

(1987) 01 OHC CK 0022

In the Orissa High Court

State of Orissa

APPELLANT

Vs

Ghanashyam Mohanty and Others

RESPONDENT

Date of Decision : 20-01-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 18, 19, 20, 21, 24
Penal Code, 1860 (IPC) — Section 302

Citation : (1987) 63 CLT 409 : (1987) CriLJ 1008

Hon'ble Judges : L. Rath, J;G.B. Patnaik, J

Bench : Division Bench

Judgement

L. Rath, J.—This criminal revision was before Hon"ble Justice N. K. Das who by his order dt. 15-7-1981 referred the matter to a larger Bench since the case involves an important point of law on which there is no decision of this Court. The question which arises for consideration is whether; a confessional statement of an accused recorded during the Investigation of one case can be; admitted as evidence in other cases started" on F.I.Rs. lodged subsequent to recording of the confessional statement. The criminal revision is at the instance of the State against an order passed by the Additional Chief " Judicial Magistrate, Bhubaneswar holding that such a confessional statement cannot be admitted as evidence in the later cases.

2. The facts of the case briefly stated are that G.R. 1763/74 was registered on F.I.R. lodged on 1-10-1974. In that case a confessional statement of accused Prahallad Parida was recorded u/s 164, Criminal P.C. on 2-12-1974. The statement was formally proved in that case by the Magistrate, P.W. 21 and was marked as Ext. 52. In the statement, the confessor implicated himself as well as the other two accused persons. On the basis of such confessional statement the Investigating Officer lodged F.LRs. on 6-12-1974, 10-12-1974 and 25-12-1975 in the Sahidnagar P.S., Bhubaneswar and on the basis of those F.LRs. G.R. Case Nos. 2207, 2208, 2209, 2210, 2216, 2217, 2218 and 2219 of 1974 and G.R. Case Nos. 190 and 191 of 1975 were registered. After investigation chargesheet was

submitted in all the 10 cases. During the trial of all these cases the Judicial Magistrate Sri M. R. Panda, who had recorded the confessional statement in G.R. Case Np. 2207 of 1974, was examined and formally proved the statement which has been marked as exhibits in all these cases. An objection was however raised in all the cases regarding the admissibility of the statement of Prahallad on the ground that the statement could not be treated as a confession recorded u/s 164, Criminal P.C. in any of the 10 cases being not a statement recorded during the investigation of those cases and hence it was not admissible in evidence. The objection was overruled and the documents were marked as exhibits, in each case with the observation that the objection regarding admissibility was to be considered at the time of arguments. A revision carried before this Court in Criminal Revn. No. 505 of 1979 against the order was disposed of on 10-12-1979 without expressing any views on the question raised and left it to be considered and decided by the trial Court. The trial Court having held that the statement was : inadmissible, the State has come up with revision.

3. Indisputedly the statement cannot be ? used as confessional statements in any of the 10 cases. All these cases were started on F.LRs. lodged subsequent to the recording of the statement on 2-12-1974. Section 164, Cr. P.C. provides for recording of a confessional statement in relation to a case during investigation of that case. All these cases having been started on the F.I.Rs. lodged subsequent to the recording of the confessional statement in the previous G.R. Case, the statement cannot be treated as confession recorded during the investigation of these cases and hence is not admissible as such.

4. Mr.-R. K. Patra, the learned Additional Government Advocate urged that the statement is a public document u/s 74 of the Evidence Act being an act of a public officer and that its contents are proved even by mere production of a certified copy thereof. He relied on *Madi Ganga Vs. State of Orissa*, and *Kashmira Singh Vs. State of Madhya Pradesh*, to submit that the practice of examining the Magistrate recording statements u/s 164, Cr. P.C. is to be deprecated since the statements prove themselves. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary and authorises the Court to presume that the document is genuine and the statements therein as to the circumstances under which it was taken are true and that! the confession was duly taken. While no exception can be taken to the submission, yet it does hardly arise in the case since Section 80 concerns itself with dispensing of formal proof by presuming the documents to be genuine and of other facts as stated above. But however the question still remains regarding! its admissibility and relevancy in evidence.

5. As has been found above, the statement! without doubt cannot be utilised as a confession being not in terms of Section 164, Cr. P.C. That however does not answer the question raised. Even if the statement is not! admissible as a confession, it is admissible as a piece of evidence otherwise? We think in the affirmative. While the statement falls short of confession, yet it may be admissible in evidence as an admission against the maker thereof u/s 21 of the

Evidence Act. Merely because the statement cannot be treated as a confession having not been recorded u/s 164, Cr. P.C. yet it does not cease to be a statement of the person concerned and is not beyond the provisions of the Evidence Act. If the statement is admissible in evidence under any provisions of the Evidence Act, there is no reason why it should not be so admitted. The question was considered by the Privy Council in (1950) 51 Cri LJ 1552 (Ghulam Hussain v. King) where it was held that an admission made to a Magistrate while he is functioning u/s 164, cannot take it outside the scope of the Evidence Act and if it does not amount to a confession, it can still be used against the maker as an admission under the purview of Sections 18 to 21, Evidence Act. The position was again reaffirmed by the Hon'ble Supreme Court in *Aghnoo Nagesia Vs. State of Bihar*, relying upon an earlier decision, *Faddi Vs. The State of Madhya Pradesh*, holding that where first information is given by the accused himself, the fact of giving information is admissible against him as the evidence of his conduct u/s 8 of the Evidence Act and if the information is a non-confessional statement, it is admissible against the accused as an admission u/s 21 of the Evidence Act is relevant.

6. The position thus seems to be conclusive that a statement made by the accused to the Magistrate prior to the investigation of the case, though is not a confession u/s 164, Cr. P.C, yet is admissible against him in the trial as an admission.

7. The question that however arises is even if the statement is admissible in evidence, what is its effect. Certainly it cannot be used as a confession against the accused. A confession, as was pointed out in AIR 1939 47 (Privy Council) , 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. A statement that contains self exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. The question came up again before the Hon'ble Supreme Court in *Aghnoo Nagesia Vs. State of Bihar*, where the issue was examined in greater detail. While holding that confession is a species of admission and is evidence against the maker of it unless its admissibility is excluded by some provision of law, it was clarified that a statement containing self exculpatory matter cannot amount to confession and when an admission is sought to be used against the accused, the whole of it should be tendered in evidence. When part of the admission is exculpatory and part is inculpatory, the prosecution cannot use in evidence only the inculpatory part. It was held as follows :-

Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is

tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession.

If proof of the confession is excluded by any provision of law such as Section 24, Section 25 and Section 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as Section 27 of the Evidence Act. Little substance and content would be left in Sections 24, 25 and 26 if proof of admission of incriminating facts in a confessional statement is permitted.

XX XX XXX Proof of not only the admission of the offence but also the admission of every other incriminating fact such as the motive, the preparation and the subsequent conduct is excluded by Section 24. To hold that the proof of the admission of other incriminating facts is not barred by Section 24 is to rob the section of its practical utility and content. It may be suggested that the bar of Section 24 does not apply to the other admissions, but though receivable in evidence, they are of no weight, as they were caused by inducement, threat or promise. According to this suggestion, the other admissions are relevant, but are of no value. But we think that on a plain construction of Section 24, proof of all the admissions of incriminating facts contained in a confessional statement is excluded by the section. Similarly, Sections 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer but also admissions contained in the confessional statement of all incriminating facts related to the offence.

It is clear from the above that if the statement of the accused is a confession but is excluded under any of the provision of Sections 24 to 26 of the Evidence Act or unless it can be proved u/s 27 thereof, the whole of the i confessional statement must be excluded and no single part of it disclosing some incriminating fact would be treated as a confession or part of confession. But however where the confessional statement is not so excluded by the provisions of Sections 24 to 26 of the Evidence Act and Section 27 of the Evidence Act does apply, there is no reason as to why the statement in itself would not be proved as an admission against the accused. All that the decision has decided is that when a confession is irrelevant having been caused by inducement, threat or promise proceeding i from a person as contemplated u/s 24, or is one made to a police officer, or while in" custody of the police is not made in the immediate presence of a Magistrate, it shall not be proved against the accused and that j such confession is excluded

would not only | include the actual confession itself but also all parts of it. Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu, was a case where the accused was charged u/s 302,1.P.C. for having caused murder of the deceased. The case against him depended upon circumstantial evidence, one of which was his statement to the Doctor to whom he was taken after his arrest to the effect that the deceased had caused injuries to his toe by biting him on the fatal night. It was urged that the statement was inadmissible against the accused u/s 26 of the Evidence Act having been made while the accused was in the custody of the police. It was held that the High Court was r;ight in its conclusion that the statement of the accused before the Doctor was properly admitted in; evidence and could be relied upon as an admission u/s 21 of the Evidence Act. Discussing the question whetb ;r the statement was inadmissible u/s 21 of the Evidence Act, their Lordships held that the statement in question did not amount to confession and that it was an admission of fact, no doubt of an incriminating fact, which established the: presence of the appellant in the deceased"s room but was not clearly barred u/s 26 of the Evidence Act.

8. The position that emerges on the. authority of the above decisions is that the statement of an accused made before a Magistrate previous to the starting of the investigation of the case is admissible in evidence and is relevant u/s 21 of the Evidence Act even though it is not admissible as a confession u/s 164, Cr. P.C. But; such statement can be used as an admission only if it does not amount to a confession and is not excluded by any of the provisions of Sections 24 to 26 of the Evidence Act. Since the statement cannot be utilised as a confession it is apparent that no conviction can exclusively be based on such admission alone since an admission of a fact, even of a gravely incriminating fact, by itself would not be an admission is to be considered as an item of evidence and while each of the evidence independently considered may not warrant a "conviction, yet the cumulative effect of all such evidence may justifiably serve as the basis of a conviction. Thus in the final analysis, the statement so admitted u/s 21 of the Evidence Act would remain only as a piece of evidence but certainly not as a confession.

9. In the result, the revision must be allowed and the order of the learned Additional Chief Judicial Magistrate, Bhubaneswar passed in G.R. Case No. 2207 of 1974 on 7-3-1980 be set aside. The confessional statement must be treated as evidence in the ten cases but however their relevancy and weight is to be considered in the light of the aforesaid observations.

G.B. Patnaik, J.

10. I agree.