has proved the first information report (Ext. 1) and P. W. 6 who has proved the inquest report (Ex. 3). Occular evidence in support of the prosecution case has been provided by P. W. 2, Singheshwar Mandal, P. W. 3 Deo Narayan Sao, P. W. 4 Dayanand Mandal, P. W. 5 Nand Mohan Mandal, P. W. 9 Bachni Devi and the informant (P. W. 8). Dukhai Mandal (P. W. 7), who has been examined as a prosecution witness, however, has not supported the prosecution case and has been allowed to be cross-examined by the prosecutor. The defence has examined only one witness namely Sadanand Thakur (D. W. 1) and produced a copy of a complaint petition (Ext. A) filed in the court of the Sub-divisional Judicial Magistrate, Araria, by the father of deceased Udhai.

4. Five witnesses namely, P. W. 8 the informant, P. W. 3 Deo Narayan Sao, P. W. 4 Dayanand Mandal, P. W. 2 Singheshwar Mandal and P. W. 5 Nand Mohan Mandal have stated that when they reached after hearing the cry of the appellant that he had killed the thief, they saw Udhai lying in injured condition. They have deposed that Udhai told them that he was injured and assaulted by the appellant. Bachni Devi (P. W. 9), wife of the victim Udhai, has also deposed to the said effect. It is however, on the record that she had not stated before the police in her statement u/s 161 Cr. P. C. that her husband had told her that the appellant had assaulted him and the informant had said that other witnesses arrived after Bachni Devi (P. W. 9) offered water to her husband, meaning thereby that whatever Udhai stated was heard only by him.

5. Oral evidence, therefore, is to the effect that the victim stated before his death that he had been assaulted by the appellant. Hearsay is inadmissible subject to the exceptions that are available in the specific provisions of the Evidence Act. One such exception is available in Section 32 (1) of the Evidence Act which says :--

Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be produced without an amount of delay or expense, which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

This provision is wide enough to include in its ambit the statement attributed to

Udhai, the victim, that he was assaulted by the appellant. It is not necessary to investigate that when he made the statement he was under expectation of death or not as we know for certain that soon after the assault Udhai died. Cause of Udhai's death has been stated by P. W. 10, Dr. Mohammad Afaque Sidique, who has deposed that on 12.4.79 he was posted at Araria hospital as Civil Assistant Surgeon and on the said date at 3 P. M. he held post mortem examination on the dead body of Udhai Mandal in which examination he found atni mortem injuries which were grievous in nature and caused by sharp pointed and cutting weapons. He has also deposed that the death had taken place within about 24 hours due to shock and haemorrhage as a result of the anti mortem injuries.

6. The informant and other witnesses have deposed that Udhai died soon after water was offered to him by his wife (P. W. 9). It is thus obvious that if in fact Udhai stated as deposed by the witnesses that the appellant had assaulted him, he made statement as to the cause of his death.

7. Still, in our view, it is not possible to place reliance upon the statement of the witnesses who have deposed that Udhai stated in their presence before his death that he had been assaulted by the appellant. P. W. 9, Bachni Devi, wife of Udhai, has claimed that he stated before his death that the appellant had assaulted him, but she had made no such statement before the police. P. W. 8, the informant, has narrated in some details how after hearing the shouts of the appellant he rushed to the bamboo grove and found Udhai lying in the injured condition and heard him saying that he had been assaulted by the appellant. He has stated in the cross-examination that he was first to reach the place followed by P. W. 9, the victim's wife, and when they reached, Udhai asked for water. He has said that P. W. 9 went to bring water but when she returned with water in a jug Udhai had already died. He has deposed that other witnesses arrived thereafter. This evidence of the informant has thus ruled out any other witnesses hearing the words of the victim that he had been assaulted by the appellant.

8. The same very witness have also deposed that they heard the shouts of the appellant who was saying that he had killed the thief. If this statement is accepted as a confessional statement or admission of the fact that the appellant had assaulted Udhai, that may provide such extra judicial confession which, if otherwise not found infirm, may furnish the basis of conviction of the appellant or at least corroborate the dying declaration of Udhai before the informant that he was assaulted by the appellant.

9. In *State of U. P. v. M. K. Anthony* (A. I. R. 1985 S. C. 48) Desai, J. speaking for the Court has said that there is neither any rule of law nor of prudence that evidence furnished by extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. He has said after taking into consideration a series of judgments of the Supreme Court in which the evidentiary value of extra judicial confession was considered :--

It thus appears that extra judicial confession appears to have been treated as a

weak piece of evidence. But there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about the extra judicial confession comes from the mouth of witness/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 for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extrajudicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra judicial confession is reliable, trustworthy and beyond reproach the same can be relied upon and a conviction can be founded thereon"

It has indicated how a court considering extra judicial confession shall scrutinise the evidence and see before placing reliance upon such extra judicial confession that it has come from the mouth of witness/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 for attributing an untruthful statement to the accused and (2) to see whether the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the court may accept the extrajudicial confession as the basis for conviction, the same being reliable, trustworthy and beyond reproach.

10. In the instant case, however, if the words that are attributed to the appellants by P. W. 8 are tested they do not fully convey that the appellant confessed that he had assaulted the victim. All that he is attributed is that he said that he had killed the thief; unless it is accepted that the appellant (sic) was the said thief, his words do not suggest that he killed the appellant (sic). It is well settled that statement merely suggesting an inference of committing a crime is not an admission of offence. There has to be a plain admission of guilt and the statement of facts attributed to must without any ambiguity, constitute the offence.

11. In *Narain Swami v. Emperor* (A. I. R. 1939 P. C. 47) it is said-.....a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence, An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession.

The view taken by the Privy Council is reiterated by the Supreme Court in *Palvinder Kaur v. State of Punjab* (A. I. R. 1962 S. C 334) and in *Om Prakash v. State of U. P.* (A. I. R. 1960 S. C. 409) in terms, when the statement attributed

to the appellant does not satisfy the necessary test constituting confession. The statement attributed to the appellant neither admits in terms the offence nor substantially the facts which constitute the offence. The said statement cannot be admission of the fact that the appellant killed victim Udhai.

12. We are also not satisfied that dying declaration aforesaid by Udhai before the informant, on the facts of this case be accepted as the conclusive proof of assault upon Udhai by the appellant. The words that are attributed to the appellant create some doubt to the effect that the appellant might have assaulted Udhai thinking that he was a thief. Although after quite some time but alleging specifically that the appellant and others constituting an unlawful assembly surrounded Udhai near the bamboo grove at the alleged time of occurrence and variously assaulted him, a petition of complaint was filed by the father of the appellant in the court of Sub-divisional Judicial Magistrate, Araria, (Ext. A). This contains allegations quite different from the allegations made by P. W. 8 in the Fardbeyan and reiterated in the court. It cannot be said that the evidence of P. W. 8, the informant, has no infirmity at all or that there cannot be any doubt as to the manner of occurrence. On the sole testimony of P. W. 8 in which he has stated that the victim named the appellant as his assailant, to up-hold appellant's conviction will, in our view, be not proper. The appellant, on the evidence available on the records, in our view, is entitled to benefit of reasonable doubt. In the result this appeal is allowed. The appellant is acquitted of the charges levelled against him. His conviction u/s 302 of the Code is set aside and he is discharged from the liabilities of his bail bond.