

CASE NO.:
Appeal (crl.) 1635 of 2005

PETITIONER:
Babubhai Udesinh Parmar

RESPONDENT:
State of Gujarat

DATE OF JUDGMENT: 24/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The appellant herein was a labourer. He is said to have committed a series of offences involving heinous crimes. He is involved also in a case of rape and murder of a minor girl Savita. She was sister of Shankar Bhursinh (complainant). He lodged a First Information Report on 1.07.1998 inter alia stating that he with a view to earn his livelihood came with his family to Karamsad town. He was staying in a shed opposite to Tirupati Petrol Pump. He was sleeping in that shed. He woke up at about 2 a.m. for answering the call of nature. At that time her sister was sleeping along with other family members. When he woke up again, he did not find Savita. It was raining on that night. Searches were made for her. On the next day morning, her dead body was found lying in the surrounding field belonging to Malabhai and Kanbhai. Her neck was tied with a frock which was worn by her. She was found to be dead. The blood was found to have been oozing out from her private part. The knicker worn by her was also missing. He informed the police. The appellant was arrested by the investigating officer Mr. R.G. Patel on 12.08.2002. He purported to have made a confession about committing rape and murdering Savita. He also allegedly showed the place of incidence to the investigating officer. He prepared panchnama of the scene of offence and recorded statement of the concerned witnesses. He then sent the frock worn by the deceased to Forensic Science Laboratory. The appellant purported to have made a confessional statement before PW-2 Ambalal.

Principally relying on or on the basis of said judicial confession made by the appellant, he was found guilty of commission of offence. The learned Sessions Judge took into consideration the fact that he has been found guilty of commission of similar offences as also other offences and, thus, imposed death penalty on him. The High Court affirmed the said judgment of conviction and sentence by its judgment dated 2.03.2005.

The High Court while recording that the confession was found not only to be true but having been voluntarily made, opined that the same could be relied upon. At the same time, the High Court proceeded on the basis that the accused was free to make retraction of his confession when his statement under Section 313 of the Code of Criminal Procedure was recorded. The High Court furthermore noticed that oath should not have been administered to the accused but opined that the same is not of much significance but proceeded on the basis that the decisions of the Apex Court have often said that the court cannot solely rely on the retracted confession and make it a foundation for convicting the accused. But, while purporting to keep the confessional statement of the appellant aside, it examined the purported circumstances used against him. We are afraid, nothing has been brought on record to show existence of any circumstance which would lead to the conclusion that the appellant alone is guilty of commission of the offence.

Rape and murder of Savita is not in dispute before us. It is also not disputed before us as that apart from the purported judicial confession there is no other material which can be said to be sufficient to establish the guilt of the appellant. The Chief Judicial Magistrate, Nadiad recorded the confession on the basis of an application made by the said Mr. R.G. Patil. An application was also filed to record the confession of the appellant in another case bearing No. I.C.R. No. 123 of 1997.

The confession was recorded on 7.09.2000. He was in judicial custody for a period of 16 days. His statement is as under:

"The incident is of two years old I do not remember the exact date. On that day I was at my house and at night say around 12.00 I went to the field which is at opp Karamsad Petrol Pump. I don't know whose field is this. On being reached to the field I saw that there was one shed with a _____, and under that shed one girl was sleeping. I have lifted her. I don't know the age of the girl, as soon as she wanted to shout I have closed her mouth, and behind that field one cannal is there and I have taken the girl in that cannal, there was a field near the cannal, and in that field one tree namely baval was there and one floor was constructed thereon. I have taken the girl to that field, I have removed the cloth of the girl in the field, the mouth was shunted and have raped her, and thereafter I have given the noose on the neck with her frock as a result of which the girl was died. And I have taken the girl to the corner of the field and left the field after keeping the girl in the corner of the field. I have not told anybody about the incident, this is my confession regarding the offence."

It preceded by routine questions. It was accompanied by a certificate in usual form.

The learned Magistrate examined himself as PW-2. In his deposition he reproduced the statements of the appellant. In his cross-examination, he accepted that the confession started at about 11.15 a.m. and was completed at about 11.30 a.m. He did not remember that on the same day he recorded another confession of the appellant in relation to Session Case No. 298 of 2000. He, however, accepted that he had done so when it was brought to his notice. Recording of that confession was completed at 11.45 a.m. Till then no legal aid was provided to him.

He did not examine the body of the accused. He asked only the routine question as to whether he was ill-treated by the police. He accepted that the accused was produced before him under police protection and was also taken back under the police protection. He stated:

"\005two things is to be noted in the confession statement regarding voluntarily and reality. I cannot say that the accused has shown the reality or not\005"

Two inconsistencies appeared in the prosecution case vis-à-vis the said purported confession. The evidence of the brother of the deceased categorically shows that the offence was committed in between 2 a.m. and 4 a.m. The purported confession shows that the offence was committed around 12 O'Clock in the night. The prosecution case proved that not only the complainant but also other family members were sleeping in the same

shed. The purport of the confessions goes to show that the deceased was sleeping alone in the shed.

We do not appreciate as to why oath had to be administered to the accused while recording confession. Taking of a statement of an accused on oath is prohibited. It may or may not be of much significance. But, it may assume significance when we examine that a purported deposition of accused was taken on 10.03.2003 wherein also his evidence on oath was recorded in the following terms:

"I hereby state on oath that:-

My Name : Babubhai

My father's name : Udesing Parmar

My age about : 27 years

My occupation : Labour Work

Village of Residence: Native Umrav Tadia

Pura, at present Karamsad

Question: Have you received copy of documents of police investigation?

Answer: Yes

Question: Is the charge sheet Exh. 4 read over to you, Do you admit the offence? Or you want to proceed further the judicial proceedings?

Answer: I do not admit the offence.

Question: Have you engaged private advocate for your self defence or you want to engage advocate at the cost of Government?

Answer: I have engaged free advocate."

Ms. Hemantika Wahi, learned counsel appearing on behalf of the State, would submit that the provisions of Section 164 of the Code of Criminal Procedure contains a salutary principle and only in the event the confession is found to have been voluntarily rendered, the same can be the foundation for recording a judgment of conviction.

A judicial confession undoubtedly is admissible in evidence. It is a relevant fact. A judgment of conviction can also be based on a confession if it is found to be truthful, deliberate and voluntary and if clearly proved. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged on the basis of the entire prosecution case. [See *Bharat v. State of U.P.*, (1971) 3 SCC 950 and *Subramania Goundan v. The State of Madras*, (1958) SCR 429]

In *State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru* [(2005) 11 SCC 600], this Court observed:

"Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide *Taylor's Treatise on the Law of Evidence Vol. I*). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should

eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer.

Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police."

However, it was categorically stated that retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false.

Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But, it does not envisage compliance of the statutory provisions in a routine or mechanical manner.

The court must give sufficient time to an accused to ponder over as to whether he would make confession or not. The appellant was produced from judicial custody but he had been in police custody for a period of 16 days. The learned Magistrate should have taken note of the said fact. It would not be substantial compliance of law. What would serve the purpose of the provisions contained in Section 164 of the Code of Criminal Procedure are compliance of spirit of the provisions and not merely the letters of it. What is necessary to be complied with, is strict compliance of the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance of the statutory provisions in letter and spirit. We do not appreciate the manner in which the confession was recorded. He was produced at 11.15 a.m. The first confession was recorded in 15 minutes time which included the questions which were required to be put to the appellant by the learned Magistrate for arriving at its satisfaction that the confession was voluntary in nature, truthful and free from threat, coercion or undue influence. It is a matter of some concern that he started recording the confession of the appellant in the second case soon thereafter. Both the cases involved serious offences. They resulted in the extreme penalty. The learned Magistrate, therefore, should have allowed some more time to the appellant to make his statement. He should have satisfied himself as regards the voluntariness and truthfulness of the confession of the appellant.

In *Devendra Prasad Tiwari v. State of U.P.* [AIR 1978 SC 1544], this Court opined:

"\005It is also true that before a confessional statement made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as

ordered on Sept. 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock up even if he did not confess his guilt\005"

[See also Kashmira Singh v. State of Madhya Pradesh AIR 1952 SC 159]

In Parmananda Pegu v. State of Assam [AIR 2004 SC 4197], this Court opined:

"The foremost amongst the factors that are sought to be relied upon by the prosecution is the retracted confession of the appellant recorded under Section 164 Cr.P.C. The confession has been extracted supra in verbatim. Before acting on a confession made before a Judicial Magistrate in terms of Section 164, the Court must be satisfied first that the procedural requirements laid down in Sub-sections (2) to (4) are complied with. These are salutary safeguards to ensure that the confession is made voluntarily by the accused after being apprised of the implications of making such confession. Looking at the confessional statement (Ext.8) coupled with the evidence of PW 22, the then Addl. Chief Judicial Magistrate, Dhemaji, we have no doubt in our mind that the procedural requirements have been fulfilled. Inter alia, PW 22 deposed that after cautioning the accused that the confessional statement, if made, will be used in evidence against them, he gave three hours time for reflection during which the accused were kept in a room attached to the Court in the immediate presence of an office peon. PW22 further stated that it appeared to him that the accused made the statement voluntarily. A memorandum as required by Sub-section (4) was also recorded. Thus the first requirement for acting on a confession is satisfied but that is not the end of the matter. The Court, called upon to consider the evidence against the accused, should still see whether there are any circumstances appearing from the record which may cast a doubt on the voluntary nature of the confession. The endeavor of the Court should be to apply its mind to the question whether the accused was free from threat, duress or inducement at the time of making the confession. In doing so, the Court should bear in mind, the principle enunciated in Pyare Lal v. State of Rajasthan [(1963) Suppl.1 SCR 689] that under Section 24 of the Evidence Act, a stringent rule of proof as to the existence of threat, duress or inducement should not be applied and a prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. To put it in other words, "on the evidence and the circumstances in a particular case it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved."

17. Having thus reached a finding as to voluntary nature of a confession, the truth of the confession should then be tested by the Court. The fact that the confession has been made voluntarily, free from threat and inducement, can be regarded as presumptive evidence of its truth. Still, there may be circumstances to indicate that the confession cannot be true wholly or partly in which case it loses much of its evidentiary value.

18. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the Court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroborated so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the Court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true\005"

We must also notice that there was no direction to provide free legal aid to the appellant. He had no opportunity to have independent advice. We may, however, hasten to add that it does not mean that such legal assistance must be provided in each and every case but in a case of this nature where the appellant is said to have confessed in a large number of cases at the same time, the State could not have denied legal aid to him for a period of three years.

There is another aspect of the matter which must be taken into consideration. The same being the manner in which the case has been dealt with by the courts below.

The judgment of the learned Trial Judge gives an impression that he had proceeded on the basis that the appellant is guilty of commission of crime in large number of crimes. The High Court although taken note of the propositions of law, while pointing out the corroborative pieces of evidence, repeated only the evidences brought on records which proved the commission of offence. The purported corroborative evidence brought on record by the prosecution and as noticed by the High Court did not indicate that the appellant was guilty of commission of the offence. The circumstances were not such which formed links in the chain and point out only to the guilt to the accused and accused alone.

We, therefore, with respect, are constrained to record disagreement with the ultimate findings of the learned Sessions Judge as also the High Court. We, however, may observe that we have only considered the merit of the present appeal. Each case against the appellant must be judged on the basis of the legal evidence brought on records. Our observations, we are sure, would not influence the learned Judges dealing with other cases involving the appellant and pending before them.

The judgment of conviction and sentence is set aside and the appeal is allowed.