

Mohammad Ali and ors. Vs. Emperor

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Court : Allahabad

Decided On : Oct-12-1933

Reported in : AIR1934All81; 147Ind.Cas.390

Appellant : Mohammad Ali and ors.

Respondent : Emperor

Judgement :

Sulaiman, C.J.

1. Certain points in this case have been referred to the Full Bench by a Division Bench, of which one of us was a member, because in the opinion of the Bench certain observations made in another case of this Court were not correct. The whole case has not been referred to us and we are called upon only to answer the questions put. The expression of our opinion would then be a guide to the Court in disposing of the case itself. It appears that in a criminal appeal the sole or main corroboration of the approver's evidence consisted of certain confessions said to have been made by the accused persons under Section 164, Criminal P.C. It is in respect of these confessions that the following questions have been formulated : (1) What weight, if any, ought to be given to a confession where the Magistrate has not put the necessary preliminary questions? (2) What weight ought to be attached to a confession where the accused had never been out of police custody? (3) Are mere certified copies of confessions made before the Court, when the originals are not produced, admissible in evidence? (4) Where some of

the confessions bear neither the signature of the Magistrate nor of the accused, what effect would this have upon the question of the value of the confessions as corroboration

2. Before answering these questions separately it would be convenient to consider the provisions of the Indian Evidence Act and the Code of Criminal Procedure. It is obvious that the Evidence Act deals with the relevancy and admissibility of evidence whereas the Code of Criminal Procedure deals with procedure and the method of recording confessions. Sections 24 to 30, Evidence Act, deal specifically with the admissions of the accused persons which are called confessions, and they obviously control the general provisions contained in the preceding sections of the Indian Evidence Act. Confessions obtained by inducement, threat or promise become irrelevant in criminal proceedings' under Section 24 and confessions made to police officers cannot be proved under Section 25. Section 26 provides that no confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it be made in the immediate presence of a Magistrate. It is clear that the mere fact that the police officer is present at the time or the accused is in custody of such police officer at such time would not make a confession inadmissible, if it was actually made in the immediate presence of a Magistrate. Leaving out Sections 27 and 28 which deal with matters with which we are not concerned in this case there is Section 29 which provides that if such a confession is otherwise relevant then it does not become irrelevant merely because the accused was not warned that he was not bound to make such confession, and that evidence of it might be given against him. It is therefore clear that so far as the mere admissibility of the confession is concerned the mere fact that the accused had not been warned that he was not bound to make such a confession before he made the confession would not be a fatal defect.

3. Coming to the provisions of the Code of Criminal Procedure, Section 164 confers upon the Magistrate the power to record statements and confessions of accused persons, and it prescribes the manner in which such statements should be recorded. The confessions have to be recorded and signed by the Magistrate in the manner provided in Section 364 and the Magistrate before recording such

confession has to 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 the Magistrate is also enjoined not to record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. He is further required to make a memorandum at the foot of such a record certifying that he had explained to the accused that he was not bound to make a confession and that if he made it, it might be used as evidence against him, and further that he believed that the confession had been voluntarily made and that it was taken in his presence and hearing and was read over to the person making it and admitted by him to be correct and contained a full and true account of the statement made by him. No doubt the provisions of this section are imperative and mandatory, and it is the duty of every Magistrate to follow these provisions strictly, and if he fails to do so he would be failing in the discharge of his duty. The Government have also issued certain instructions contained in the Government Manual, Ch, 36 from paras. 851 to 853(a) which have to be followed by Magistrates. It is by way of extra precaution that it is necessary in such cases that Government have issued these instructions, and there is no doubt that it is essential that Magistrates should follow those directions strictly in order that the accused person making a statement should not be prejudiced in any way. This was emphasized by a Bench of this Court in the case of Patey Singh v. Emperor : AIR1931 All609 .

4. But the question is what would be the result if the Magistrate unfortunately fails to comply with the imperative provisions of Section 164. The Code of Criminal Procedure itself provides under Section 533 what is to happen if the Court before which a confession of an accused person is recorded fails to comply with the provisions of Sections 164 and 364. Section 364, Criminal P.C., prescribes the manner in which the examination of an accused person is to be recorded, the language in which it must be recorded, and the way in which the memorandum by the Magistrate is to be appended. If any Court before which a confession recorded under Section 164, or Section 364, is tendered in evidence find that any of the provisions of either of such sections have not been complied with by the Magistrate who recorded the statement, it shall take evidence that such person or persons duly made the statement recorded.

5. It further provides that

notwithstanding anything contained in Section 91, Evidence Act, such a statement shall be admitted if the error has not injured the accused as to his defence on the merits.

6. The language of the section is perfectly clear, and it is intended to cover every case in which any of the provisions of Sections 164 or 361 have not been complied with. In all such cases the Court before which the confession is tendered is bound to take evidence that such person had 'duly made' the statement recorded. There is no doubt that before the confession can be admitted under Section 533 and the irregularity cured the statement must have been 'duly made.' But it is not necessary that it should have been duly recorded. The defect in recording a statement which had been duly made can be cured by calling further evidence to prove that it had been duly made. It may also be noted that this section is not in any way controlled by the provisions of Section 91, Evidence Act, and therefore, even if in a case where a statement is required by law to be reduced to the form of a document and it has not been done, evidence can be given in proof of that statement. This would meet a case where, although Section 164 or Section 364 requires that certain things should be recorded by a Magistrate and he has omitted to do so, the Court can admit the statement by calling oral evidence to prove that the statement had in fact been 'duly made.' But there is a safeguard in the section, and a statement which has not been recorded in accordance with law cannot be taken in evidence if the error has injured the accused as to his defence on the merits. Cases of this kind may arise where the statement has been taken down in a language different from that in which the accused made his statement and which was not intelligible to him, or where only part of his statement had been recorded and not the whole of it.

7. This position is made further clear if we refer to Sections 74 and 80, Evidence Act. The record of a confession recorded by a Magistrate is undoubtedly a record of an Act of a public officer done in the discharge of his duty. That record therefore is a public document within the meaning of Section 74, Evidence Act. A certified copy of the record would therefore be sufficient to prove it so far as the proof of the

act of the Magistrate is concerned. But Section 80 requires that if a document purporting to be a statement or confession of any prisoner or accused person taken in accordance with law and purporting to be signed by a Judge or Magistrate is produced before a Court, the Court shall presume that the document is genuine, that the statement and circumstances under which it was taken are correct and that the statements purporting to be made by the persons signing them are true and that such statements or confessions were duly taken. But the presumption would obviously not arise if the statement or confession had not been 'taken in accordance with law. It would follow that if a statement or confession has been recorded in perfect compliance with all the provisions contained in Section 164 and Section 364, Criminal P.C., a certified copy of it would be admissible, although by way of precaution the Court might well send for the original and satisfy itself that the copy is correct. But where the provisions of the law have not been complied with and the statement was not taken in accordance with law, there would be no presumption as to the correctness of the statement and as to the circumstances under which it was taken, it must also be pointed out that a mere production of a certified copy of the statement would not be sufficient to prove the identity of the person who made it, or to prove for instance that the statement had in fact been voluntarily made, but there would be a presumption under Section 80 that it had been duly made if there were no irregularity.

8. In the case of *Shambhu v. Emperor* : AIR1932 All228 the question was whether the confession made by a co-accused person could, be used as evidence against another accused. The person who had made the confession had not directly incriminated himself, and the confession was not being used so much against him as against his co-accused. The Bench pointed out that certain safeguards had been provided for against errors and abuses in the matter of recording confessions under Section 164, Criminal P.C., and observed:

Where there is nothing in the statement to show that besides the usual stereotyped questions any serious attempt has been made by the Magistrate to find whether the statement was voluntary or otherwise, we should hesitate to accept his certificate at its face value.

9. No doubt it is the imperative duty of the Court to satisfy itself that the statement had been made voluntarily and that there had been no inducement or threat, etc. If the learned Judges meant to lay down that as a rule of caution they would hesitate to accept the record of the statement if there was nothing else to show that the statement had been made voluntarily, it may be difficult to say that the observation is contrary to law; all the same the statement of the law is too widely put. The learned Judges however went on to quote in extense a passage from a judgment of a Division Bench of the Chief Court of Oudh in *re Prag v. Emperor*, A.I.R. 1930 Oudh 449 at p. 451, in which emphasis had been laid on the rules contained in the Manual of Government Orders referred to above. In that case however there was some doubt as to whether the person recording the confession was understood by the prisoner to be a police officer and not a Magistrate, and accordingly the Bench doubted whether the statement was a voluntary confession. That is a distinguishing feature, but they went on to observe:

It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the Court of Session, and the High Court or the Chief Court, to arrive at the same conclusion as that to which the recording Magistrate has come as regards the voluntary nature of the confession. Without supplying these data or materials it is impossible to form any estimate as to the voluntary nature of a confession.

10. These observations were accepted by and met the concurrence and approval of the Bench of this Court. In view of the provisions of the sections of the Code of Criminal Procedure, particularly those contained in Section 533, Criminal P.C., it is difficult to say that the omission to record questions and answers is a fatal defect, and that it is only by recording such questions and answers that a confession can furnish data which enable the Court to arrive at the conclusion as to the voluntary nature of the confession. It is equally difficult to hold that when supplying these data or materials it would always be 'impossible' for the trial Court to form an estimate as to the voluntary nature of such confession. The defect no doubt is a gross irregularity and it may in certain special cases injure the accused in his defence on the merits, but barring such cases such a defect is completely cured by the provisions of Section 533, Criminal P.C. It is open to a Court to come to a

conclusion from the internal evidence furnished by the statement itself or from other evidence that the statement had been voluntarily made, and the mere fact that there was an omission to record questions and answers would not debar the Court from coming to that conclusion. Nor can it be said that without these data or materials it is 'impossible' for a Court to arrive at a conclusion that the confession had been made voluntarily. Where, of course, the defect is not merely one of recording it in due form and in accordance with law, but there is a defect that the statement was not duly made at all, the position would be different. It need hardly be added that the duty of the Court to see that the confession had been made voluntarily is imperative: *Nazir v. Emperor* : AIR1933 All31 .

11. Coming to the four questions put to us, the first question raises two subsidiary questions: (1) whether any weight at all ought to be given to a confession where the Magistrate has not put the necessary preliminary questions and (2) if any, what weight. As regards the first part of it the question seems to be whether a confession, where the Magistrate has not recorded the necessary preliminary question is at all admissible in evidence. The answer to that question must be in the affirmative provided the omission has not injured the accused in his defence on the merits. If there is no such apprehension or fear, then the defect is not a fatal defect, and the confession is admissible.

12. When the question has not been recorded we have decided that the irregularity can be cured under Section 533, Criminal P.C. So far as the Evidence Act is concerned, it appears that the failure to; put questions does not make the confession irrelevant. It is only necessary that the Magistrate (Court) should not believe that the confession was caused by any inducement (Section 24). Section 533, Criminal P.C., does not help, for it only enables the Court to take evidence to prove that the confession was 'duly made,' i.e., in accordance with Sections 164 and 364, Criminal P.C. But if the questions were not put at all, the confession was not 'duly made.' But it is not necessarily irrelevant. The Court may satisfy itself that there was no inducement, etc., and so fulfil the requirements of Section 24, Evidence Act. It may have to take evidence to satisfy itself on this point. As regards the question what weight should be attached to it, that is a matter which is for the Bench disposing of the case to decide, for the question of weight varies

with the circumstances and it is the cumulative effect of the entire evidence in the case which is to be taken into account. It is impossible to lay down any hard and fast rule as to what amount of weight should be attached to such a confession in case it is legally admissible in evidence.

13. Similarly, as regards the second question the amount of weight to be attached to a confession where the accused had never been out of police custody would depend on the circumstances of each particular case. Where there is reason to apprehend that the influence of the police is still continuing on the mind of the accused the confession would have little weight. Where there is no such apprehension it may have greater weight. But it is impossible to lay down any definite rule as to the amount of weight that can be attached to such confession. All that can be laid down is that such a confession is legally admissible in evidence. As regards the third question, certified copies of confessions by accused persons would be admissible under Section 74, Evidence Act, as evidence to prove the act of the Magistrate recording the confession. Where there are no irregularities, and the statement was taken in accordance with law, then under Section 80, Evidence Act, there would be a further presumption that the circumstances under which it was stated to have been taken were true, but there would be no such presumption if the statement had not been taken in accordance with law. The copies would not be sufficient to prove the identity of the accused. This is our answer to the third question.

14. As regards the fourth question, a confession which bore neither the signature of the Magistrate nor of the accused, would be one not in strict accordance with the provisions of Section 364, Criminal P.C. But the fact that it had been duly made by the accused can be proved by further evidence under Section 533, Criminal P.C., and except perhaps in cases which are not easily conceivable, the accused is not likely to be injured in his defence on the merits on account of such an omission. Such a confession would therefore be certainly admissible in evidence. But the question of the value to be attached to this question as corroboration of other evidence is a question of weight of evidence and the degree of its reliability, and that must depend on the circumstances of each case. It is impossible to lay down any definite rule. These are our answers to the four

questions.

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