

**Noor UddIn Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/448981](http://sooperkanoon.com/448981)

**Court :** Allahabad

**Decided On :** Mar-26-1964

**Reported in :** AIR1965All40

**Judge :** B. Dayal and ;S.D. Khare, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 164; [Evidence Act, 1872](#) - Sections 32

**Appeal No. :** Criminal Appeal No. 2489 of 1963

**Appellant :** Noor Uddin

**Respondent :** State

**Advocate for Def. :** G.A.

**Advocate for Pet/Ap. :** P.C. Chaturvedi, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**B. Dayal, J.**

1. Nooruddin has appealed against his conviction under Section 302 I P C. and the sentence of death He has been convicted for having stabbed to death his grandmother Smt Bachiran, his Father Badrauddin, his mother Smt Ashiya, his wife Smt

Sabira, and his minor daughter Km. Noor Bano aged about 10 years on the 10th of May, 1963 at about 3-15 p.m. in his own house in Nala Mantole. Mohalla Rakabganj Agra City.

2. The prosecution case is that there was a domestic quarrel between the accused Nooniddin and his father Badruddin that afternoon in the course of which Nooniddin accused stabbed his father Badruddin. When his mother and grandmother rushed to protect Badruddin, they were also stabbed. The accused then stabbed his daughter Km Noor Bano and in order to save the girl Smt. Sabira. wife of the accused intervened and she was also stabbed. While all this was going on in the house, the other members of the house rushed out and made a noise. Their relations and neighbours then came at the scene. The accused was overpowered and a dagger (Ext. 1) was snatched from his hand Arrangements were then made for carrying the injured to the hospital.

While this was being done, the accused escaped from the house and ultimately surrendered himself in the court of Shri S. P Misra at 4.45 p.m. He made a confessional statement which was recorded by the Magistrate and he sent him to jail. Ajmari had dictated the first information report at police station Rakabganj at 3.45 p.m. The investigating officer immediately started for the scene of occurrence and reached there at 4.25 p.m. when he found that the accused had disappeared from the house. He started investigation and recorded the statements of all the relevant witnesses and ultimately sent the challan to court.

3. Out of the injured Smt. Bashiran and Smt. Ashiya, grand-mother and mother of the accused died on the spot and the remaining three Badruddin, Smt. Sabira and Km. Noor Bano died ultimately in the hospital within 6-8 hours Badruddin and Smt. Sabira never regained consciousness but Km. Noor Bano was conscious when she reached the hospital. Her dying declaration was first recorded by Dr. B. S. Lal. The doctor put her questions which she answered. The questions and their answers are as follows:

Q. What is your name?

A. Noor Bano.

Q. What is your father's name?

A. Noor Uddin.

Q. Who assaulted you?

A. My father assaulted me.

Q. With what did he assault?

A. He assaulted with Chhuri.

Q. Why did he assault you?

A. A quarrel had taken place between (him) and Dadi. I do not know why he assaulted me.

Q. How much time has elapsed since you received injury?

A. About one hour has elapsed.

Q. Where were you when you received injury

A. He assaulted me in his house. He assaulted me while I was playing.

Q. Whom else did he assault?

A. He assaulted my brother Noor Ahmad. sister Tahsim. My mother too must have received the blow. I ran away to the house of the female tenant.

Q. Do you want to say anything else?

A. No.

4. Thereafter on the arrival of the Magistrate, her dying declaration was again recorded by Shri G. C. Jain, Addl. District Magistrate and she stated as follows:

'More than about two hours back, my father stabbed me with a knife on my abdomen. He struck with it to my brother and sister. The name of my brother is

Noor Ahmad and that of my sister is Nargis.'

The confession of the accused which was recorded by Shri S P Misra, Magistrate is as follows

'I have used a Chhuri. I have used it against my wife and children. But I cannot say what their conditions are. I was not on good terms with my wife. So I stabbed her with chhuri. The chhuri has struck her, my wife on the flank. She has died. I am appearing before you I have received injuries on my right cheek, below the eye- and left shoulder blade, in the course of quarrel The importance of this confession and the dying declaration will have to be considered in detail because the eye-witnesses of the occurrence who made statements before the investigating officer have gone back upon them. In the court of session no witness claimed to have seen the appellant killing any of the five deceased persons

5. The accused has denied all the charges against him and his contention is that in the afternoon when he returned to the house from the market, he found that his wife and daughter Km. Noor Bano were lying injured, He asked his father the reason when his father rushed to kill him also with a dagger His mother and grandmother rushed to catch hold of him In self defence he picked up the chhuri and struck them.

6. The eye-witnesses of the occurrence are P. W. 3 (Ejazuddin), P W. 5 (Hakimuddin) who are brothers of the deceased and living in the same house, P. W. 6 (Smt. Sakina) a neighbour who came immediately to the scene of occurrence, P. W. 7 (Smt. Firdaus), who is the brother's wife of the accused and P. W. 8 (Moor Ahmad) the injured son of the accused. P. W. 3 (Ejazuddin) who is the brother of the accused is a minor aged about 12 years. He was found by the learned Sessions Judge to be quite intelligent and capable of giving intelligent answers and understood the sanctity of oath. He was therefore administered oath.

He stated that his parents, he himself, the accused and his family lived in different portions of the same house and they used to have quarrels very often. But according to him, his father and Nooruddin accused never quarrelled. On the date of occurrence, he states that his grand-mother demanded money from the wife of

the accused. She refused to give any money whereupon a quarrel started and his father Badruddin stabbed his Bhabhi and her daughter Km. Noor Bano who intervened to save her mother, Thereafter the accused Nooruddin came in and his (the witness) father, mother and grand-mother rushed at him. Nooruddin then picked up a knife and in order to save his life, attacked them. The witness ran to the house of his maternal uncle. This witness was declared hostile by the prosecution and he was cross-examined. He denied having made any statement to the police. The statement which he had made was read out to him and was denied.

7. P. W 5 (Hakinmddin) is aged 24 years and is the younger brother of the accused. According to him when he was at his shop at the time of occurrence, his sister Smt. Nisar Bano rushed to him and informed him that Badruddin and Nooruddin were fighting. The witness reached the house and found that his mother and grand-mother were lying murdered in the verandah and his father and Smt. Sabira and Km. Noor Bano were lying injured in the court-yard He thus denies having seen the actual stabbing.

8. P. W. 6 (Smt Sakina) is a neighbour of the accused. According to her Smt. Firdaus (P. W 7) went to call her when the quarrel started in the house and both of them went to the scene of occurrence. They found that Smt. Sabira, Smt. Ashiya and Smt. Bashiran were lying murdered. Nooruddin then came in when Badruddin assaulted him with a dagger. Nooruddin defended himself by picking up another dagger and both of them stabbed each other Badruddin was thereupon injured When they had entered the house, they also found Km. Noor Bano lying injured. According to her Nooruddin had been shut in a room and when the police arrived they took him away. She also denied her statement before the police. In cross-examination she stated that Tahsin and Nargis are both daughters of Nooruddin and were neither assaulted nor injured. Tahsin is aged three years while Nargis is aged five years.

9. P W. 7 (Smt. Firdaus) is the brother's wife or the accused. She has also corroborated the statement of P. W. 6 as mentioned above and has denied the statement made to the police.

10. P. W. 8 (Noor Ahmad) is the son of the accused who had received injuries. He is aged 9 years. Since he did not understand the sanctity of oath, he was not administered oath. According to him, there was a quarrel over money between his mother and grand-mother whereupon his grandfather killed his mother and stabbed his sister who tried to intervene and he himself received injuries from his dagger. Thereafter he ran away from the house. He was also declared hostile and he denied his statement made before the investigating officer. We are satisfied that these witnesses have changed their statements in an attempt to save the accused.

11. On this state of the prosecution evidence before the court, the prosecution had relied upon the confession made by the accused before Shri S. P. Misra, Magistrate and the dying declaration of Km. Noor Bano recorded by the doctor and the Magistrate.

12. The learned Sessions Judge had taken into consideration the confession made by the accused before Shri S. P. Misra Magistrate. The first point to be noted about this confession is that Shri S. P. Misra admitted in his statement before the court that he had recorded the statement of the accused as soon as he arrived in his court without giving him any warning that the statement may be used and read against him. He also did not record questions and answers which were put to the accused in order to ascertain that his statement was voluntary. Shri S. P. Misra therefore did not follow the provisions of Section 164 Cr. P. C. which provides as follows:

'164(1)--Any Presidency Magistrate, any 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 or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial

(2).....

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:.....

13. It has been contended by the State counsel that it was not necessary for the Magistrate to follow the procedure laid down in Section 164 Cr. P. C. because this confession was not being recorded 'In the course of an investigation' According to him, the accused had run away from the scene of occurrence and it was not even known to the investigating officer who was making investigation that the accused would surrender himself before the Magistrate and make a confession. In these circumstances, it is not possible to say that the confession had been made 'in the course of an investigation'. His contention is that the phrase 'in the course of an investigation' does not merely indicate the period of time during which investigation is going on but also contemplates that the confession must be made as a part of and a step in furtherance of the investigation by the police. The confession having been recorded independently of the police investigation, cannot be said to have been recorded 'in the course of an investigation' and is not hit by the provisions of Section 164 Cr. P. C.

In support of this contention learned counsel relied upon the case of Emperor v Aftab Mohamad Khan, : AIR1940 All291 . In that case a Division Bench of this Court had to interpret the phrase 'in the course of an investigation' as used in Section 162 of the same Code and came to the following conclusion:

'The words 'in the course of' in the context of Section 162(1), Cr. P. C. import that the statement must be made as a step in a pending investigation to be used in that investigation. The said words do not refer merely to that period of time which elapses between the beginning and the end of the investigation. The exact shade of meaning of the words 'in the course of' may well vary according to their context.'

No case directly interpreting Section 164 Cr. P. C. has been relied upon.

14. Considering the language of the two sections, we are of the opinion that the next (sic) import of the phrase 'in the course of an investigation' used in the two sections is not necessarily the same. In Section 162 Cr. P. C. the reference is to the statement made to a police officer in the course of an investigation. Obviously such statements must be taken by the police as a step in furtherance of investigation but Section 164 Cr. P. C. deals with confessions recorded by the Magistrate who does not investigate the crime and any statement recorded by him cannot be a step in furtherance of the investigation. The contention of the learned State counsel is that the recording of the statement itself could not be in furtherance of an investigation but in a case where the accused is brought by the police and is put up for the recording of his statement, such a recording can be said to be in furtherance of an investigation.

We are unable to construe the section so narrowly. We do not think that the legislature confined the power for the recording of confessions under Section 164 Cr. P. C. to a case where the police in the course of an investigation brought an accused for the recording of his confession. To our mind, the section is wide enough to authorise recording of confessions by the Magistrate whenever after the commission of the crime the accused wanted to make a confession which would ultimately be used in the trial of that offence. The phrase 'in the course of an investigation' in this section appears only to refer to the period of time when the investigation had started and was still going on. This precaution was obviously taken as a safe-guard to prevent forcible extortion of confession from the accused by the prosecuting agency. An accused person for fear of police may not like to go into their hands and make an independent confession at the time of surrendering himself so that he may be sent directly to jail. If such an independent confession is made before a Magistrate, who is empowered to record confessions and the Magistrate is satisfied that the crime has been committed and the accused ought to be sent to (sic) he is perfectly authorised to record that confession after following the safe-guards mentioned in the section. The period 'in the course of an investigation' is not the only period mentioned in this section when confessions may be recorded. In this section another period of time is indicated by the phrase 'or at any time afterwards before the commencement of the enquiry or trial.' Thus in this section two periods of time have been mentioned.

If the contention of the learned Government Advocate is accepted in respect of the first period of time, namely, 'in the course of an investigation then only that confession can be recorded which is at the request of the police but during the second period no such restriction can be imported and a confession, however, made at the request of any other person can also be recorded. This to our mind, would not be a proper interpretation. In this section at least, we think that both the phrases refer merely to period of time during which confessions could be recorded after following the precautions in the section. Moreover, if it is accepted that the confessions recorded at the instance of the police alone are covered by Section 164 Cr. P. C.: it will be an easy matter to evade this section and the precautions mentioned therein for the benefit of the accused by getting the prosecution witnesses or some other interested persons to apply to the court that a particular accused had been arrested and his confession might be recorded without the police coming forward to make that request. Such an interpretation of the section, to our mind, is improper.

15. A similar question arose before a learned single Judge of this Court in the case of *Bhola Nath v. State*, 1956 All LJ 700. There investigation was going on at Allahabad but The accused having been arrested at Varanasi in connection with another crime made a confession of the crime which was being investigated at Allahabad and the Allahabad police did not have any hand in the confession It was held that the confession must be held to have been made 'in the course of an investigation' since the investigation was going on at Allahabad. Similar views were expressed by a Bench of the Lahore High Court in *Muhammad Sarfraz Khan v. Crown*, 52 Cri LJ 1425 (Lah).

16. In the circumstances of the present case therefore the position is that the confession record ed by Shri S P. Misra Magistrate was not a proper confession under Section 164 Cr. P. C. as mention ed above. The precautions mentioned in Section 164 Cr. P C. not having been followed no evidence regarding confession can be given and the confession cannot be taken into consideration at all

17. The only evidence against the accused which remains for consideration are the two dying declarations of Km. Noor Bano The contention of the learned

counsel for the appellant with regard to the two dying declarations is that they are statements of a minor child and they have been contradicted by the eye-witnesses in the court of session and. in any case, there is discrepancy in the two statements inasmuch as in one of the statements she has mentioned that her sister Tahsin had been injured while in the other she stated that her sister Nargis had been injured. On this basis it is contended that these dying declarations are not reliable and the conviction of the appellant cannot be based merely on these dying declarations.

18. After a very careful consideration of the whole case, we are of the opinion that the dying declarations made by Km Noor Bano ought to be accepted as sufficient evidence against the appellant From the questions put to the girl by the doctor it is quite clear that she understood those questions and gave clear answers in full possession of her mental faculties. The incriminating answer which she gave was so simple and clear that we do not feel her age to be a handicap in making that statement. With regard to the little discrepancy about the name of the sister whom she alleged had also been injured, it may be that after she had been injured, she saw her brother Noor Ahmad also being injured and thereby inferred that all the children were being killed, and it was upon that impression that she might have named two younger sisters also as having been injured although there is no evidence on the record that any one of them was in fact injured. But the relevant fact whether she herself got injured by the accused or not is so essentially different from the statement regarding the injuries to sister Tahsin or sister Nargis that any discrepancy with regard to the injury to the sisters cannot so seriously minimise the importance of the statement that she herself was injured by the appellant as to make it completely ineffective evidence against the appellant The interested statements of prosecution witnesses who have turned hostile are False and cannot weaken the dying declarations.

19. The last contention of the learned counsel for the appellant was that Km. Noor Bano used to call grand-father, 'father' and therefore when she stated in her dying declaration that her father killed her, she in fact meant to refer to grand-father Such ingenious explanations have no doubt been given by the accused but we are unable to accept this as a true statement of fact. The questions put by the doctor

to the girl made it quite clear that she called the accused as father. A question was put to her as what was her father's name and she said 'Noor Uddin'. Then she was asked, who assaulted her. She replied that her father had assaulted her. The juxtaposition of this question makes it quite clear that she referred to the accused Nooruddin as her assailant and not meant to refer her grand-father.

20. On a consideration of the evidence, we are of opinion that the dying declarations made by Km.Noor Bano are the only admissible evidence against the appellant to prove that he stabbed her to death. There is no reliable evidence regarding the murder of the other deceased persons. Relying solely upon the two dying declarations of Km.Noor Bano we hold the appellant Nooruddin guilty of murdering Km. Noor Bano and convict him under Section 302 I. P. C. There being no extenuating circumstances in his favour, we think that the sentence of death is the only proper sentence to be imposed upon him, We accordingly confirm the death sentence imposed upon the appellant by the learned Sessions Judge and dismiss the appeal. Thereference for the confirmation of the death sentence of the appellant Nooruoddin is accepted.

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