

(1999) 02 AHC CK 0009
In the Allahabad High Court
Case No : Cnminptl Appeal No. 618 of 1980

Nabi Ahmad and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 05-02-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Evidence Act, 1872 — Section 145, 27, 32(1)
Penal Code, 1860 (IPC) — Section 201, 302, 34, 394

Citation : (1999) 1 ACR 620

Hon'ble Judges : V.M. Sahai, J; J.C. Gupta, J

Bench : Division Bench

Advocate : R.B. Sahai, for the Appellant; A.G.A., for the Respondent

Judgement

J.C. Gupta and V.M. Sahai, JJ.—The above noted Appellants who have been convicted and sentenced to imprisonment for life u/s 302 read with Section 34. I.P.C, to undergo R.I. for 7 years u/s 201/34. I.P.C. and to undergo R.I. for 10 years u/s 394, I.P.C. by the judgment dated 22.03.1980 passed by the then IIIrd Additional Sessions Judge, Fatehpur in Session Trial No. 227 of 1979, have preferred this appeal before this Court.

2. The case relates to the murder of Smt. Bandera wife of Ram Astray, P.W. 1. A written report was lodged by Ram Asrey at the police station on 17.10.1977 at 12.20 p.m. to the effect that his wife Bandera was not traceable since the preceding evening and despite a vigorous search having been made during night, her whereabouts could not be known and that she was having some ornaments on her body. On this point, case was registered and police came into action. The Investigating Officer Shri Shiv Kumar Singh (P.W. 7) caught hold of Smt. Salatunnisa (P.W. 4) the wife of Appellant Nabi Ahmad and he got the lock of one of the rooms of her house opened by the keys provided by her. On entering that room, it was noticed that some portion of the floor of the room was blood-stained and some pieces of broken bangles were also lying there. The

Investigating Officer took into his custody bloodstained and plain earth and so also the pieces of bangles through recovery memo. Ext. Ka. 1 and Ext. Ka. 8. It is further alleged that at the instance of Smt. Salatunnisa, the Investigating Officer got the dead body of the deceased searched in the pond situated in front of her house whereupon pieces of her dead body kept in two earthen pots were recovered. Memo Ext. Ka. 3 were prepared in respect thereof. It was also disclosed by Smt. Salatunnisa to the Investigating Officer that in the intervening night of 16/17 October, 1977, the present Appellants had committed the murder of the deceased in the room of her house and after committing the murder, the dead body was cut into pieces and put in two earthen pots. They also wrapped her head with her Dhoti and threw the pots in the aforesaid pond.

3. Dr. M. M.S.A. Khan conducted the post-mortem examination and found the following ante-mortem injuries:

(1) Incised wound 7" x 2" liquefied brain matter flowing out on the right front parietal region horizontally ; clotted blood present underneath the scalp, clean cut fracture of right front parietal bone, extending below as a linear fracture into anterior and middle cranial fosse reaching the base of skull, meanings clean cut.

(2) Incised wound 5-1/2" x 2" x bone deep extending from the left ear to left superior orbital margin, clotted blood present underneath, clean cut fracture of left fronto-parietal bone present underneath.

(3) Incised wound 6-12/2" x 5-1 /2" x through and through present over the upper part of neck at the level of 3rd cervical vertebra; cleanly cutting the body of 3rd cervical vertebra, trachea, esophagus, vessels of the neck, nerves of the neck along with the other structures of neck cleanly cut through and through clotted blood present all round the wound and not the subcutaneous tissues.

According to the opinion expressed by the Doctor, death of the deceased was caused due to shock and hemorrhage on account of ante-mortem injuries. The post-mortem report is Ext. Ka. 19. The blood stained earth, Dhoti of the deceased and a piece of rope were sent to the Chemical Examiner and Serologist. As per the report of Serologist human blood was found on the Dhoti whereas the blood on earth and on rope was found disintegrated. The blood group of blood-stained Dhoti, however, could not be fixed.

4. After completing investigation, the police submitted charge-sheet against all the Appellants who were duly tried before the trial court. In support of their case, the prosecution examined nine witnesses in all, namely Ram Asrey the first informant and the husband of the deceased as P.W. 1 ; Chotey Lal (P.W. 2), Visheshwar (P.W. 3) ; Smt. Salatunnisa (P.W. 4), the wife of the accused Nabi Ahmad, Constable Afaq Husain (P.W. 5); Ishaq (P.W. 6) ; Investigating Officer Shiv Kumar Singh (P.W. 7); Sri Bharthari Prasad (P.W. 8) the Judicial Magistrate who recorded the statement of the witness Smt. Salatunnisa u/s 164, Code of Criminal Procedure and Dr. M.M.S.A. Khan (P.W. 9) who conducted the postmortem examination.

5. The Appellants in their statements recorded u/s 313, Code of Criminal Procedure denied the prosecution allegations and stated of their false implication. They produced no witness in defence.

6. The learned Sessions Judge found that the prosecution has proved its case beyond reasonable doubt and consequently has recorded conviction of the Appellants by the impugned judgment.

7. We have heard learned Counsel for the Appellants and the learned A.G.A. at length. Record of the Court below has also been perused.

8. It is not disputed by the learned Counsel for the Appellants that the pieces of dead body which were found in the two earthen pots and recovered from the pond were of the deceased Basdeia. It is also not challenged that Smt. Basdeia died a homicidal death. However, the argument of the learned Counsel for the Appellants is that there is absolutely no evidence, direct or indirect, to connect the Appellants with the murder of the deceased. It is argued that the learned Sessions Judge has committed a grave error of law in basing conviction of the Appellants solely on the basis of statement of Smt. Salatunnisa recorded u/s 161, Code of Criminal Procedure during investigation and statement recorded u/s 164, Code of Criminal Procedure. We find substance in the above submission of the learned Counsel for the Appellants. As already stated above after when the report of disappearance of Smt. Basdeia was lodged by her husband Ram Asrey, P.W. 1, the police came into action and the Investigating Officer interrogated Smt. Salatunnisa who herself opened her house and got the inspection made. It is further the case of the prosecution that it was Smt. Salatunnisa who took the Investigating Officer to the pond and on her pointing out, pieces of the dead body of the deceased were recovered from the pond which were kept in two earthen pots. At the trial, Smt. Salatunnisa was examined as a prosecution witness (P.W. 4). She, however, did not support the prosecution case at all and turned hostile. She was confronted with her statement recorded by the Investigating Officer u/s 161, Code of Criminal Procedure and also with her statement recorded u/s 164, Code of Criminal Procedure. She denied to have given any statement to the Investigating Officer. In respect of her statement recorded u/s 164, she stated that she was kept at the police station for three days and was forced to give such a statement. The learned Sessions Judge has, however, relied upon the statement of the said witness as was recorded

9. u/s 161, Code of Criminal Procedure and u/s 164, Code of Criminal Procedure and has based the conviction of the Appellants on such statements.

10. It is well established law that statements recorded during investigation u/s 161, Code of Criminal Procedure are wholly inadmissible and accepting them as evidence is utterly erroneous. Under no circumstances, the statement given by a person to the police during investigation can be used as substantive evidence. It can be relied upon for the purpose of contradicting the maker thereof as is provided u/s 162, Code of Criminal Procedure, and its proviso. The fundamental

and legal proposition is that a statement made to a police officer by any person, examined in the course of the investigation, recorded u/s 161, Code of Criminal Procedure is not and cannot be treated as substantive evidence except when falling within the provisions of Clause (1) of Section 32 of the Evidence Act or with regard to a discovery u/s 27 of the same Act, It may be used only for the purpose of contradicting the evidence of the said person when examined as a prosecution witness in the manner provided by Section 145, Evidence Act. Such a statement cannot be used for the purpose of seeking corroboration or assurance for the testimony of the witness in the Court.

11. Similarly, a statement recorded u/s 164, Code of Criminal Procedure can never be used as substantive evidence and cannot be made use of except to corroborate or contradict the witness. Even where the witness admits that a statement of his was recorded u/s 164, Code of Criminal Procedure and that what he had stated there was true would not make the entire statement admissible. A statement made u/s 164, Code of Procedure can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what had been stated by him out of Court u/s 164, Code of Criminal Procedure was true. Substantive evidence is one which is given by a witness in Court on oath in the presence of the accused whereas the statement u/s 164, Code of Criminal Procedure is recorded in the absence of accused and, therefore, the same cannot be made basis of conviction even where the Court may be of the opinion that the witness has been won over.

12. In the present case, the learned Sessions Judge has committed a gross error of law in placing reliance on the statement of Smt. Salatunnisa as recorded by the Investigating Officer u/s 161, Code of Criminal Procedure and also on her statement recorded u/s 164, Code of Criminal Procedure by using such statements as substantive evidence. It may also be relevant to mention here that the two witnesses Chutney Lai P.W. 2 and Visheshwar P.W. 3 also turned hostile and did not support the prosecution case. They were cross-examined on behalf of the State but nothing material could come in their cross examination, which could be used in corroboration of the prosecution story. In the present case even as per the prosecution case, the dead body was got recovered by Smt. Salatunnisa and not by any of the accused persons. Therefore, provisions of Section 27 of the Evidence Act also could not be attracted against any of the Appellants. From the report of the Serologist, it is also not established that the earth recovered from one of the rooms of the Appellant Nabi Ahmad was stained with human blood. The mere fact that the Dhoti which was wrapped on the head of the deceased contained human blood cannot be used as an incriminating circumstance against the Appellants as it is not established that the "DHOTI" belonged to any of the accused persons. After examining the entire record, we find that there is absolutely no legal evidence whatsoever to connect the Appellants with the murder of the deceased. Since the dead body was got recovered at the instance of wife of one of the Appellants, only a suspicion could

arise but that suspicion alone will not be sufficient to hold the Appellants guilty of the commission of the murder of the deceased or for connecting them for the offence punishable u/s 201. I.P.C. or 394, I.P.C. and they are entitled to be acquitted.

13. For the reasons stated above, the order of conviction and sentence passed by the learned Sessions Judge has to be set aside.

14. The appeal is allowed. The judgment dated 22.03.1980 is set aside and the Appellants are acquitted of all the charges leveled against them. They are on bail and they need not surrender. Their bail bonds are cancelled and sureties discharged.