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Philips Vs. State of Karnataka

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Court : Karnataka

Decided On : Jul-03-1979

Reported in : 1980CriLJ171

Judge : M.S. Nesargi and ;D.R. Vithal Rao, JJ.

Appellant : Philips

Respondent : State of Karnataka

Judgement :

M.S. Nesargi, J.

1. The appellant has challenged the legality and correctness of the conviction and sentence passed on him by the First Additional Sessions Judge, Bangalore, in Sessions Case No. 11 of 1978, convicting him for having committed the offence punishable under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life.

2. The prosecution case is that, the deceased Muthu and the accused were, sometime earlier to the incident which took place at about 9.30 P. M. on 7-12-1977, friends. P. W. 15 Fathima is the wife of Muthu. As Muthu could not carry on in his profession as bar-tender he took up vending illicit liquor. He enlisted the assistance of the accused on payment basis. The accused started cheating him in the business. Muthu warned the accused on many occasions. It is also the case of

the prosecution that sometime earlier to the incident, Muthu had caused injuries on the hands of the accused and the accused nurtured grievance against Muthu. When the accused did not correct himself, but continued to cheat Muthu in the business. Muthu asked the accused to give up assisting him. The accused was taking food in the house of Muthu and residing there. Muthu drove him out. The accused went and commenced working for Kanthamma (not examined). Muthu went and told Kanthamma not to entertain the accused as the accused was unreliable and so on. Kanthamma gave up employing the accused The illwill nurtured by the accused against Muthu came to head in view of this fact also.

3. By about 9.30 P. M. on 7-12-1977, Muthu, P. W. 4 Kainikaraj. P W. 5 Chittibabu. P. W. 6 Satish, P. W. 7 Vadivelu and others were playing cards in Aakra Khan compound, also known as Agha Khan compound, by the side of Miller Road in Bangalore. The accused went there and commenced to play. He lost money. He therefore gave up playing and went away. He returned after sometime. He had covered himself with bed-sheet M. O. 7 up to his neck. He stood behind Muthu who was dealing cards. He suddenly took out M. O. 1 the chopper and cut Muthu. All the persons ran away. P. Ws. 4, 6 and 7 went and stood near the hotel called Bombay Restaurant in that locality. Some time later the accused went there and told them that he had cut and finished Muthu and expressed that perhaps they also would be happy on learning that, and went away. At about 10.15 P. M. on the very day, he appeared in Cubbon Park police station where P. W, 17 M. D. Basannavar was the Sub-Inspector of Police. The accused was wearing banian M. O. 6, white pant M, O. 8 and had covered himself with the bed-sheet M. O. 7. He was having M. O. 1 the chopper is his hands. All these articles were stained with blood. He gave information to P. W. 17 regarding the occurrence and P. W. 17 reduced the same to writing. P. W. 17 registered case in crime No. 817 of 1977, issued F. I. R. and sent express reports. He secured panchas including P. W. 16 Narasaiah and in their presence sealed and seized M. Os. 1,6,7 and a constable to the scene of offence after instructing them that they should keep proper guard and watch over the spot. He went there in the course of the investigation. Before going, he attempted to contact P. W. 18 N, Krishnappa. Circle Inspector of Police, but he was informed that the Circle Inspector of Police had gone for investigation in some other case. At the spot, he found the head constable and the constable

attending to their duties. He went to Dabuspet locality situated by the side of the Miller Road and recorded the statements of P. Ws. 5 to 7 and 8 Mangalakumar. P. W. 18 took up investigation on receiving the express reports, at about 7.00 A. M. on 8-12-1977. He held inquest proceedings over the dead body and arranged to send the dead body for autopsy to P. W. 2 Dr. B. C. Ghandregowda, who conducted post mortem examination between 11.00 A. M. and 1.00 P. M. and prepared his notes as per Ex. P. 1. During the course of his investigation P. W. 18 questioned the accused and the accused gave some information. Then the accused led P. W. 18 to the City Market viz., Krishnarajendra Market in Bangalore City. P. W. 18 collected panchas including P. W. 13 S. S. Udupa. The accused led them to a gujari shop said to have been owned by Mahaboob Shariff. The owner of the shop sent for the boy, aged about nine years. P, W. 10 Aman, Panchanama as per Ex. P. 6 was recorded on the accused pointing out P. W. 9 Syed Sab. on the sopt. P. W.]8 recorded the statements of P. Ws. 9 and 10 and others, and thereafter he also recorded the statements of P. W. 5 and others including P. W. 15 Fathima, and got the accused remanded to judicial custody. By 12-12-1977 P. W. 18 found that the accused wanted to make a confession and as such gave a requisition to P. W. 1 C. H. Nanjappa. Metropolitan Magistrate (VI Court) Bangalore. P, W. 18 proceeded with the investigation by sending the seized articles etc. Even before that, the accused had taken P. W. 18 and panchas to a hut near about Miller Road and produced voters enumeration list as per Ex. P. 11 which P. W. 18 seized under panchanama Ex. P. 10. On 16-12-1977 P. W. 1 secured the presence of the accused and put preliminary questions to find out whether the accused was going to make a statement voluntarily. He recorded his proceedings as per Ex. P. 3. He then sent the accused to judicial custody, with directions that he should be produced on 17-12-1977. By about 12.00 noon on 17-12-1977 the accused was produced before P. W. 1 and P, W. 1 once again put the questions to the accused to find out whether the accused was still willing to make a statement and that too voluntarily. On finding that, P. W. 1 gave time to the accused till about 4.00 P. M. in the evening. Thereafter he sent for the accused in his chambers and took the precaution of sending away all police officials and officers and again put questions to the accused to find out whether he was voluntarily willing to make a confessional statement. On satisfying himself that the

accused was voluntarily willing to make a statement, he proceeded to record his statement as per Ex. P. 4. It also contains the proceedings recorded by P. W. 1 on 17-12-1977. P. W. 18 completed the investigation and placed charge-sheet against the accused.

4. The defence of the accused is that P. Ws, 4 to 8 had given evidence falsely against him as they were not on good terms with him and that he was all along friendly with Muthu. On 7-12-1977 he had gone to see a first-show in a cinema theatre and after the first-show was over he went to a hotel where some persons came running and he asked them what had happened but he did not secure satisfactory answers from them. He knew that the deceased and others used to play cards in Agha Khan compound and, therefore, went there to find out what had happened. He had taken an auto-rickshaw lamp with him as it was dark. In the light shed by the auto-rickshaw lamp, he found Muthu lying in a pool of blood in that compound. M. O. 1 the chopper, safety razor and some other articles were lying by the side of the body of Muthu. He took M. O. 1 and went to the Cubbon Park police station. He informed P. W. 17 as to how he had found M. O. 1 lying by the side of the body of his friend Muthu and how some people had run away. He also informed P. W. 17 that the persons who were present at that time near about the spot were P. Ws. 4 to 7 and further that Muthu had kept Rani, sister of P. W. 5. as his mistress and, therefore, P. W. 5 was angry with Muthu and he might have committed the murder of Muthu, but the police caught him and foisted this case on him. He has explained that M. Os. 6 to 8 were on his person and had become bloodstained as the blood from the chopper had dripped on the same. In regard to the confessional statement recorded by P. W. 1. he has stated that he did not know anything about the contents but he had stated as tutored by the police and that in fact he had been ill-treated by the police so as to make him to state before P. W. 1 as tutored by them, and when he was produced before P. W. 1 on 8-12-1977 he had been made by the police to state that he had not been ill-treated by the police and, therefore, he had stated accordingly and the Magistrate had recorded accordingly.

5. The prosecution has, in proof of the charge against the accused, relied on the eye-witness account furnished by P. Ws. 4 to 8. It has also relied on their evidence

and the evidence of P. W. 15 to establish the motive against the accused. It has next relied on the circumstances viz, the accused appearing in the police station before P. W. 17 at about 10.15 P, M. on 7-12-1977 with bloodstained chopper M. O. 1 and wearing bloodstained clothes M. Os. 6 and 8 and having covered himself with the bloodstained bed-sheet M. O. 7, and also the circumstance relating to his pointing out P. W. 9 and the shop of Mahaboob Shariff. It has lastly relied on two more circumstances viz., recovery of Ex. P. 11 at the instance of the accused and the fact that the accused had by 9.15 P. M. on 10-5-1977 consumed dalf in an attempt to commit suicide and had been taken to Bowring Hospital before P. W. 11 Dr. Venkatachalapathy, who was the duty Doctor in the Casualty ward by about 8.00 A. M. on 11-5-1977 by one Balan.

6. We are surprised that the prosecution has examined P. W. 11 to prove that the accused had either on 10-5-1977 or on 11-5-1977 attempted to commit suicide by taking dalf as it is plain that this fact is totally irrelevant to the case on hand. The First Additional Sessions Judge ought not to have permitted the prosecution to adduce this evidence, but on the other hand has, without even noting an objection in this behalf, allowed the evidence to go on record. This evidence deserves to be ignored,

7. It is recorded in the evidence of P. W. 18 the Circle Inspector of Police, that he took up investigation by 7.00 A, M. on 9-12-1977 from P. W. 17. We looked into the original deposition of P. W. 18 and found that there also it has been recorded accordingly. This is an apparent mistake, and the First Additional Sessions Judge has allowed it to remain on record. He ought to have - if in fact he had read over the deposition of P. W. 18 after it was typed to P. W. 18 - corrected the date as 8-12-1977. This shows that recording of evidence appears to have been done by the First Additional Sessions Judge in an indifferent manner without applying his mind to what he was recording. In our opinion, this is not the proper way of conducting a sessions trial. We are constrained to make this observation in view of a few more facts and circumstances, showing that this observation is justified, that will be pointed out by us in the course of this judgment.

8. We will first take up for consideration the question pertaining' to the judicial confession said to have been made by the accused to P. W. 1 as per Ex. P. 4. The First Additional Sessions Judge has chosen not to act on this confession as according to him P. W. 1 had failed to put on record two questions that he had put to the accused on 17-12-1977 and had administered oath to the accused while recording Ex. P. 4 and lastly had recorded Ex. P. 4 though he knew that he himself was the committing Magistrate and. therefore, ordinarily ought not to have proceeded to record the confessional statement of the accused. Nowhere has the First Additional Sessions Judge taken the trouble of adverting to Section 463 Cr. P. C., which reads as follows:

463. Non-compliance with provisions of Section 164 or Section 281.- (1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under Section 164 or Section 281, is tendered, or has been received, in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

The First Additional Sessions Judge has not weighed the evidence of P. W. 1 to find out whether he had stated the truth about putting those two questions to the accused but had not recorded those questions in the proceedings he held on 17-12-1977. It was his duty to apply his mind to the evidence of P. W. 1 in regard to this aspect and come to a conclusion one way or the other. If his conclusion was that P. W. 1 had stated the truth, then in view of Section 463, Cr. P. C., it would have been incumbent on him to hold that the recording of confession by P. W. 1 had been done by him - except in regard to administering of oath to the accused - in a manner as required by the provisions in Section 164, Cr. P. C. He has observed that P. W. 1, being the committing Magistrate as he was the jurisdictional

Magistrate in the case against the accused, ordinarily ought not to have proceeded to record the confessional statement of the accused. He has not supported himself, in regard to this observation, by any provision. But, on the other hand, he has gone on to observe that though the law did not bar P. W. 1 to record the confessional statement on the ground that he was the jurisdictional Magistrate, it was not desirable for P. W. 1 to record the confessional statement. He has not at all considered the effect of exercise of this power by P. W. 1 on Ex. P. 4 the confessional statement. What the First Additional Sessions Judge has failed to notice in this behalf is the provision in Rule 4 of Chap. V of the Criminal Rules of Practice framed by this Court. It reads as follows:

When a requisition for recording a statement under Section 164 of the Code is received by a Magistrate having jurisdiction to try the offence or commit the accused for trial, he shall direct the accused to be taken before another Magistrate for that purpose, unless the Magistrate, for reasons to be recorded in writing, deems fit to record the statement himself; and when he does so, he shall report the case to the Sessions Judge, who may take the case on his own file or refer it to another Magistrate.

It is expected of a Sessions Judge of some experience, to know this rule, but we are pained to see that the First Additional Sessions Judge has exhibited his ignorance of this provision. Reading of this rule shows that it is a rule meant for guidance of Magistrates and does not say anything about the power not being there with such Magistrates to record confessional statements.

9. We do not consider it necessary to go into the evidence of P. W. 1 to find out whether P. W. 1 had recorded Ex. P. 4 in accordance with the provisions in Section 164 of the Code of Criminal Procedure in the light of Section 463 of the Code as in our opinion the fact that P. W. 1 had administered oath on the accused while recording the confessional statement, deprives the statement Ex. P. 4 of any evidentiary value. In this connection the First Additional Sessions Judge has in para VII (gg) of his judgment, adverted to the provision in Section 5 of the Indian Oaths Act, 1873. Here; again, the First Additional Sessions Judge has exhibited his ignorance of the law holding the field because Indian Oaths Act, 1873, has

been repealed by the Indian Oaths Act, 1969. Section 5 of the Indian Oaths Act, 1969 is not in pari materia with Section 5 of the Indian Oaths Act, 1873. Section 5 of the Indian Oaths Act 1969, has no application in regard to this question.

10. Section 164 (4) Cr. P. C, lays down that such confession shall be recorded in the manner provided in Section 281 of the Code for recording the examination of an accused person and shall be signed by the person making the confession and so on. In view of this provision, it was incumbent on P. W. 1 to record the confessional statement of the accused by following the manner and method laid down in Section 281 Cr. P. C. Section 281 reads as follows:

281. Record of examination of Accused.- (1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in that behalf

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable, in the language of the Court.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the. record contains a full and true account of the

statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

11. It is clear from the above that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate, When this specific provision is made, the other provisions of the Indian Evidence Act etc., regarding recording of statements, will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of Section 281, Cr. P. C.. It is well settled by a series of Judgments of the Privy Council as well as the Supreme Court that when the mandate of the law is that a particular act has to be done in a particular manner, it has got to be done in that manner or it should not be done at all. Therefore, recording of Ex. P. 4 by P. W. 1 confessional statement by the Magistrate after administering oath to the accused, is not as provided by Section 281 Cr. P. C. and as such Ex, P. 4 loses its evidentiary value. Moreover, the object behind this provision viz. Section 164 (4) Cr . P. C. is clear on the face of it. The concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that he would be incurring the wrath of law. In fact similar is the object in regard to the manner and method of recording the statements of witnesses during the investigation by the police, under Section 161 Cr. P. C. There, it is provided that the signatures of the persons are not expected to be taken below their statements so recorded. If this aspect viz., recording of examination of the accused is gone deeper into by looking into the provisions of the Code of Criminal Procedure, it will be clear that there are three stages at which examination of the accused is provided. First stage is Section 232 Cr. P. C. That would be during a sessions trial when the prosecution closes its case. The next is Section 239 of the Code. That is the stage at which in a trial of warrant case on police report a Magistrate has to decide whether he should frame charge or pass an order of discharge. The third is Section 313 of the Code which is a general provision because it states that an accused may be examined at any stage in any enquiry or trial, to enable him to explain personally any circumstances appearing in evidence against him, Section 313 (2) Cr. P. C. specifically lays down that no

oath shall be administered to the accused when he is examined under Sub-section (1) of that Section. It is easy to see that it has no application to the recording of a confession of an accused under Section 164 (4) Cr. P. C. and in that behalf only the provisions in Section 281 of the Code are specifically made applicable.

12. In view of the foregoing, we hold that administering oath to the accused by P. W. 1 before recording Ex. P. 4 the confessional statement, is an illegality and. hence, Ex. P. 4 loses its evidentiary value. It is of course true that the learned First Additional Sessions Judge had reached the same conclusion, but what we have observed is in regard to the reasoning put forth by him and the manner in which he has exhibited his ignorance of the provisions of law and the rules, which he is expected to know;

13. Before going into the evidence adduced by the prosecution in proof of the charge against the accused, we have to express our displeasure in regard to the approach of the First Additional Sessions Judge in conducting the trial, in view of one more fact available in the evidence of P. W. 17. It may be remembered that the prosecution case is that the accused appeared before P. W. 17 in Cubbon Park police station at 10.15 P. M. on 7-12-1977 and gave information to P. W. 17. That is also the say of the accused in his statement recorded under Section 313 Cr. P. C. P. W. 17 has given evidence to that effect. It was the duty of the First Additional Sessions Judge to look into what was the information given by the accused to P. W. 17 and reduced to writing by P, W. 17 at that stage itself. May be the information given by the accused tallies with the stand he has taken in his defence. If that were to be so, the same ought to have been brought on record as first information and that would have been useful to the accused. Under such circumstances, failure on the part of the First Additional Sessions Judge to look into it and consider it, would have been prejudicial to the accused. The trial would not be fair. In case the information given by the accused was confessional in character, then also it was. the duty of the First Additional Sessions Judge to look into it to decide whether any part of it would be admissible as first information setting the criminal law in motion in view of the decisions of the Supreme Court in Aghnoo Nagesia v. State of Bihar : 1966 CriLJ100 . Nishi Kant Jha v. State of Bihar : 1969 CriLJ671 , Khatri Hemraj v. State of Gujarat : 1972 CriLJ626 and

Keshoram Bora v. State of Assam : 1978 CriLJ1089 . The First Additional Sessions Judge has recorded the evidence of P. W. 17 so as to make it appear that he was not at all asked to look into the information of the accused as recorded by P. W. 17. Whether the prosecution had insisted on it or not, it is our firm opinion that it was the duty of the First Additional Sessions Judge to look into that information recorded by P. W, 17 and decide the question of admissibility on the basis of the law laid down in the aforementioned decisions of the Supreme Court, and then proceed to admit part of it or whole of it or discard whole of it. Here again he has shown his ignorance of the settled law on the question. It only means that he has not applied himself whole heartedly to the trial of the case against the accused. But, fortunately enough this non-application of the mind of the First Additional Sessions Judge, has not caused any prejudice either to the accused or to the prosecution in this case.

14. It is by now well established that when there is direct evidence in regard to the offence committed, the evidence regarding motive will pale into insignificance. Therefore, we proceed to consider the evidence of P. Ws. 4 to 8 and the other circumstances relied upon by the prosecution, of course, ignoring the evidence of P. W. 11 regarding what the accused is supposed to have done on 10th or 11th of May 1977.

(After discussing the remaining evidence in Paras 15 to 18, the judgment concluded).

19. On discussing the entire evidence adduced by the prosecution, we conclude that the prosecution has satisfactorily established the charge against the accused and, therefore, this appeal is liable to fail, and as such we dismiss the same.

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