

(1951) 07 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 15 of 1950

Vidyamati

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 25-07-1951

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 164, 309, 509
Evidence Act, 1872 — Section 101, 102, 103, 159, 24

Citation : AIR 1951 HP 82

Hon'ble Judges : Chowdhry, C.J

Bench : Single Bench

Advocate : Chandu Lal, for the Appellant; Bakshi Sita Ram, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Chowdhry, J.—This is an appeal by Vidyamati, aged about 17, against her conviction by the learned Additional Sessions Judge of Jubbals u/s 302, I.P.C., and the sentence of transportation for life imposed upon her.

2. She is the daughter of one An Das of village Bamhnoli, police station Rohm in district Mahasu. She was married to Chain Ram (P. W. 8) of the same village on 6-3-1950 and four days later, on 10-3-1950, she was delivered of an illegitimate female child in her father's cattle-shed. She buried it in a Khud, or gorge. The prosecution case is that the child was borne alive and the appellant caused its death by severing the head from the body with an axe. The appellant pleaded that the child was born dead.

3. The first question that arise is whether the child was born alive. The prosecution relies in this connection on the testimony of one Mt. Herpati, a mid-wife of Bamhnoli, and of Dr. Jiwan Lal, Medical Officer-in-charge of the Civil Hospital at Jabbal, who held the post-mortem on 20-3-1950 on the dead body of the alleged child. The prosecution also relies upon the appellant's confession. The dead body was discovered in the Khud by Shankar Lal (P.W. 2), of Bamhnoli

at about 9 A.M. on 17-3-1950. It appeared to have been exhumed by wild animals. The head was lying at a short distance from the body. The lower jaw, left arm, ribs of left side, anterior abdominal wall in catches and all the internal viscera (lungs, heart, spleen, liver, kidneys, stomach, intestines, urinary bladder, etc.), had been eaten up by wild animals.

4. The medical evidence in this case is most unsatisfactory and inconclusive. The first thing unsatisfactory was the manner of recording the doctor's evidence in the Sessions Court. The doctor proved the post-mortem report Ex. P. E., and the only material part of it about which he deposed in Court was that in his opinion death had been caused by cutting off the head with a sharp weapon. No question was put to him with regard to other material portions of the report, e.g., portions having a bearing on whether it was a mature delivery. The lawyer conducting the prosecution and the Sessions Judge seem to have been unaware of the elementary rule that it is the doctor's statement in Court, and not his post-mortem report, which is substantive evidence, and that the report can only be used by the doctor u/s 159, Evidence Act, for refreshing his memory while under examination, provided he had prepared it at the time of holding the post-mortem or so soon afterwards that the Court considers it likely that the facts noted at the post-mortem were still fresh in his mind. "Rohuni Singh v. The Empress", 9 Cal 455; "Queen Empress v. Jadub Das", 27 Cal 295; Rangappa Goundan v. Emperor" AIR 1936 Mad 426.

5. The doctor also did not record in the postmortem report, as it was no doubt his duty to do in a suspected case of infanticide, any data for arriving at the two main conclusions germane to such cases: that the child was born alive, and that it met with a post-natal violent death. Presumably, he did not at all direct his attention towards the necessity of doing so. The result was that he broke down completely on both the points when subjected to cross-examination. For the determination of either of the above two questions it was not enough for him to have recorded merely that in his opinion death had been caused by cutting off the head with some sharp weapon. So far as the first point is concerned, he should have tried, if possible, to ascertain whether the child showed any signs of life after being born. In the Court of the committing Magistrate he stated that respiration was the only test for this. As a scientific person he should rather have said that it was the most important, and not the only, test. He improved upon that statement in the Sessions Court for he stated that establishment of normal circulation as well as of respiration were the two tests for determining whether an infant was born alive or dead. The report does not indicate that at the time of post-mortem examination he applied any of these tests. As to respiration, he admitted that examination of the lungs was necessary, but that the lungs were in this case missing. He however, added that respiration could also be established by an examination of the body as a whole. Cross-examined further as to what he meant by examination of the body as a whole, he stated that non-establishment of respiration produces one or the other of the two changes in the colour of the skin known as asphyxia livida and asphyxia pallida, that there will be

subarachnoid haemorrhage in the brain, and that there will be visible small spots known as petechiae. But he said nothing as to whether he subjected the body to an examination for these signs and, if so, with what result. As to normal circulation, he admitted that for its establishment examination of the heart and blood vessels was necessary. He could not examine the heart as he admitted that it was missing. He stated before the Sessions Judge that he had examined the blood vessels in the brain and also in the body in general and found clotted blood in both. If he had really applied these tests, he would naturally have made a mention of it, and of the results of the tests, in the report. That he did not in fact do so, so that his statement to that effect in the Sessions Court was anything but correct, is further apparent from the fact that he had admitted in the Court of the committing Magistrate that he had not examined the veins inside the body. The explanation which he offered for the contradictory statement was hollow in the extreme, namely, that he did not examine the veins specifically but those veins which re-encountered during dissection. It is surprising to come across evidence of this nature in the case of what should be testimony of an entirely independent nature, that of a doctor. From what has been stated above it is manifest that medical evidence in this case failed to establish that the child was born alive. Certain observations made in the post-mortem report, which would have had a bearing on whether the child was a mature one, and which could therefore have been of some help, although not necessarily conclusive in determining the point under consideration, were however, not deposed to by the doctor in the Sessions court, as adverted to above, and cannot consequently be taken into consideration.

6. I have to refer here in passing to an application filed in the course of arguments before me by the learned counsel for the appellant praying that the doctor's statement recorded in the committing Magistrate's Court be read in evidence in this. Court u/s 509, Criminal Procedure Code or, the doctor be summoned and examined in this Court. The reason alleged for making this application was that whereas in the Court of the committing Magistrate the doctor had stated that he could not say if the child whose post-mortem he had performed respired after birth or not, be deposed in the Sessions Court that he could say that the infant girl in this case did respire after birth. Order on this application was reserved. Now, in the light of what has already been stated above in regard to the doctor's testimony, it is unnecessary for me to deal with this application.

7. Before dealing with Mt. Harpati's statement, I would take up the alleged confession of the appellant. The sequence of events, all of which happened in the month of March, 1950, is as follows : The child was born on the 10th a dead body alleged as dead body of this child was discovered, by Shankar Lal on the 17th, written reports of discovery of dead body of an unidentified child were lodged at police station Eohru on the 18th, S. I., Sohan Singh reached the village the same night and took possession of the corpse the following day, the appellant was arrested on the 20th, a report for recording her confession was made by the

S. I., on the 29th, and on the same day her confession was recorded by Shri Laxman Das. Magistrate, First Class, Rohru. Admittedly, the appellant remained in police custody throughout the period, i.e., from the 20th to the 29th. Admittedly, also, she was handed over again to the police on the 29th after her confession, and she remained in police custody that night. The reason given by S. I., Sohan Singh was that there was no judicial lock-up at Rohru but 14 miles away from there at Jubbal. Be the reason what it may, the fact remains that both before and after her so-called confession she was in police custody. What is more, the S. I., says that the appellant had confessed to him on the 26th. It was, however, only on the 29th that he produced her before the Magistrate for the recording of her statement u/s 164, Criminal Procedure Code. In between the two dates he took her to Bamhnoli for the purpose of pointing out the place of birth of the child and the place where she had buried its dead body, and for recovering from her father's residential house the axe with which she is said to have cut off the child's head and the basket in which she carried the dead body to the Khud for burial. I shall refer presently to the worthlessness of these discoveries. What is important to bear in mind at this stage is that the first thing which the police should have done after coming to know that the appellant was in a frame of mind to make a confession was to have produced her before a Magistrate for recording the confession, specially when the Magistrate before whom she was actually produced on the 29th was stationed at the same place, Rohru, from where she was taken to Bamhnoli. It was observed in *Abdul Subhan and Another Vs. Emperor*, as follows:

"If an accused has been sent up to headquarters for production before a Magistrate within 24 hours of his arrest and if then he made a confession it may be argued on behalf of the prosecution that there was nothing suspicious about the circumstances in which the confession was made. But when it is found that the man who makes a confession has been kept in police custody in defiance of the rules on the point for a number of days, this circumstance throws a great deal of suspicion and the Court is entitled to ask the prosecution to explain why the irregularities were committed."

It makes no difference whether the confessing accused had been kept in police custody in defiance of rules of custody or of ordinary and natural course of prudent conduct. The practice of producing from police custody of even a witness, to say nothing of an accused, to have his statement recorded by a Magistrate u/s 164, Criminal Procedure Code, was deprecated in "*Queen Empress v. Jadub Das*", 27 Cal. 295, and it was held that the voluntary character of such a statement cannot but be doubted. In the present case not only was the appellant produced from police custody, but she was restored to that custody after her examination, and there was unaccountable delay in the police producing her before the Magistrate for the purpose. The mere fact that the Magistrate kept the appellant sitting for about half an hour in a corner of his room before recording her confession, as he professes to have done, does not in the circumstance make any difference, especially when he does not appear to have

done anything to reassure her that she need not make any statement under police pressure, such an assurance was all the more necessary since the appellant had been produced before him from police custody. In fact, he admits that he did not care even to inquire how long she had, been in police custody. The length of time during which an accused person is in police custody before he makes his confession has been held to be an important element for the consideration of the Court in reference to the admissibility of the confession. "Emperor v. Bhagwandas", AIR (28) 1941 Bom 50. As it is an element for the determination of the voluntary nature of the statement, it is an equally important element for the consideration of the Magistrate who is about to record a confession, so that where he fails to do so despite the accused having been produced from police custody he can hardly be said to have done all that is reasonably necessary to lead him to believe, u/s 164, Criminal Procedure Code, that the confession was being made voluntarily.

8. The facts mentioned above are not the only ones which cast a doubt on the voluntary character of the confession. The appellant retracted the confession in the committing Magistrate's Court and, while doing so, she made detailed and specific allegations as to the police having subjected her, her father An Das and her uncle Daulat Bam to torture for the purpose of eliciting the confession. The learned Government Advocate cited in this connection the observations made in Purnananda Das Gupta and Others Vs. Emperor, that the excuse of torture by the police in compelling an accused to make a confession is used so often without any justification time and again that it has become very difficult for any Court to pay any serious attention to it. But, as is pointed out in the same ruling, a Court should pay attention to it when it is supported by evidence. In the present case the allegation is supported by the testimony of the appellant's father and uncle and other witnesses. This is therefore a case where there exists a greater degree of probability of the making of the confession having been caused by police pressure than the use of the word "appears" indicates in Section 24, Evidence Act. This is also a case where the burden of proving the voluntary nature of the confession, which always rests on the prosecution, ("Ibham v. Emperor", AIR 1914 P. C. 155) did so all the more heavily in view of the clear and definite allegations of torture which the appellant had already made against the police, in the Court of the committing Magistrate. Not a single question was however, put to S. I., Sohan Singh by the prosecution to repel those allegations. That being so, those allegations, corroborated as they are by the testimony of the aforesaid defence witnesses must be accepted as correct. I must therefore hold not only that it appears, but that it has been proved, that the confession in the present case was caused by police pressure. It is therefore irrelevant and must be totally excluded from evidence, and it cannot be looked into for the purpose of finding any intrinsic evidence of truthfulness in it. "Emperor v. Bhagi Vedu" 4 Cri L J 332 (Bom) and "Emperor v. Panchkowi Dutt, 52 Cal 67.

9. The statement of Mt. Harpati is therefore the only evidence on which the determination of the first question mentioned above is left. She died before she

could be examined in the Court of the Sessions Judge, and therefore her statement in the committing Magistrate's Court was admitted in evidence in the Sessions Court u/s 33, Evidence Act. She professed to be a mid-wife by profession and stated that she was approached by the appellant about 4 months before the delivery for a massage of her abdomen in order to bring about an abortion, but that she refused to comply with the request despite the appellant offering her Rs. 10/- as she considered it a sinful act. She further stated that in the forenoon of the 27th of Phagun, 2006 B. (corresponding to 10-3-1950) the appellant again came to her and told her that she was in labour and asked her to come to her place to assist her in childbirth; that she (the witness) reached the appointed place in the afternoon; that as soon as she reached the door of the house and peeped in the appellant remonstrated with her for having come after a female infant had already been born to her; that the infant was moving her hands and feet and was alive; and that thereafter she came away from there. In cross-examination she stated that she just peeped into the room and saw the infant girl lying there and immediately came away from there, that the infant appeared to have been born after 10 months of pregnancy, that up to the date of her examination in Court she had not spoken of this incident to anybody, and that she had been working as a mid-wife for two years but during these two years she had not assisted in the birth of any child on account of her illness. The learned counsel for the appellant cited the ruling "Nawab v. the Crown", AIR 1923 Lah 391, in support of the contention that when a person seen a murder committed and gives no information thereof, his evidence is little better than that of an accomplice. Mt. Harpati did not, however, see any murder being committed but only the birth of an illegitimate child, which latter fact she would, naturally be inclined to conceal to protect the appellant's reputation. There is nothing to show when Mt. Harpati came to know of the alleged murder if at all she ever did so, and therefore her evidence cannot be described under the aforesaid, ruling as little better than that of an accomplice. The testimony of this witness does not however ring true. She professes to have worked as a midwife for two years, but she admits that during this time she had not assisted in any child birth on account of her illness. Her son Begi (P.W. 4), has also made a statement to the same effect, and he has further admitted that during the said two years she could not even look after her agriculture but to her illness. Begi no doubt says that before his mother his grandmother used to practise midwifery, but from the aforesaid admissions of this witness and of Harpati herself I do not think that, the latter ever worked as a mid-wife. There is no evidence that there was no other mid-wife in, or in the neighbourhood of the village. That being so, it is difficult to believe that the appellant should have requisitioned her services. The appellant has categorically denied it. Again, if the statement of Harpati that up to the date of her deposition in Court she had not spoken of the incident to anybody be true, it remains unexplained how she came to be produced as a prosecution witness. Nor does it stand to reason that having taken the trouble of responding to the appellant's call Mt. Harpati should have left the place immediately on coming to know that a child had already been born to the

appellant. Apparently, the appellant was still in need of her assistance since the prosecution case is that the cord was still attached to the umbilicus when the dead body was recovered. It is also strange that by just a peep through the door the witness should have formed the opinion that the child was a full term ten-month baby. What the appellant is said to have told the witness need not necessarily imply that the child was a living child, for all that the appellant is said to have told her was that an infant girl had been born to her, and not that it had been born alive or dead. That the child was alive was concluded by the witness from the fact that it was moving its hands and feet. It has however come out in the statements of the prosecution witnesses themselves that the cattle shed where the birth took place was a dark and dingy place even in day time. Amar Singh (P.W. 7) who was present with the police in the cattle-shed on 27-3-1950 when the appellant is said to have pointed out the place of birth and also a bloodstained beam and blood-stained stones and pieces of straw, has admitted that near the door there was light but beyond the door it was dark. He further added at the end of his statement that when the aforesaid articles were pointed out by the appellant they could only be seen by the light of a Jogati, translated by the learned Sessions Judge as a piece of chil fire-wood. None of the witnesses, and there are several who have spoken of these recoveries, has stated that the cattle-shed was visited in the company of the appellant at night. On the contrary, all of them have referred to the visit as having taken place in the day. Another prosecution witness Kanwal Ram (P.W. 9), uncle-in-law of the appellant, has described the cattle-shed as very dark. He stated further on re-examination that if the door of the shed is left open light comes in one portion of the shed in front of the door but in the other portion it remains dark. The place of birth has been shown in the sketch Ex. P. U. as in the interior of the shed away from its only door. It is difficult to believe Mt. Harpati, therefore, when she says that on just a peep through the door she was able to see the child moving her limbs. She does not say that she heard the child crying. For all the above reasons the testimony of Mt. Harpati does not appear to me to be of worthy of credence. In any case, it would be most unsafe to have the appellant's culpability on the sole testimony of such a witness in the absence of other corroborative evidence on record. The result is that the prosecution has failed to prove the basic fact that the child was born alive.

10. It might have been possible to draw that Conclusion in an indirect manner if here were convincing evidence on the record on the second point, namely, that it was an ante-mortem injury which caused the child's death. As already stated, the post-mortem report is totally silent as to whether the doctor adopted any method for arriving at this important conclusion. In his cross-examination he admitted that the following six signs establish an ante-mortem injury: (1) haemorrhage, more or less copious and generally arterial, (2) marks of spouting of blood from arteries, (3) clotted blood, (4) deep staining of the edges and cellular tissues, which is not removed by washing, (5) the edges gape owing to the reaction of the skin and muscle fibres and (6) inflammation and reparative

processes. He admitted that, except for sign No. (3), the remaining five signs were absent in the present case. In other words, there were only 17 per cent chances of the injury in question having been caused ante-mortem, while there was 63 per cent chances of its having been caused post-mortem. The medical evidence being thus so overwhelmingly in support of the injury being a post-mortem one, it would be most unsafe to draw any conclusions from mere conjecture. One such conjecture would be that the appellant would not cause such an injury to the child if it were dead. The learned counsel for the appellant stated that she had given a plausible explanation for that in her confession. For reasons already recorded, the confession cannot be looked into, but the explanation can certainly be considered even though it emanates from the appellant's counsel. The explanation given was that the appellant had been advised by her paramour to cut the child because in that way the decomposition would be accelerated. It is immaterial whether any such suggestion had in fact been made to the appellant, or whether it would have worked, it is however not beyond the bounds of possibility that the cut may have been inflicted on the infant on the said supposition. It is also possible that the head may have been severed from the body in order to bury the two separately as a safeguard against detection. It is noteworthy that there is no evidence that the body and the head had been buried at one and the same place. When they were discovered they were found at a few feet one from the other. The mere fact, therefore, that the head of the child had been severed from the body with some sharp weapon did not lead necessarily to the conclusion that the severance was caused by the infliction of an ante-mortem injury.

11. A word about the alleged discoveries. That the appellant pointed out the place of birth (supposing that evidence is admissible) is of no consequence since she has admitted that fact. Nor is it of any consequence that she pointed out certain blood-stained stones, wood or straws in that place, for that is quite compatible with the stains having been caused as a result of child birth. Likewise, the discovery of an axe from her father's house by the appellant is of no help since such a conduct is consistent with the axe having been used for causing a post-mortem injury. There is nothing else against the appellant.

12. It was further argued by the learned counsel for the appellant that the prosecution had failed to prove that the child whose dead body was recovered and subject to post-mortem examination was the child which had been given birth to by the appellant. It is, however, unnecessary for me to go into this question. Suffice it to say that even if the identity of the child be held to have been established, the prosecution has failed to prove both the above basic facts that the child had been born alive and that the appellant caused its death.

13. All the three assessors with whose help the appellant was tried were unanimously of the opinion that the charge had not been brought home to her. For reasons recorded above, the opinion formed by them was to my mind quite correct. I would like to say a word about the way in which the learned Sessions

Judge has recorded the opinions of the assessors. To the very first question each of them stated clearly that the prosecution had failed to make out a case u/s 302, I.P.C, against the accused. In spite of that the learned Sessions Judge asked them to give reasons for their opinions and two of them were subjected to questions in the nature of cross-examination. All this was quite unnecessary, and even unjustified, in the face of the clear and definite opinions which each of them had given at the very outset, Section 309, Cr. P.C., no doubt authorises the Court to put questions to the assessors, but that is only where it is necessary to ascertain their opinions. Where the opinions are clear and definite such questions are wholly unwarranted, especially when the questions are in the nature of cross-examination. "Khewa v. Emperor" AIR 1929 Lah. 37 and "Nazimuddin v. Emperor", 40 Cal 163.

14. Before I conclude I must observe that the case for the prosecution has failed mainly on account of the very unsatisfactory manner in which post-mortem was held on the dead body of the child. Medico-legal post-mortem examination is a very important part of the prosecution evidence, and it is therefore necessary that it be conducted by a doctor fully competent, alike by his training and experience, to do so. I am not sure if all the medical officers in charge of the various civil hospitals in Himachal Pradesh possess that qualification. The Government might therefore consider the desirability of getting the post-mortem done only by the Civil Surgeons. This may be done either by sending the dead body to the place of posting of the Civil Surgeon, or by requiring the Civil Surgeon himself to go to the civil hospital nearest to the place where the dead body is found and hold the postmortem there, or any other manner deemed fit and practicable.

15. The question of the appellant's culpability for offences punishable under Sections 317 and 318, I.P.C., was also canvassed before me. The former is totally out of the question in view of the failure on the part of the prosecution to establish that the child was born alive. As regards the other offence, it is not possible to alter the finding and convict the appellant under that section because there are two material ingredients of that offence which were not put to the appellant during the trial. One is that the burial or disposal of the dead body of the child should have been secret, and the other that at such burial or disposal should have been made with the intention of concealing the birth of the child. Nor would it be justifiable to order a retrial since there is no evidence with regard to secret burial or disposal of the dead body. The two prosecution witnesses Jindu (P.W. 3) and Begi (P.W. 4) related only to the fact that the appellant was seen washing her clothes on 11-3-1950. It is not said that anybody saw her burying the child. True, burial of the child is admitted by the appellant, but in order to support a conviction u/s 318, I.P.C., the burial should be a secret one.

16. The appeal is allowed, the appellant is acquitted of the charge u/s 302, I.P.C., and her conviction and sentence are set aside. She is on bail and need not surrender; her bail bonds are discharged.