

PETITIONER:
NIKA RAM

Vs.

RESPONDENT:
THE STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT 28/04/1972

BENCH:
KHANNA, HANS RAJ
BENCH:
KHANNA, HANS RAJ
SHELAT, J.M.

CITATION:
1972 AIR 2077 1973 SCR (1) 428
1972 SCC (2) 80

ACT:
Code of Criminal Procedure s. 164-Confession recorded by Magistrate not empowered to record it is inadmissible-So is oral evidence of such Magistrate in support of the confession-Reduction of sentence, considerations for.

HEADNOTE:

The appellant was tried by the Sessions Judge for an offence under s. 30 of the Indian Penal Code for the murder of his wife.. According to the prosecution the appellant had suspected the fidelity of his wife because he believed that a son born to her was not his. The wife was last seen in the company of the appellant on the evening of the murder. It was alleged that the appellant went to the Tahsildar and made a confession. The Tahsildar thereafter called the police. At the instance of the appellant the body of his wife was recovered from his house. When produced before a first class Magistrate for having his confessional statement 'recorded the appellant declined to make any confessional statement. Relying upon the confession made to the Tahsildar and the other evidence the Sessions Judge convicted the appellant. The High Court upheld the conviction. In appeal before this Court it was inter alia contended on behalf of the- appellant that the confession recorded by the Tahsildar was inadmissible in evidence since he was a second class Magistrate not specially empowered by the State Government in terms of s. 164 of the Code of Criminal Procedure, to record a confession,

HELD : In Singhara Singh's case this Court relying on Nazir Ahmed's 'case laid down that a confession recorded during the investigation of a case by a second class Magistrate not specially empowered could not be put in evidence under ss. 74 and 80 of the Indian Evidence Act. It was also held that the oral evidence of the Magistrate to prove the confession was inadmissible. In the present case therefore the confession recorded by the Tahsildar was inadmissible and so was his oral testimony to prove ,It. [434 B-C]
State of Uttar Pradesh v. Singhara Singh and Others, [1964] 4 S.C.R. 485 and Nazir Ahmed v, King Emperor, L.R. 63 I.A. 372, applied

It could not be said that the Tahsildar recorded the statement before the commencement of investigation, The

confession was recorded at 10 p.m. while the intimation to the police regarding a murderer having come to the residence of the Tahsildar was entered in the daily diary at 10.50 p.m. The Head Constable after having made that entry proceeded to the residence of the Tahsildar and on arrival there put the accused under arrest. It is well established that the discovery and arrest of the suspected offender is one of the essential steps in the course of an investigation. [435 E-G]

H. R. Rishbud and Inder Singh v. The State of Delhi, [1955] 1 S.C.R. 1150 and The State of Madhya Pradesh v. Mubarak Ali, [1959] Supp. 2 S.C.R. 201, followed.

In re Yendra Narasimha Murthy, A.I.R. 1966 A.P. 131, referred to
429

However in the present case even if the confession was excluded the rest of the material on record proved the guilt of the accused. [435 E]

[Conviction maintained but in view of the special facts of the case, sentence reduced from death to imprisonment for life.]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 11 of 1972.

Appeal by special leave from the judgment and order dated September 16, 1971 of the Himachal Pradesh High Court in Criminal Appeal No. 37 of 1970 and Murder Reference No. 3 of 1970.

G. Narayana Rao, for the appellant.

H. R. Khanna and R. N. Sachthy, for the respondent.

The Judgment of the Court was delivered by

Khanna, J. Nika Ram (34) was convicted by learned Sessions Judge Mahasu under section 302 Indian Penal Code for committing the murder of his wife Churi (26) and was sentenced to death. On appeal and reference under section 374 of the Code of Criminal Procedure, the High Court of Himachal Pradesh confirmed the conviction and death sentence. Nika Ram has now come up in appeal to this Court by Special leave.

The prosecution case is that Nika Ram was married to Churi deceased near about 1958. In 1964 Churi gave birth to a son named Joginder. Nika Ram considered that Joginder was not his son and had been born as a result of adulterous conduct on the part of Churi. When Joginder was three months old, Churi and Joginder were sent to the house of Churi's mother Smt. Nagju (PW 2) in village Gani. Churi on arrival at her mother's house told her that the accused had not been treating her well. After Churi had stayed at her mother's house for about three or four years, the accused paid visits to her and wanted to take Churi to his house. The accused, however, declined to take Joginder with him. At the suggestion of Nagju, Churi, Joginder and Nagju came to the house of the accused in village Shilaroo which is at a distance of 1 1/2 mile from Gani. At his house, the accused gave beating to Churi deceased. Nagju consequently returned along with Churi and Joginder to her village Gani. On the day of Shivratri before 'the present occurrence', the accused took Churi along with him to his house. Joginder was, however, left with Churi's mother Nagju. The accused and his wife lived alone, in their house in Shilaroo. No one else resided with them in that house. On the evening of September 16, 1969, the accused and his wife

were seen together at the house.

430

Kotkhai is at a distance of 2 1/2 furlongs from Shilaroo. At about 10.30 p.m. on September 16, 1969 the accused went to the residence of Shri Sudershan Kumar Mahajan (PW 15), Naib Tehsildar who exercised the powers of second class magistrate,, in Kotkhai. The accused appeared to be nervous and told Shri Mahajan that he had murdered his wife. Shri Mahajan told the accused to sit down and be composed. On enquiry of Shri Mahajan, the accused stated that his wife was of loose character and had given birth to in illegitimate son. His relations with her were consequently strained. the accused, who was wearing a Kachha and a coat, added that he had tried to commit suicide by jumping into nulla but had somehow survived. Shri Mahajan thereafter recorded statement PH of the accused, wherein the accused stated +that he had murdered his wife by giving her three Khokhri blows. According to the accused, he,had enquired from the wife regarding the father of the child, whereupon she had abused him. He consequently killed her. There was no reference to the attempt at suicide in statement PH of the accused.

At about .10.45 p.m. Shri Mahajan called his peon Mangan Ram (PW 10) and sent him to the police post at Kotkhai to call the officer incharge of the police post. Mangat Ram went to the police post and arrived there at 10-50 p.m. At the police post he told Head Constable Bhag Singh (PW 13) that an accused in a murder case had come at the residence of the Naib Tehsildar and the police was wanted there. Entry 26, copy of which is PV, was made in the daily diary of the police post at 10-50 p.m. regarding the above, intimation given by Mangat Ram. The entry was signed by Mangat Ram. Head Constable Bhag Singh then went to the residence of Shri Mahajan Naib Tehsildar. The, accused, who was present there, was Put under arrest by the Head Constable. The Head Constable found that the coat and Kachha of the accused were wet. Writing PH was also handed over by the Naib Tehsildar to the Head Constable. The Head Constable returned with the accused to the police post and made entry in the daily diary. Intimation about the occurrence was also sent to Police station Theog as well as to the Superintendent of Police.

At about 12 mid night, Head Constable Bhag Singh went to the. village of the accused. He awakened Poshu Ram (PW 7), Mani Ram (PW 8) and Bhagat Ram (PW 16) and went to the house of the accused with those witnesses The door of the verandah of the accused was found bolted from inside. Poshu Ram PW jumped into the verandah and unbolted the door. The door of the residential room of the accused was found closed and was opened. Torch light was thrown inside and the dead body (If Churi deceased was found lying in a pool of blood. There was

431

a quilt up to the, chest of the body. A number of injuries were found on the body. A Khokhri, its scabbard, male shirt and a pair of tongs were lying near the body stained with blood. The Read Constable then took steps for keeping a watch over the house.

Police station Theog is at a distance of 20 miles from Shriaroo. Sub Inspector Devi Singh of Theog police station was on the night of September 16, 1969 away to Gajairi at a distance of five. or six miles from Theog in connection with a fair there. At mid night the Sub Inspector received intimation that a murder had taken place at Kotkhai. The Sub Inspector accordingly went in a truck to Kotkhai and

reached there at about 3 a.m. The Sub Inspector took rest at the police post and after sunrise went to the place of occurrence. The accused too was taken by the Sub Inspector to the spot. The party reached, the house of the accused at about 8 a.m. Inside the room the Sub Inspector found the dead body of Churi deceased lying on the floor. The Sub Inspector prepared injury statement and inquest report. The blood-stained clothes as well as Khokhri P. 1 and its scabbard were taken into possession and were made into sealed parcels. The dead body of Churi deceased was sent for post mortem examination to Civil Hospital Kotkhair. Post mortem examination was performed at the said hospital by Dr. G. C. Gupta at 6 p.m. on September 17, 1969. Parcels containing the bloodstained articles which had been taken into possession from the spot were sent to the Chemical Examiner and the Serologist, whose report showed that human blood was found on the Khokhri, scabbard and the male shirt. The accused was sent to judicial lock up on September 17, 1969. On September 29, 1969 Sub Inspector Devi Singh made an application to PW 6 Shri Raj Kumar Sharma, magistrate first class Theog for recording the confessional statement of the accused. The accused was also produced before Shri Sharma. Shri Sharma then apprised the accused of the consequences of confession. The accused volunteered to make a confessional statement. Shri Sharma, however, considered it necessary to give him time to think over the matter. The accused was accordingly ordered to be produced on October 4, 1969. Shri Sharma, who also holds his court at Kasumpti, could not visit Theog on October 4, 1969. The accused was directed to be produced before Shri Sharma on October 18, 1969. On that day the accused declined to make any confessional statement.

At the trial the accused stated that he had been married to Churi; deceased- in 1957. It was admitted by the accused that Churi had given birth to Joginder about four years after the marriage, but he denied having maltreated Churi. The accused admitted that Churi had come to his house on the Shivratri day,

432

but, according to him, the child too had come along with her. As regards the date of occurrence, the accused stated that he was with Churi in the house during the day but at 6 p.m. he left for Kotkhair leaving his wife alone at the house. The accused denied having gone to Shri Mahajan and having made any confessional statement on the night of occurrence. It was also denied by the accused that his Kachha and coat were in a wet condition at the time of his arrest. As regards the 'blood-stained Khokhri and shirt, the accused stated that those articles did not belong to him. The accused further made the following statement

"I had cordial relations with my wife for the past 14 years. I claim the son to be my own. He is not illegitimate. I left my house, at 6 P. m. on 1st of Asuj last year. It was Tuesday 2026 Bk. leaving, my wife at home, to see a documentary film being exhibited at Kotkhair. Gaddu Ram was with me in the show. The picture finished at about 9-30 p.m. I was taken by the police to the Police Post from the bazar. I was called through a police constable who was not produced as prosecution witness. I was given beating at the police post. A.S.I. was there besides other Foot Constable. My signatures were obtained on a paper. I do not know what had been written on that. It was disclosed to me by the S.H.O. next morning that my wife had been murdered, and I was taken to my village. From there I was brought to Theog. I am innocent and have no hand in the crime."

No evidence was produced in defence.

Learned Sessions Judge accepted ,lie prosecution case that it was the accused who had caused injuries to Churi deceased, as a result of which she died. Reliance in this connection was placed upon the other evidence adduced by the prosecution in the case as well as upon the confession made to Shri Mahajan PW. On appeal the learned Judges of the High Court in maintaining the conviction of the accused relied upon the confession made by the accused to Shri Mahajan PW as well as upon the other circumstances of the case. The confession was found to have been amply Corroborated by the other evidence on record.

The present appeal was filed by the accused-appellant through jail. Arguments have, however, been addressed on his behalf by Shri Narayana Rao, who has contended that the material on record is not sufficient to justify the conviction of the accused-appellant. Admissibility of the confessional statement of the accused recorded by Shri Mahajan PW has also been questioned. As against that, Mr. Khanna on behalf of the State has convassed for the correctness of the view taken by the High Court.

433

It cannot be disputed that Churi deceased died as a result of the injuries inflicted upon her. Dr. G. C. Gupta, who performed post mortem examination on the dead body of the deceased, found ten injuries on the body of the deceased, out of which the following three were individually sufficient to cause death in the ordinary course of nature "(1) Punctured wound right side of the neck, 2 inches diameter 1 1/2 inches deep.

(2) Punctured wound 2" diameter, 1 1/2" deep, 2" below injury No. 1.

(3) Incised wound 6 X 1" x 1" on left side of the neck."

Besides the, above three injuries, there were one incised wound on the left eyebrow two incised wounds on the left forearm one incised wound on the fingers of the left hand, one incised wound on the right hand and one incised wound in the right arm. A scratch was also found on the right hand. The punctured and incised wounds, in the opinion of the doctor, could be caused by Khokhri P. 1 Larynx and trachea were found to be torn and punctured. Probable time between the receipt of injuries and death was five minutes, while between I death and post mortem was 19 1/2 hours.

According to the prosecution case, the injuries found on the body of Churi deceased were caused by the accused. The accused, as stated earlier, has denied this allegation. In order to bring the charge home to the accused, the prosecution has relied upon the confessional statement PH of the accused recorded by Shri Mahajan as well as the other circumstances of the case.

It has been argued on behalf of ,lie accused-appellant that confessional statement Ex. PH is not admissible in evidence. In this connection it is pointed out that Shri Mahajan was a second class magistrate and there is nothing on the record to indicate that he was specially empowered by the State Government to record a confession. The confession, it is further stated, was recorded during, the investigation of the case and as it was not recorded in the manner prescribed by section 164 of the Code of Criminal Procedure, the same is inadmissible in evidence. In this contexts we find that according to sub-section (1) of section 164 of the Code of Criminal Procedure, any Presidency Magistrate, and Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf by the State Government may, if he is not a

police officer, record any statement or confession made to him in the course of an investigation under this chapter (Chapter XIV of the Code) be under any other law for the time being in force or at any time afterwards before the commencement

434

of the enquiry of trial. 'Mete is no material on the record to indicate that Shri Mahajan was a second class magistrate who had been specially empowered by the State Government to record a confession. Indeed, Mr. Khanna on behalf of the respondent State has argued the case on the assumption that Shri Mahajan was not specially empowered in this behalf. question as to whether a confession recorded during the investigation of a case by a second class magistrate not specially empowered was admissible in evidence was considered by this Court in the case of State of Uttar Pradesh v. Singhara Singh and Others.(1) It was held that the record of such a confession could not be put in evidence under sections 74 and 80 of the Indian Evidence Act. Reliance in this connection was placed upon the decision of the Judicial Committee in the case of Nazir Ahmed v. King Emperor. (2) Argument was further advanced in Singhara Singh's case that oral evidence of the magistrate to prove the confession was admissible. This contention was rejected by this Court in the following words :

"When a statute, confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been even to him. Now the power has been conferred by s. 164 on certain magistrates of higher classes. Obviously, it was not intended to confer the power on magistrates of lower classes. If, therefore, a proper construction of s. 164, as we have held, is that a magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by s. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and' could be ignored, where the confession had been made to a magistrate of a lower class and that such a magistrate was, therefore, free to give oral evidence of the confession made to him. We cannot put an interpretation on s. 164 which produces the abnormality that while it is not possible for higher class magistrates to, practically abrogate the safeguards created in s. 164 for the benefit of an accused person, it is open to a lower 'class magistrate to do so. We, therefore, think that the 'decision in Nazir Ahmed's case (supra) also covers the case in hand and that on the principles there applied, here to oral evidence given by Mr. Dixit of the confession made to him must be held inadmissible."

Mr. Khanna on behalf of the State concedes that in view of the a decision, a confession recorded by a second class magistrate

(1) [1964] 4 S.C.R. 485.

(2) L.R.63 I.A. 372.

435

not specially empowered during the investigation of a case is not admissible in evidence and no oral evidence in respect of that confession can also be led at the trial. Mr. Khanna, however, contends that the restriction on the admissibility of the above evidence would operate only if

the confession is recorded during the course of investigation. If, however, the confession is recorded at a stage prior to the commencement of investigation, there would be no bar to the admissibility of such a confession. Reference in this connection has been made to the case of In re Yondra Narasimha Murthy. (1) In that case an accused after committing murder went to a second class magistrate and made a statement that he had killed the deceased. The statement was recorded by the magistrate and was signed by the accused. It was held that the aforesaid statement was admissible in evidence. Dealing with the contention that there had not been compliance with section 164 of the Code of Criminal Procedure, the court observed that the person making the confession was not an accused at the time he went to the magistrate and no investigation of a crime registered against him was in progress at that time.

Question consequently arises whether statement Ex. PH was recorded by Shri Mahajan during the investigation of the case or whether it was recorded before the commencement of the investigation. In this connection we find that the time mentioned by Shri Mahajan of the recording of confessional statement was 11 p.m. while the intimation which was given by Mangat Ram (PW 10) to the police regarding a murderer having come to the residence of Shri Mahajan was entered in the daily diary at 10.50 p.m. Head Constable Bhag Singh (PW 13) after having made that entry proceeded to the residence of Shri Mahajan and on arrival there put the accused under arrest. It is well established that the discovery and arrest of the suspected offender is one of the essential steps in the course of an investigation (see in this connection H. N. Rishbud and Inder Singh v. The State of Delhi (2) and The State of Madhya Pradesh v. Mubarak Ali. (2) We are, therefore, of the view that the contention advanced on behalf of the appellant that the confessional statement Ex. PH was recorded during the investigation of the case cannot be deemed to be devoid of force. It is not, however, necessary to dilate upon this aspect of the matter because we are of the opinion that even after excluding the confessional statement PH from consideration, the other material on record proves the guilt of the accused. It is in the evidence of Girju PW that only the accused in Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle

(1) A.I.R. 1966 A.P. 131. (2) [1955] 1 S.C.R. 1150.

(3) [1959] supp. 2 S.C.R. 201.

436

of the accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p. in., while Poshu Ram (PW 7) saw the accused and the deceased at their house or, the evening of the day of occurrence. The accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the accused, according to plan PM, consists, of one residential room one other small room and a varandah. The correctness of that plan is proved by A.- R. Verma overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt.

The evidence of Nagju (PW 2), mother of the deceased, shows

that the accused had been illtreating Churi deceased. It is further in the testimony of Girju (PW 1) that the accused had a Khokhri at his house similar to Khokhliri P. 1 which was found near the dead body of the deceased and with which the injuries on the body of the deceased, according to Dr. Gupta, could have been caused. Besides that it is established by the evidence of Mangat Ram (PW 10) and Shri Mahajan (PW 15) 'that the accused on the night of occurrence at about 10.30 p.m. went to the house of Shri Mahajan and talked to him. Shri Mahajan thereafter sent for Head Constable Bhag Singh through Mangat Ram. Head Constable Bhag Singh lids deposed regarding his having arrested the accused at the house of Shri Mahajan. The dead body of Churi deceased was thereafter discovered lying in the house of the accused. The discovery of the dead body from the house of the accused can thus be traced to the visit of the accused to the residence of Shri Mahajan.

The various circumstances referred to above, in our opinion, clearly point to the conclusion that it was tile accused and none else who was responsible for the murder of Churi deceased. The plea of the accused that he had gone to see film show at Kotkhai on that evening and that the murder of the deceased was committed during his absence cannot be accepted. I-lad the accused gone to the film show, the persons with whom he sat at the film show must have noticed his presence there, but no evidence has been adduced to show that anyone noticed the accused at the film show. According to the accused, Gaddu Ram was with him at the film show. Gaddu Ram has, however, not been examined as a witness. The film show at Kotkhai, which had been arranged by the Publicity Department, according to Head Constable Bhag Singh PW, lasted from 7 to 8-30 p.m. Assuming that the accused went to the film show, it would not have taken more than 10 or

437

15 minutes 'for the accused to return' to his house after the film show. The accused would thus be present at his house at about 9-30 p.m. when the present occurrence took place. Had someone other than the accused murdered his wife Churi, the accused would have raised hue and cry and this fact must. have attracted to the spot his neighbours like Poshu Ram PW. The accused would have also in that event gone and made a report to the police. The conduct of the accused in neither raising hue and cry nor going to the police even though his wife was murdered in his house is hardly consistent with his innocence. The version of the accused that he was taken by the rolice to the police post from the bazar cannot be accepted because there is nothing to show that the police was aware of the murder of Churi deceased before the visit of the accused to the house of Shri Mahajan. On the contrary, the evidence on record establishes beyond any manner of doubt that the dead body of the deceased was recovered after the accused had visited the house of Shri Mahajan. We are, therefore, of the view that it was the accused and none else who caused injuries, to Churi deceased as a result of which she died. We, therefore, maintain his conviction.

So far as the sentence is concerned, we are of the view that it is not a fit case in which the extreme penalty need be exacted from the accused. It is the case of the prosecution itself that the accused suspected the fidelity of Churi deceased and believed that Joginder had been born to her as a result of her adulterous conduct. Had Joginder been the son of the accused, the accused would have had a natural affection for the child and it is difficult to

believe that he would have insisted upon Churi staying with him without the child. It is also the case of the prosecution that shortly before the occurrence, the accused enquired from the deceased regarding the father of the boy and the deceased thereupon abused him. The act of the deceased in abusing the accused must have been taken by the accused to be adding insult to the injury by an unchaste wife. In view of the above, it would, in our opinion, meet the ends of justice if the accused is awarded the lesser penalty. We, therefore, alter his sentence into that of imprisonment for life.

G.C.

438

