

MAHABIR BISWAS AND ANR.

A

v.

STATE OF WEST BENGAL

OCTOBER 28, 1994

[M.M. PUNCHHI, M.K. MUKHERJEE AND K. JAYACHANDRA
REDDY, JJ.]

B

*Evidence Act, 1872-Section 30— Confession-Evidentiary value-Its use
against a co-accused.*

*Indian Penal Code, 1860— Section 302/34— Murderous assault-
Retracted judicial confessions-Discoveries made pursuant to statements of
two accused—Conviction—Whether legally sustainable.*

C

The two appellants, along with six others were arraigned for offences punishable under Sections 364/34, 302/34, 201/34 and 379 IPC. The appellants were convicted u/s 302/34 IPC and sentenced to death. On reference, the High Court while upholding the conviction of the two appellants commuted their sentence to imprisonment for life.

D

The case of the prosecution was that the two victims were returning to their houses in a rickshaw when some miscreants led by the two appellants came there, surrounded the two victims, dragged them out of the rickshaw and forcibly took them, and that on the following morning their dead bodies were found lying on the road with their hands tied and with multiple injuries on their persons.

E

The prosecution examined the rickshaw puller, to give an ocular version of the incident, but he turned hostile. In absence of any other witness to the actual commission of the crime, the prosecution rested its case upon two retracted judicial confessions of the appellants and certain discoveries made pursuant to the statement of the two appellants.

F

In this appeal filed against the judgment of conviction, the question that arose for determination was whether the prosecution had been able to prove conclusively that the appellants were amongst others, the authors of the crime and whether the convictions recorded by the trial Court and the High Court could be sustained or not. Disposing of the appeal, this Court

G

H

A **HELD 1.1** A confession, before it can be acted upon must be established to have been voluntarily made and is true. As regards the evidentiary value of a confession, which passes the above two tests, against the maker thereof, in law it would be open to the Court to convict him on his confession itself though he has retracted his confession at a later stage. (245-G-H)

B 1.2 Such a confession can also be used against a co-accused, in view of Section 30 of the Evidence Act. (246-C)

Sarwan singh v. State of Punjab, AIR (1957) SC 637; *Kehar Singh v. State (Delhi Admn)*, AIR (1988) SC 1883 and *Kashmira Singh v. State of Madhya Pradesh*, AIR (1952) SC 159, relied on.

C 1.2 To ascertain whether the confession of appellant was true or not, the trial Court considered all the relevant factors required to be looked into for that purpose, including the period he was kept in segregation and the questions put by the Magistrate before recording the same, and on proper appraisal thereof answered the question in the affirmative and the High Court concurred with the same. Whether a confession is voluntary or not, is a question of fact and when both the trial Court and the High Court have, on proper discussion of the materials brought on record, held it to be true, there is no reason whatsoever to disturb that finding. (246-H, 247-B)

E 1.3 The trial Court proceeded to examine the confession of the appellant M in the light of the rest of the prosecution evidence and the probabilities of the case to find out whether it was true and on a threadbare discussion held it to be so. In arriving at this conclusion the Court pointed out, that appellant M's unequivocal admission fitted in with the evidence adduced by the witnesses to the inquest and the Doctor who held the post mortem examination. The above reasons found favour with the High Court and meet approval of this Court too. (247-C-D)

F 1.4 Record indicates that M retracted the confession by filing an application. The trial court considered the allegations in the light of the materials on record and probabilities and found them to be baseless. This finding is unexceptional. (247-E)

G 1.5 Besides the retracted confession the prosecution relied upon the discoveries of the sword and the watch of the victim pursuant to the statement of appellant M. The recovery of wrist watch pursuant to the statement of appellant M fully corroborates his confession that during

H

their 6/7 days stay in the paternal aunt's home of the appellant S after the murder, S sold the said watch to PW 34, son of his aunt. This confession of appellant M can be safely and fully relied upon to uphold his conviction. (247-F-H, 248-A)

2. In the case of appellant S, both the trial Court and the High Court have relied upon the confessional statements of co-accused A and M and discovery of a silver ring belonging to the victim pursuant to his statement made while in police custody. The confession of the co-accused have to be ignored as against S and can be pressed into service only to lend assurance to other substantive and reliable evidence. Considering the evidence relating to the discovery of the ring, the admissible part of the statement of S, pursuant to which the ring was recovered, only proves that he knew that the ring was concealed in the ash dump. From such knowledge no inference of S committing theft of the ring from the person of the deceased at the time of his murder and for that matter, of his participation in the murder can be drawn, more particularly when the recovery was made almost six months after the murder. In the absence of any other substantive evidence against appellant S, the confessions of the coaccused cannot be called in aid. (248-C-E)

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.14 of 1991.

From the Judgment and Order dated 31.7.90 of the Calcutta High Court in D.R. No.3 of 1989 and Cri.A. No. 371 of 1989.

D.B. Vohra for the Appellants.

Tapash Ray, Dilip Sinha, J.R. Das and A. Bal for the Respondent.

The Judgment of the Court was delivered by.

M.K. MUKHERJEE, J. Mahabir Biswas and Shiba @ Bijoy Krishna Dutta, the two appellants herein, along with six others, including one Amit Haldar @ Pagla, were arraigned before the Court of Session for offences punishable under Sections 364/34, 302/34, 201/34 and 379 I.P.C. On conclusion of the trial the Court, while recording an order of acquittal in favour of four, convicted the other four including the two appellants and Amit Haldar under section 302/34 I. P. C. but acquitted them of the charge under section 201/34 I. P. C. As regards the charges under sections 364/34 I. P. C. and 379 I. P. C. the Court recorded a finding that those were redundant in the facts and circumstances of the case and, as such, did not

- A pass any formal order of conviction and sentence in respect of the same. For the conviction under section 302/34 I.P.C. the two appellants were sentenced to death and the other two to imprisonment for life. The reference made to the High Court under section 366 Cr.P.C. for confirmation of the sentence of death and the appeal preferred by the appellants were heard together and by the impugned judgment the High Court while upholding the conviction of the two appellants commuted their sentence to imprisonment for life. Hence this appeal by special leave.

- C Bereft of details the case of the prosecution is as under. On March 20, 1987 at or about 10.30 P.M. Pabitra Bhattacharjee and Tapan Ghosh (the two victims) along with one Shambhu Debnath were returning to their respective houses in a rickshaw from Naihati Railway Station rickshaw stand after being dropped there by Dr. Tarun Adhikari, the local M.L.A. On the way Shambhu Debnath got down from the rickshaw in front of his house. Immediately thereafter some miscreants led by the two appellants came there, surrounded the two victims, dragged them out of the rickshaw and forcibly took them towards the nearby football ground.

- D Information about the abduction of the two victims was given to the members of their families by Shambhu Debnath on the same night, who in their turn, informed the local police station. In spite of vigorous searches conducted by the members of the victim's families and the police they could not be traced. However, on the following morning, their dead bodies were found lying by the side of a water tank on Adahata Road, Naihati with their hands tied and multiple injuries on their persons. Thereafter on a written complaint lodged by Debaprasad, the younger brother of Pradip, a case was registered and on completion of investigation charge sheet was submitted against the appellant and others alleging that after forcibly taking the victims to the football ground the miscreants tied them with rope, killed them and removed their dead bodies to the nearby water tank.

- F The defence of the appellants, as it can be gathered from the tenor of their cross examination of the prosecution witnesses and the statements made by them in their examination under section 313 Cr. P.C., was one of innocence and of false implication due to political rivalry.

- G That the dead bodies of the two victims were found lying on Adahata Road in the early morning of March 31, 1987 and that they met with their death owing to murderous assault stand conclusively proved by overwhelming and unimpeachable evidence on record. In fact, this part of the prosecution case was not seriously challenged by the defence. While the

H

evidence of Sunil Bose (P.W. 18) and Ranjit Kumar Bhattacharya (P.W. 20), who were the two witnesses to the inquest (exhibit 3 and 4), besides that of others, proves the find of the dead body, the evidence of Dr. S.K. Ganguli (P.W. 36) who held post mortem examination upon the two dead bodies proves the murder. P.W.36 found four incised injuries on the mandible, chin and shoulders of Pabitra, besides some bruises and abrasions. In his opinion the death was due to the shock and haemorrhage caused by the incised injuries which were ante mortem and homicidal in nature. When shown the sword seized during investigation (Ext.VIII) he stated that such injuries could be caused by that weapon. According to P.W. 36 the abrasions and bruises which he found on the wrists on the deceased could be caused if the hands were tied by ropes. On the dead body of Tapan, P.W. 36 found one incised wound on the neck at the level of 4th cervical vertebra with all the vessels, nerves and muscles cut. The trachea and oesophagus were also cut. He also found bruises and abrasions on different parts of the body including the two wrists. He testified that the incised wound was fatal and could be caused by the sword (Ext. VIII) and the abrasions and bruises by tying the victims with ropes and by dragging.

The next and the most pertinent question that falls for determination is whether the prosecution has been able to prove conclusively that the appellants were, amongst others, the authors of the crime; in other words, whether the convictions recorded by the trial Court and the High Court can be sustained or not.

To bring home the accusations levelled against the appellants and the other accused, the prosecution examined Shambhu Debnath (P.W.4) and Sunil Karmakar (P.W.8) the rickshaw puller, to give an ocular version of the incident, but they turned hostile. In such circumstances and in absence of any other witness to the actual commission of the crime, the prosecution rested its case upon two retracted judicial confessions of the appellant Mahabir and Amit @ Pagla and certain discoveries made pursuant to the statements of the two appellants.

A confession, before it can be acted upon, must be established to have been voluntarily made and is true. As regards the evidentiary value of a confession, which passes the above two tests, against the maker thereof, this Court has held, in *Sarwan Singh v. State of Punjab*, A.I.R. (1957) S.C 637 :

“.....in law it would be open to the Court to convict him on his confession itself though he has retracted his confession at a later stage. Nevertheless usually Courts require some

A corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case."

B The same principle has been reiterated by this Court in *Kehar Singh v. State (Delhi Admn.)*, A.I.R. (1988) SC 1883..

Such a confession can also be used against a co-accused, in view of Section 30 of the Evidence Act, which reads as under :

C "When more persons than one are being tried jointly for the same offence, and a confession make by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

D The next question that naturally arises is how far and in what way the confession can be used against a co-accused, who has faced the trial for the same offence with the maker thereof. This was pithily answered by this Court in *Kashmira Singh v. State of Madhya Pradesh*, A.I.R. (1952) SC 159 with the following words :

E "The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

G Keeping in view the above principles we may now proceed to consider the case of the appellants separately. On perusal of the impugned judgments we find that to ascertain whether the confession of Mahabir (Ext.16) was true or not, the trial Court considered all the relevant factors required to be looked into for that purpose, including the period he was kept in

H

segregation and the questions put by the Magistrate before recording the same, and on proper appraisal thereof answered the question in the affirmative and the High Court concurred with the same. Needless to say whether a confession is voluntary or not, is a question of fact and when both the trial Court and the High Court have, on proper discussion of the materials brought on record, held it to be true, we do not find any reason whatsoever to disturb that finding.

The trial Court then proceeded to examine the confession of Mahabir in the light of the rest of the prosecution evidence and the probabilities of the case to find out whether it was true and, on a threadbare discussion held to be so. In arriving at this conclusion the Court pointed out, - in our view rightly - that Mahabir's unequivocal admission that (i) on the fateful night he along with others compelled Pabitra and Tapan to come down from the rickshaw, (ii) forcible took them to some distance, (iii) there they tied them with ropes, (iv) he and Shiba killed Pabitra with swords while his associates killed Tapan and (v) all of them then carried the dead bodies to dump them near a tank, fitted in with the evidence adduced by the witnesses to the inquest and the doctor who held the post mortem examination. The above reasons found favour with the High Court and meets our approval too.

Record indicates that Mahabir retracted the confession by filing an application before the Sub-Divisional Magistrate, Barrackpore on February 12, 1988 wherein he stated that he made it according to the dictates of the C.I.D. Officer as he threatened him with dire consequences. The trial Court considered the allegations in the light of the materials on record and probabilities and found them to be baseless. This finding also, in our view, is unexceptional.

Besides his retracted confession the prosecution relied upon the discoveries of the sword and the watch of victim Pabitra pursuant to the statement of Mahabir. The wrist watch was recovered on 29th August, 1987 from the possession of Pradip Roy (P.W. 34). Though P.W. 34 was declared hostile by the prosecution as he did not support its case that the appellant Shiba had handed over the watch to him he did not deny the fact that the wrist watch (Ext.VI) was recovered from his possession. He, however, claimed that he had purchased the wrist watch from a Bangladeshi national in 1984. In absence of any proof of such purchase and in view of the admitted fact that on the band of the wrist watch the name 'Pabitra' was engraved, the trial Judge was right not only in discarding the claim of P.W. 34, but also recording that the wrist watch belonged to victim Pabitra, relying upon the other evidence on record. The recovery of wrist watch

- A pursuant to the statement of the appellant Mahabir fully corroborates his confession that during their 6/7 days' stay in the paternal aunt's home of Shiba after the murder, Shiba sold the watch of Pabitra, which was taken away at the time to his murder, to Pradip Roy (P.M. 34), son of his aunt. Since, for the foregoing discussion we find that the confession of Mahabir can be safely and fully relied upon to uphold his conviction we need not
- B consider the evidence regarding the recovery of sword nor call in aid the confession of the co-accused Amit.

- Coming now to the case of other appellant, namely, Shiba @ Bijoy Krishna Dutta we find that both the trial Court and the High Court have relied upon the confessional statements of Amit and Mahabir and discovery
- C of a silver ring belonging to Pabitra on September 20, 1987 from an ash dump pursuant to his statement made while in police custody. Since, to start with, the confessions of the co-accused namely Mahabir and Amit have to be ignored as against Shiba and can be pressed into service only to lend assurance to other substantive and reliable evidence, we proceed to consider
- D the evidence relating to the discovery of the ring. The admissible part of the statement of Shiba, pursuant to which the ring was recovered, only proves that he knew that the ring was concealed in the ash dump. From such knowledge no inference of Shiba's committing theft of the ring from the person of Pabitra at the time of his murder and for that matter, of his participation in the murder can be drawn, more particularly when the recovery was made almost six months after the murder. In absence of any
- E other substantive evidence against appellant Shiba, the confessions, of the two co-accused cannot be called in aid.

- On the conclusions as above we dismiss the appeal, so far as it relates to Mahabir, the appellant No.1, but allow that of Shiba @ Bijoy Krishna Dutta, the appellant No.2. Let the appellant No.2 be released forthwith.
- F The appeal is thus disposed of:

A.G.

Appeal disposed of.