

(2007) 10 GAU CK 0057
In the Gauhati High Court

Sankhi Chiba and Another

APPELLANT

Vs

State of Arunachal Pradesh

RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 1, 164, 281, 3, 313
Evidence Act, 1872 — Section 4
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2008) CriLJ 1734 : (2008) 1 GLT 388

Hon'ble Judges : P.K. Musahary, J;Aftab H. Saikia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Aftab H. Saikia, J.—Heard Mr. J.M. Choudhury, learned Sr, Counsel assisted by Mr. S.K. Deuri and Mr. T. Boo, learned Counsel appearing for the appellants in Criminal Appeal No. 10(AP)/2005 and in Criminal Reference (Hill) No. 2/2007. Also heard Mr. B. Banerjee, learned P.P. representing the State of Arunachal Pradesh in both the cases.

2. The conviction of the appellants-respondents under Sections 302/34 IPC and sentence to undergo rigorous imprisonment for life with a fine of Rs. 3000/- each and in default for payment of fine to undergo a further term of 3 months rigorous imprisonment so handed down by the learned Additional District and Sessions Judge,, First Track Court Eastern Zone, Namsai, by his judgment and order dated 28.9.2005 in Session Case No. 01/94 have been challenged in the criminal Appeal by the appellants-respondents being Criminal Appeal No. 10(AP) 2005/05. At the same time the impugned conviction and sentence have also been referred to this Court under Regulation 30 of the Assam Frontier (Administration of Justice) Regulation 1945 (1 of 1945) for confirmation of the Judgment and Order dated 28.9.2005 abovementioned by way of Criminal Reference (H) No. 2/07

3. Since both the Criminal Appeal as well as the Criminal Reference above mentioned carry the common question of law structured on similar factual circumstances, both the matters are being taken up together for analogous hearing and the same are being disposed of by this common judgment and order.

4. The prosecution case in short compass needs to be narrated for proper adjudication of the issues in hand.

5. The investigation of the instant case was initiated on the basis of an information which was accepted as an FIR lodged by one K. Riba, Circle Officer, I/ C Extra Assistant Commissioner, Lohit Valley: Hayuliang by his communication dated 21.7.93 informing that on account of clan clash one Sri Fayolum Koramai of Kromna village under CGM Circle was alleged to have been murdered on 14.7.93 at 1200 hrs on suspension bridge over Tapri Stream jointly by three accused namely, both the appellants and one Lagya Chiba who died during the pendency of the trial, by using their local made guns fired from a closed range by amusing themselves.

6. The Police on completion of the investigation submitted charge-sheet against the accused appellants under Sections 302/34 IPC read with Sections 25/27 of the Arms Act, 1959. During the trial the prosecution examined as many as 18 witnesses including P.W. 15, P.W. 17 and P.W. 18 C.N. Lungking, who conducted the Post Mortem over the dead body, investigated the case as I.O. and recorded the confessional statement respectively. The appellants were examined u/s 313 Cr.P.C.

7. The learned Judge on consideration of the entire evidence on record including the confessional statements of the appellants so recorded by the P.W. 18 found both the appellants guilty of the offence of commission of murder of the deceased and accordingly convicted and sentenced them as already indicated above. Hence this Criminal Appeal along with Criminal Reference.

8. It has been vehemently argued by Mr. Choudhury, the learned Sr. Counsel that the conviction and sentence basically based on the sole ground of the confessional statement so recorded by the learned Magistrate, the P.W. 18 but the same was in total contravention of the provision of law prescribed u/s 164 Cr.P.C. His main thrust is that the learned Magistrate failed to record such confessional statement in strict compliance of the provision of the above section. According to him, such noncompliance of the provision of law is apparent on the face of record itself. Drawing attention to the confessional statements which were not even exhibited as well as the deposition of P.W. 18, the learned Sr. Counsel has stated that no searching inquiry was made by the Magistrate from the accused persons as to why they wanted to make such statements which would surely go against their interest. Even no caution was administered with the warning that appellants were not bound to make their statements and if they made such statement the same might be used against them in the evidence. The Magistrate also, as reflected from the record itself, did not give any reasonable

time for reflection. More significantly the Magistrate did not put his signature in the voluntary statements of the appellants-respondents so recorded by him. The case of the appellants is that the so called voluntary statements were recorded by the Magistrate perfunctorily and mechanically without any application of mind. In view of the above factual situation the confessional statements cannot be accepted to become the sole basis of the conviction of the appellants as there were no other evidence either ocular or circumstantial to indict the appellants for the commission of offence as indicated above and accordingly the appellants-respondents deserve acquittal from those charges.

9. To bolster up his said submissions the learned Sr. Counsel has relied on the following decisions:

- (i) AIR 1936 253 (Privy Council)
- (ii) Shivappa Vs. State of Karnataka, .
- (iii) Mukul Munda v. State of Assam 1994 (3) GLT 256.
- (iv) Mahabir Singh etc. etc. Vs. State of Haryana, .
- (v) Lalrintluanga v. State of Mizoram 2006 (2) GLT 240.

10. In support of the impugned conviction and sentence, on the other hand, Mr. Banerjee, the learned P.P. submitted that since the Code of Criminal Procedure is not applicable in the State of Arunachal Pradesh, the technicalities and formalities so contemplated u/s 164 Cr.P.C. cannot be strictly adhered to and as such, according to him, the learned Judge was not in any fault for not applying the provision of law laid down under 164 Cr.P.C. in its letter and spirit. Referring to the deposition of P.W. 18 he has also pointed out that in his evidence this Magistrate was categorical that the appellants-respondents were given sufficient time to reflect the proper deposition and after warning to them that their statements were not against them and such testimony suffice to prove the fact that the learned Magistrate complied with the provision of law though the same was not reflected in the confessional statements. Under such circumstances, the challenge to the conviction and sentence merely on the ground of non-compliance of provision of Section 164 Cr.P.C. cannot be sustained and no interference is called for with the impugned conviction.

11. Having given our thoughtful consideration to the extensive argument so placed on record by the learned Counsel representing the rival parties and also upon meticulous analysis and scrutiny of the entire evidence on record particularly the evidence of P.W. 18 and the confessional statements of the appellants-respondents so recorded by the P.W. 18, it is found that the confessional statements so recorded by the P.W. 18 appears to be not in consonance with the provision of law stipulated u/s 164 Cr.P.C.

12. It will be appropriate and necessary to refer to the provisions of Section 164 Cr. P.C. which read as under:

164. Recording of confessions and statements: (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate shall not authorize the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that the confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate

(5) Any statement (other than a confession) made u/s 4(1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

13. An ordinary reading of the above provisions of law would go to exhibit that a Magistrate while recording of confessional statement, before taking up such exercise is required to explain to the person making such confession that he is not bound to make such confession and the said person must be informed that if he does so it may be against him. Furthermore the Magistrate must be satisfied that such confession is being made voluntarily. Even Sub-clause (4) of Section 164 Cr.P.C. clearly indicate that such confession must be recorded in the manner

provided u/s 281 Cr.P.C. Section 281 Cr.P.C. provides for recording of examination of the accused and such confession must be signed by the person and the Magistrate is required to make memorandum at the foot of such record with the recital as already quoted above by putting his signature.

14. It would also be apt to extract Section 281 which runs as under:

281. Record of examination of accused--Whenever the accused is examined by a Metropolitan Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by any officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

15. Having regard to the above legal provisions as enshrined in the statute book, we do not see any such compliance in the recording of the confessional statements so placed before us. There is no whisper as regarding putting any question of such nature as prescribed in the above provisions of law. P.W. 18 admitted in his evidence that the confessional statement was in the plain sheet and not in procedural format without any signature. In his cross he also admitted that although the requisite procedure taken had to be followed, no signatures of the accused were taken in the copy of the confessional statements. Even he did not annex any memorandum.

16. In Nazir Ahmed's case (supra), the Privy Council speaking through Lord Loche in a 5 Members Bench in dealing with the scope of Section 164 Code of Criminal Procedure, 1989, being *peri materia* with the Code of Criminal

Procedure, 1973 observed as follows:

To this contention it was answered that there was no ground for reading the word "may" in Section 164 as meaning "must" on the principles described in 5 AC 214 (18). There is no need to call in aid this rule of construction well recognized in principle but much debated as to its application. It can hardly be doubted a Magistrate would not be obliged to record any confession made to him, if, for example, it were that of a self accusing madman or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden....

17. In Shivappa's case (supra), delving upon the Magistrate's duty in recording the confessional statement u/s 164 Cr.P.C., the Supreme Court ruled in paragraphs 6 and 7 of the judgment as under:

6. From the plain language of Section 164 Cr.P.C. and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused u/s 164 Cr.P.C., it is manifest that the said provision emphasise an inquiry by the magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused u/s 164 Cr.P.C. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provision of Section 164 Cr.P.C. and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to the record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self interest in course of the trial, even he is contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of Sub-section (2) of Section 164 namely, that the accused is not bound to make a

statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a "Voluntary" statement within the meaning of the provision of Section 164 Cr.P.C. and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

18. The proposition of law laid down in Shivappa's case (supra) was relied upon by a Division Bench of this Court in Mukul Munda's case (supra). In the said case, this Court in paragraph 30 held as under:

30. As already noted above, the so called confession was not voluntary one. No precautions were taken by the Magistrate in recording the same, as admitted by him (P.W. 14) The Supreme Court in *Tulsi Singh Vs. State of Punjab*, has categorically held that non compliance of Sub-section (2) of Section 164 Cr.P.C. giving the requisite caution and putting questions to satisfy himself that it was being made voluntarily, such a confession cannot be acted upon. A mere endorsement of accordance with Sub-section (4) of Section 164 Cr.P.C. cannot be acted upon. In the case at hand, even such an endorsement is missing.

19. In another case, of *Mahabir Singh's* (supra) the Supreme Court had the occasion to deal with the Section 164 Cr.P.C. In paragraphs 20,21. and 22 it was observed as under:

20. The Sub-section makes it clear that the power of the Magistrate to record any confession or statement made to him could be exercised only in the course of investigation under Chapter-XII of the Code. The section is intended to make clear of confessional as well as non-confessional statements. Confession could be made only by one who is either an accused or suspected to be an accused of a crime. Sub-sections (2), (3) and (4) are intended to cover confessions alone, dehors non-confessional statements whereas Sub-sections (5) is intended to cover such statements. A three Judge Bench of this Court in *Jogendra Nahak and Others Vs. State of Orissa and Others*, has held that so far as statements (other

than confession) are concerned they cannot be recorded by a Magistrate unless the person (who makes such statement) was produced or sponsored by investigating officer. But the Bench has distinguished that aspect from the confession recording for which the following observations have been specifically made (para 12 of AIR, Cri LJ):

There can be no doubt that a confession of the accused can be recorded by a Magistrate. An accused is a definite person against whom there would be accusation and the Magistrate can ascertain whether he is in fact an accused person. Such a confession can be used against the maker thereof. If it is a confessional statement, the prosecution has to rely on it against the accused.

21. We have no doubt that an accused person can appear before a Magistrate and it is not necessary that such accused should be produced by the police for recording the confession. But it is necessary that such appearance must be "in the course of an investigation" under Chapter-XII of the Code. If the Magistrate does not know that he is concerned in a case for which investigation has been commenced under the provisions of Chapter-XII it is not permissible for him to record the confession. If any person simply barges into the Court and demands the Magistrate to record his confession as he has committed a cognizable offence, the course open to the Magistrate is to inform the police about it. The Police in turn has to take the steps envisaged in Chapter-XII of the Code. It may be possible for the Magistrate to record a confession if he has reason to believe that investigation has commenced and that the person who appeared before him demanding recording of his confession is concerned in such case. Otherwise the Court of a Magistrate is not a place into which all and sundry can gatecrash and demand the Magistrate to record whatever he says as self-incriminatory.

22. As the confession recorded by P.W.-2 cannot be brought u/s 164 of the Code it is an idle exercise to consider whether it was voluntary or true. We may again point out, P.W.-2 has not stated that before taking down the confession he explained to Ranbir Singh that he was not bound to make the confession, and that if he did so, such confession might be used as evidence against him, This is sine qua non for recording a confession. Further a Magistrate is forbidden from recording any such confession until he gets satisfaction that the person is going to make a voluntary confession. There is nothing in the evidence of P.W.-2 that he had adopted such precaution. For all those reasons we keep that document out of the ken of consideration of this case.

20. In a recent case of a Division Bench of this High Court in Lalrintluanga's case (supra), in paragraph 18 it was categorically held that it was evident from the statement recorded by the Magistrate that no time for reflection was given to the accused and accused was not even informed that in the event of not making any confessional statement he would not be remanded to the police custody. He was not informed that he was not bound to make a confession and in the event of making the same, the same might be used as evidence against him. It would also appear that the learned Magistrate in a most perfunctory manner recorded

the statement by giving a go-bye to the requirement of Section 164 of the Cr.P.C. and also without adhering to the recruitment for recording confession under the said provision of law.

21. In the instant case, there was no eye witness to the occurrence. That apart, it also appears that no circumstantial evidence could be adequately projected by the prosecution to prove its case of killing of the deceased. Eventually the entire conviction is based purely on confessional statements. From the close perusal of the confessional statement so recorded by the Magistrate along with his deposition as P.W-18 on the anvil of the legal principles set out u/s 164 Cr.P.C. as has already been noted above with the support of the judicial pronouncement of the Privy Council, the Apex Court as well as of our High Court, we are of the considered view that the confessional statements so recorded dehors the statutory provision of law laid down u/s 164 Cr.P.C. and according to us, the same was recorded in a perfunctory and mechanical manner which cannot be accepted.

22. Coming to the submission of the learned P.P., Arunachal Pradesh that Code of Criminal Procedure in its letter and spirit has not been made applicable in the State of Arunachal Pradesh, relying on the provision of Sections 1 and 3 of the Cr.P.C, we are constrained to hold that the said submission is not tenable in law simply in view of the fact that the learned Magistrate recorded the confessional statement in question in terms of Section 164 Cr.P.C. as reflected ex-facie on the record. Even there is no dispute as regard the applicability of Code of Criminal Procedure in the State of Arunachal Pradesh.

23. In view of what has been discussed, observed and stated above, this Court is of the view that the impugned conviction and sentence of the appellants deserve to be interfered with. Accordingly, the same stands quashed and set aside.

24. The appellants be set at liberty forthwith if they are not required in connection with any other case.

25. In view of the above finding, the Criminal Reference being CrI. Ref (H) No. 2/07 is also answered accordingly.

The instant Criminal Appeal stands allowed.

Send down the L.C.R. forthwith.