

Ashok and Another Vs. State of Maharashtra

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Court : Mumbai Nagpur

Decided On : Jan-15-2014

Judge : B.R. Gavai & a.S. Chandurkar

Appeal No. : Criminal Appeal No. 387 of 2010

Appellant : Ashok and Another

Respondent : State of Maharashtra

Advocate for Pet/Ap. : Shri. Sumit Joshi

Judgement :

B.R. Gavai, J.

1. The appellants take exception to the judgment and order passed by the learned Sessions Judge, Gadchiroli in Sessions Case No.87/09 dated 3.5.2010 thereby convicting the appellant no.1 for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer R.I. for life and to pay fine of Rs.1000/- and in default, to suffer R.I. for six months and convicting both the appellants for the offence punishable under Section 201 read with Section 34 of the Indian Penal Code and sentencing them to suffer R.I. for five years and to pay fine of Rs.500/- and in default, to suffer R.I. for six months.

2. The prosecution case in brief is as under :-

MaltabaiHichami was married to one Sunil Madavi. Her husband expired in 2004. After the death of her husband, she started residing at Gattepayli with her father the accused no.2. Maltabai fell in love with accused no.1 Ashok and due to the sexual relations between them, Maltabai became pregnant. A son was born to her. However, to hide away from the villagers, she started residing outside the village. Accused no.2 the father of Maltabai in order to get rid of defamation brought the insecticide by name æShimbus? and gave it to accused no.1 for administering it to the child. However, since the same did not have effect, the accused no.1 committed murder of his son by throttling and both the accused in furtherance of their common intention buried the said body in the bed of the river. Thereafter the villagers came to know about the delivery and as such, a meeting was held and during that meeting, both the accused were present. However, according to the prosecution, the accused gave extrajudicial confession of having committed the murder by accused no.1 and disclosed the whereabouts of the dead body.

3. A complaint came to be filed by PW.1 Jairam Damji, the Police Patil of the village. On the basis of the said information, FIR came to be registered. Spot panchnama was prepared and the dead body was sent for postmortem. According to the P.M. report, following injuries were sustained by the deceased :-

(a) Abrasion on thyroid on just right lateral to midline; and

(b) A bruises over the mandible on right side?.

After the completion of investigation, a charge-sheet came to be filed. Since the case was exclusively triable by the Court of Sessions, the same came to be committed to the Sessions Court, Gadchiroli. The learned Judge framed the charges. The accused pleaded ænot guilty?. At the conclusion of the trial, the learned trial Judge held the accused no.1 guilty for the offence punishable under Section 302 of the Indian Penal Code, however, acquitted the accused no.2 of the said offence. The learned Sessions Judge, however, convicted both the accused for the offence punishable under Section 201 read with Section 34 of the Indian Penal Code and sentenced them to suffer R.I. as aforesaid.

4. Shri Sumit Joshi, learned Counsel for the appellants, submits that the finding of conviction recorded by the learned trial Judge is totally perverse. The learned Counsel submits that though the present case is a case of circumstantial evidence and though the prosecution has failed to prove the incriminating circumstances and further that the circumstances so proved are not interwoven to each other and which do not lead to conclusion of guilt of the accused, the learned trial Judge should not have convicted the accused. He further submits that the evidence of discovery on the memorandum under Section 27 of the Indian Evidence Act is not at all sustainable, inasmuch as the panch witness himself has admitted that the police had not come to the spot. He further submits that in so far as the evidence regarding extrajudicial confession is concerned, the same is very weak piece of evidence and the evidence of PW.1 in that regard is not free from doubt. It is, therefore, submitted that the prosecution has utterly failed to prove the case beyond reasonable doubt. The learned Counsel further relies on the judgment of the Apex Court in the case of Sharad Birdhichand Sarda .vs. State of Maharashtra reported in AIR 1984 SC 1622 in support of the proposition that in a case pertaining to circumstantial evidence, the prosecution must establish the chain which is so interwoven to each other that leads to no other conclusion than the guilt of the accused.

5. Shri M.K. Pathan, the learned Additional Public Prosecutor for the respondent, on the contrary, submits that though the panch has turned hostile, the Investigating Officer PW.9 Somnath Jadhav in his evidence has proved the discovery of dead body on a memorandum under Section 27 of the Indian Evidence Act. The learned Counsel further submits that the extrajudicial confession given by the accused to PW.1 Jairam is sufficient to bring home the complicity of the accused. The learned Counsel submits that the extrajudicial confession if voluntary and made in a fit state of mind can be the sole ground for basing conviction. The learned A.P.P. in this respect relies on the judgment of the Apex Court in the case of State of Rajasthan .vs. Rajaram reported in AIR 2003 SC 3601.

6. From the perusal of the judgment of the learned trial Judge, it would reveal that the learned trial Judge has basically relied on evidence of PW.1 Jairam, who is the

Police Patil and PW.9 Somnath Jadhav for bringing home the guilt of the accused.

7. In so far as the evidence regarding extrajudicial confession is concerned, the learned trial Judge has mainly relied on the evidence of Jairam PW.1. It will be relevant to refer to the following evidence of PW.1:-

œTherefore, we have called the accused no.2. Maltabai as well as accused no.2 have disclosed the name of accused no.1 who was responsible for pregnancy. Maltabai delivered a son in the hospital. That newly born child is no more. I do not know how he met with death. When enquired with Maltabai, she had disclosed that accused no.1 had committed the murder of newly born son by throttling. She had also disclosed that Babaji had given insecticide a poison for the murder. When we enquired about the corpus both have informed that they have buried the body. They took us to the spot where the body was buried. The accused have excavated the dead body. I had lodged the report.?

It can thus be seen that even from the evidence of PW.1 Jairam, it cannot be said that the accused no.1 has made any extrajudicial confession to said witness. From his evidence, it would be revealed that the accused no.2 has disclosed the name of accused no.1, who was responsible for pregnancy. In so far as committing murder of the newly born son by throttling is concerned, from the evidence of this witness it can be seen that on being enquired with Maltibai, she had disclosed that the accused no.1 had done so. It can thus be seen that there is nothing in his evidence which can be said to be an extrajudicial confession by the present accused. It is further to be noted that in his evidence he states that the accused took them to the spot where the body was buried and the accused have excavated the dead body. However, in the cross-examination he states that the dead body might have been removed by the dog. He further says that he cannot say anything as he had not witnessed the excavation. Firstly, it will not be safe to rely on the testimony of this witness who has given contradictory version and in any case there is nothing in his evidence to come to a finding that there was any extrajudicial confession by the present accused.

8. The next witness on which the learned trial Judge relies is Pandurang PW.2. However, from his evidence also only extrajudicial confession that could be said to

have come on record is that the accused no.1 had also disclosed that the dead body is buried in the brooklet. This witness in his evidence has stated that it is correct to state that the police had never been to the village for panchnama. In that view of the matter, the evidence of the said witness would also be not of any assistance to the prosecution case. In that view of the matter, we find that the learned trial Judge has grossly erred in relying on the evidence of these witnesses to hold that the extrajudicial evidence of these witnesses was sufficient to base the conviction.

9. In this respect, it will be appropriate to rely on the following observations of the Apex Court in the case of Sk. Yusuf .vs. State of West Bengal reported in 2011 ALL MR (Cri) 2365 (S.C.) :

œExtrajudicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The œextrajudicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. (See : State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; and Kulvinder Singh and Anr. Vs. State of Haryana, (2011) 5 SCC 258 : [2011 ALL MR (Cri) 2053 (S.C.).

It will also be appropriate to refer to the following observations of the Apex Court in the case of Sahadevanand another .vs. State of Tamil Nadu reported in (2012) 6 SCC 403 :

œThe Principles :

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extrajudicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extrajudicial confession alleged to have been made by the accused.

- (i) The extrajudicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence.
- (iv) An extrajudicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an extrajudicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.?

It can thus be clearly seen that it has been consistently held by the Apex Court that the extrajudicial confession is a weak evidence by itself and it has to be examined by the Court with great care and caution. It has further been held that the extrajudicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and it is further corroborated by other prosecution evidence.

10. The next circumstance which is relied on by the prosecution is the discovery of the dead body of the deceased new born child. The learned trial Judge in this respect has relied on the evidence of PW.9 Somnath Jadhav. From the evidence of this witness, it can categorically be seen that he has admitted that the matter was referred for DNA. However, the DNA report was still awaited.

11. It is to be noted that the prosecution has also examined PW.3 Devaji, who is panch witness in the memorandum under Section 27 of the Indian Evidence Act and discovery of dead body. It is pertinent to note that in the examination-in-chief itself this witness stated that the accused never stated anything before them. The only material part of his evidence is that the accused no.1 discovered the dead body of the child in his presence. It will be relevant to refer to cross-examination of

this witness which reads thus:

œIt is correct to say that due to naxalite area police are afraid to visit our village and accordingly never visited our village due to naxalites. It did happen that whenever we apprised the police, police required us to prepare the panchanama and to bring the dead body for panchnama. The panchnama was scribed by police patil. None of the police officer was present at the time of panchanama..... It is correct to say that the accused never disclosed to discover the dead body. It is not correct to say that the dog had discovered the dead body.....?

It can thus be seen that the evidence of this witness has totally been shattered. He has admitted that the police never visited the village and prepared the panchnama in the police station. It is further stated that the accused never disclosed to discover the dead body. In view of the evidence of this witness and the evidence of PW.2 Pandurang, who also states that the police never had been to his village for panchnama and further the evidence of PW.1 Jairam himself that he was not sure as to how the dead body was excavated, we find that the prosecution has utterly failed to prove the said circumstances also.

12. In so far as the judgment of the Apex Court in the case of State of Rajasthan Vs. Raja Ram (cited supra), on which the learned A.P.P. heavily relies is concerned, there is no doubt that if a confession is found to be reliable and trustworthy, it can be a piece of evidence on which conviction can be based. However, in the present case, we do not find that the extrajudicial confession on which the prosecution relies can be said either to be reliable or trustworthy. It will be relevant to refer to the following observations of the Apex Court in the case of SharadBirdhichand Sarda .vs. State of Maharashtra reported in AIR 1984 SC 1622 :

œ152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made :

"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.?

In the facts of the present case, we find that firstly the prosecution has failed to prove the incriminating circumstances beyond reasonable doubt and in any case it has failed to establish that the chain of evidence was complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused. The prosecution has utterly failed to prove that in all human probability, the act must have been committed by the accused.

13. In that view of the matter, the judgment and order of conviction is not sustainable in law.

In the result, the Appeal is allowed. The order of conviction and sentence is set aside. The appellants are directed to be set at liberty forthwith if not required in

any other case.

The fees payable to the learned Counsel appointed for the appellants are quantified at Rs.5000/- (Rupees Five thousand only).

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