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Court : Allahabad

Decided On : May-13-1958

Reported in : AIR1959All518; 1959CriLJ1134

Judge : R.N. Gurtu and ;A.N. Mulla, JJ.

Acts : Evidence Act, 1872 - Sections 17 and 24; Code of Criminal Procedure (CrPC) , 1898 - Sections 164, 364 and 533

Appeal No. : Criminal Appeal No. 484 of 1957 (Capital Sentence Ref. No. 30 of 1957)

Appellant : Ram Singh

Respondent : State

Advocate for Def. : Shankar Sahai, Adv.

Advocate for Pet/Ap. : R.A. Misra and ;S.B. Mathur, Advs.

Disposition : Appeal allowed

Judgement :

A.N. Mulla, J.

1. Appellant Ram Singh has been convicted under Section 302 I. P. Code by the Additional Sessions Judge, Unnao, and sentenced to death. Five other accused

persons, namely Kirpa Shanker alias Lala Misra, Krishna Kumar alias Chhuttan, Mahesh Prasad, Lallu and Brahma Kishore alias Phunnar, were also prosecuted in this case but they were acquitted. The charge against the appellant and the other accused persons was that they committed a riot with deadly weapons, such as pistols and guns, on the night between the 14th and 15th July, 1956, near the culvert of village Bighapur and in pursuance of the common object of the unlawful assembly they committed the murder of Shankeri Brahmin by shooting him dead. The learned Judge has made the usual reference for the confirmation of the death sentence awarded to the appellant.

1A. The prosecution story is that Shankeri deceased resided in village Ghatampur, Police Station Bara Sagwar, district Unnao, and ostensibly he carried on the profession of a tailor. Shankeri's wife P. W. 4 Shrimti Ramkali lived with him and his father P. W. 13 Kedar Nath Pande also resided in a nearby house. The deceased and the accused persons in this case were members of a gang of opium and Ganja smugglers and they occasionally looted motor trucks and lorries in which these articles were transported. For this purpose they used to disguise themselves in police uniforms and thus carried out their crimes.

The leader of this gang was Mahesh Prasad, who was also a resident of village Ghatampur, but who ostensibly carried out some business.in mohalla Hatia Bazar in Kanpur town. Ram Singh appellant was a resident of village Hathigaon, police station Maharajpur, district Kanpur, but he resided at Bighapur in Unnao district where he sat on the shop of Brahma Kishore alias Phunnar accused. The deceased and the accused persons were on intimate terms and they used to meet frequently. Shankeri deceased possessed a gun and he also ran a flour mill in partnership with Mahesh Prasad.

This flour mill was at Ghatampur, but for some reasons it had closed down since about two years before the incident. In the course of their transactions Shankeri deceased had become indebted to Mahesh Prasad upto Rs. 500/- and Mahesh Prasad frequently demanded his money. Mahesh Prasad suggested to Shankeri that he should sell his gun and pay up the amount. He even suggested that a false report about the theft of the gun might be lodged and some money might be paid

to Sri Sultan Ahmed, station officer, Bara Sagwar, who would not investigate the matter. It may be mentioned that according to the prosecution case Sri Sultan Ahmed was in league with the gang of Mahesh Prasad and he used to receive frequent payments from the members of this gang.

There was a rival gang led by Ram Kumar and his brother Lallan and the relations between the two gangs were highly strained. Shankeri deceased instead of following the advice given by Mahesh Prasad contacted Ram Kumar, who gave him some money and Shankeri paid back the debt of Mahesh Prasad. This created a suspicion in the mind of Mahesh Prasad that Shankeri had now joined Ram. Kumar's gang and was thus a source of potential danger.

It was, therefore, decided by Mahesh Prasad and the other members of bis group to kill Shankeri. Some 10 or 11 days before the incident the appellant and Phunnar had some talk with Shankeri in which some threats were extended. The deceased retaliated that he would expose Mahesh Prasad and Phunnar in the matter of a bomb explosion case. It so appears that some time before the incident Ram Kumar and his brother Lallan were injured in a bomb explosion. This perhaps made Mahesh Prasad find his companions all the more determined to kill Shankeri.

2. According to the prosecution the conspirators met on the afternoon of 13-7-1956, in village Bighapur at a place known as Phunnar's Phatak. It was decided to kill Shankeri and so the next day i.e. on 14-7-1956, the appellant and Phunnar came to Shankeri's house at about midday and took him with them to Pandepur for making some purchases. Shanked deceased came back to his house at about 5 in the evening and shortly afterwards the appellant and Phunnar again came to his house and told Shrimati Ramkali, the wife of the deceased, that Shankeri was going out to dine with them.

Shrimati Ramkali saw that the deceased took out his Khaki clothes, his gun and cartridges, his torch and some other personal articles and then went on a bicycle with the appellant and Phunnar. One Jagdish barber (P.W.5), who was a servant of the deceased, accompanied the party upto Hardewan temple winch was at a short distance, but he was sent back from there by the deceased. The way

Shankeri had departed did not excite any suspicion in the mind of Shrimati Ramkali because Shankeri occasionally went out in this manner. When, however, Shankeri did not return home, Shrimati Ram-kali felt a little anxious and informed her father-in-law Kedar Nath about it, but her suspicions were quietened by Kedar Nath who said that Shankeri would come back next morning. Next morning i.e. on 15-7-1956, at about 8 in the morning Manohar, a servant of Phunnar came and informed Shrimati Ramkali that her husband had been shot dead and his body was lying near the culvert of village Bighapur.

This culvert was about two miles away from village Ghatampur. Shrimati Ramkali along with her father P. W, 28 Beni Madho and some others rushed upto the culvert and found the dead body of Shankeri lying just below the culvert with three pistol shots. Phimnar's brother Dhunnar and Kirpa Shanker alias Lala Misra were present near the corpse and they told Shrimati Ramkali not to say anything till the arrival of Mahesh Prasad and the police.

It was in these circumstances that no information was sent to police station Barasagwar which was about eight miles away. At about 5 in the evening Sri Sultan Ahmad came with Mahesh Prasad and it is alleged that it was at this time that a report was dressed up by Sri Sultan Ahmad and Ganga Krishna (P. W. 37), the brother of the deceased, was given the role of dictating this report. P. W. 16 Ram Narain who was present at the spot was sent to police station Bara Sagwar with this report and it was lodged on the night of the 15th of July, 1956, but the time of this report was not correctly recorded and on the instructions of Sri Sultan Ahmad it was ante-timed. It purported to have been lodged at 9.15 A. M. on 15-7-1936.

3. The contents of the report were also mutilated by Sri Sultan Ahmad because he was out to help Mahesh Prasad and his companions and so no accusation was levelled in this report against any known person.

4. The case was first investigated by Sri Sultan Ahmad who did not even take down the statements of the prosecution witnesses in a proper manner. Kedar Nath, the father of Shankeri deceased, was extremely dissatisfied with the way Sri Sultan Ahmad was investigating this case and so he submitted several

applications to the district authorities against the police of Bara Sagwar. On receipt of these complaints, the district authorities ordered an inquiry against Sri Sultan Ahmad and Sri Mathura Singh, Deputy Superintendent of Police (Complaints) (P. W. 14) was entrusted with this inquiry. Sri Mathura Singh was also authorized to investigate the murder case.

5. Meanwhile Sri Sultan Ahmad had completed his investigation and had submitted a charge-sheet against Ram Singh appellant alone on 26-8-1956, under Sections 302/394 I. P. Code. When the complaints were received Sri Sultan Ahmad was ordered to make further enquiries and finally the appellant along with the other five accused persons were prosecuted in this case. A charge of conspiracy under Section 120-B I. P. Code was also levelled against them. (6) Ram Singh appellant had surrendered in court on 7-8-1956, and two days later he was released on bail by the Sessions Judge. We have mentioned above that Sri Mathura Singh was conducting an inquiry under the provisions of the Prevention of Corruption Act against Sri Sultan Ahmed. In the course of this inquiry Sri Mathura Singh examined some witnesses and he wanted to examine Ram Singh also. On 22-10-1956, Sri Mathura Singh was proceeding to Kanpur in search of Ram Singh and Mahesh Prasad, when he saw two men coming to Unnao side on a motor cycle.

These two persons acted in a suspicious manner and tried to escape and so Sri Mathura Singh pursued them on the jeep. When he overtook them, he found that one of them was Mahesh Prasad, whom he knew slightly from before. Mahesh Prasad informed Sri Mathura Singh that his companion was Ram Singh. It is not disclosed as to what conversation took place between Sri Mathura Singh and Ram Singh or Mahesh Prasad when they met on the road. We are only told hat after this chance meeting, Ram Singh himself visited the bungalow of Sri Mathura Singh at about 4 P. M. the same day. He not only came to the bungalow of Sri Mathura. Singh himself but, if the prosecution case is to be believed, he repeatedly came to his bungalow during 4 and 6 P. M. Sri Mathura Singh was so unconcerned about these visits that he told Ram Singh that he was busy with some work and he would come back to his bungalow at 12 in the night.

On one side Sri Mathura Singh claims that he wanted to interrogate Ram Singh and on the other side he was not willing to examine Ram Singh even when he himself ordered to be interrogated. When Sri Mathura Singh came back late at night, he found that Ram Singh was sleeping under a thatch at his house. No inquiries were made from Ram Singh even at night. Next morning at about 9 or 9-30 A. M. Sri Mathura Singh interrogated Ram Singh.

It would thus appear that Ram Singh on his own insisted that he should be examined. Ram Singh appears to have given a long statemcnt for though his interrogation started at about 9 in the morning, it went on uptil noon. After the statement of Ram Singh was recorded, Sri Mathura Singh immediately contacted the Additional District Magistrate (Judicial), Unnao between 12 and 1 P.M. and asked him to appoint some judicial officer to record the statement of Ram Singh.

7. If Sri Mathura Singh is to he believed Ram Singh was never taken in custody and his movements were not restricted. The Additional District Magistrate (Judicial) on the application of Sri Mathura Singh directed Sri N. B. Singh (P. W. 36), who was a first class Magistrate at Unnao, to record the statement of Ram Singh. It was an extremely curious coincidence that Sri N. B. Singh was the next door neighbour of Sri Mathura Singh and only five yards divided their houses. Sri Mathura Singh then produced Ram Singh before Sri N. B. Singh when the Magistrate had come to take his lunch. Sri N. B. Singh. did not want to examine Ram Singh at his bungalow, but it was Ram Singh himself who insisted that his statement should be recorded at the bungalow as he was afaraid that Mahesh Prasad would kill him if he came to know about it.

Sri Mathura Singh after placing Ram Singh before the Magistrate had left and according to the prosecution he was nowhere in the picture after that time. The Magistrate first took his lunch and then took Ram Singh to his drawing room where Ram Singh dictated his statement and the Magistrate recorded it. It was a long statement consisting of no less than 8 foolscap pages written in Hindi, but according to the Magistrate he performed this feat Between 25 minutes to half an hour. No caution was administered to Ram Singh before recording his statement.

No questions were put to him at all and the Magistrate straightway started writing bis statement. After the statement was recorded Ram Singh was made to sign every page of the recorded statement and then this statement was forwarded to the District Magistrate Unnao. Ram Singh was not taken in custody and after making this statement it seems that he went away and later on the same evening he was arrested by P. W. 21 Sri C. L. Kulshareshtha, who was an Inspector of the C. I. D. (Investigation Branch), in connection with a crime under Section 307 I. P. Code and Section 5 of the Indian Explosives Act.

It may be mentioned that this case related to the Bomb explosion which had occurred on 30-4-1956, in village Behtar, police station Achalganj, district Unnao, in which Ram Kumar and Lallan were injured. It again appears strange that after giving his statement to Sri N. B, Singh, Ram Singh seems to have come to the office of the Deputy Superintendent of Police (Complaints), Unnao, and it was here that Sri C. L. Kulshareshtha arrested him. After his arrest Ram Singh was again questioned by Sri Kulshareshtha and a second confessional statement relating to the bomb incident was recorded by this officer from 7 to 8 P. M.

8. It would thus appear that on 23-10-1956, Ram Singh was doing nothing else, but giving statements to the police officers and the Magistrate. From 9 A.M. to 12 noon he gave his statement to Sri Mathura Singh. Then after lunch time he made his confessional statement before Sri N. B. Singh. Then he himself came to the office of Sri Mathura Singh where he was arrested by Sri Kulshareshtha and then again made a long confessional statement relating to another crime which went on for about an hour. After this Ram Singh was arrested and sent to jail.

9. It may be mentioned here that the appellant denied making the statement ascribed to him before Sri. N. B. Singh. He has contended that he was coerced and also tempted to make this statement. He also contended that he was subjected to third degree methods before his statement was recorded and actually it was P. W. 14 Sri Mathura Singh who bad put a statement in his mouth which was subsequently recorded by the Magistrate and the appellant himself only nodded his head at occasions. He also contended that he was taken in custody and the entire prosecution story that he voluntarily visited the bungalow of Sri

Mathura Singh was absolutely false. We will make our comments on the contentions advanced by the appellant at another stage.

10. When the case came up in court, a large number of witnesses were examined by the prosecution. The following facts were sought to be proved by means of these witnesses:

1. That a conspiracy was hatched a day before the incident at Phunnar's phatak between the appellant and the other accused persons in which it was decided to kill Shankeri deceased,

2. The appellant and Phunnar had come to the house of Shankeri deceased and taken him away with them on the pretext that the deceased would dine with them that night.

3. The deceased was seen in the company of the appellant and the other accused at the scene of the crime by a large number of witnesses. They included the driver and the cleaner of a Motor Truck No. USU 288 which was proceeding from Lalganj to Kanpur at the relevant time. P. W. 24 RAM Lal driver and P. W. 15 Prem Sagar cleaner had seen the conspirators near the Bighapur culvert and these conspirators had tried to stop the truck, but they did not succeed.

4. Police constables were examined to prove that Truck No. USU 286 crossed the Ganga Bridge at the relevant time.

11. Every one of the items mentioned above except No. 2 was found to be unbelievable by the. trial court. We need not cover the same ground again, but we would like to observe that the trial court has been a little charitable in its comments against the witnesses who had come to depose about these facts. The evidence in respect of these facts, in our opinion, is not only unbelievable, but every one of them is a fabricated link and there can belittle doubt that it is the brain of Sri Mathura Singh. which is behind all this evidence. Incidentally we may observe that when complaints were received against Sri Sultan Ahmad, the inquiry was entrusted to Sri Mathura Singh.

On the conclusions that we have reached, we have no doubt that Sri Mathura Singh has fabricated every bit of evidence in this case. Who will now conduct the inquiry against Sri Mathura Singh and it an officer is found to conduct an inquiry against Sri Mathura Singh, what is the guarantee that he will not be an improvement even upon Sri Mathura Singh? The police force seems to consist of so many undefendable officers that it is almost impossible to investigate their misdeeds. Where the twigs are found to be decayed one hopes that the branches are safe but where the branches have also become rotten one begins to doubt that even the trunk is sound. The rule of law cannot be maintained so long as the so-called guardians of 'law and order' are mostly composed of this class.

Unless the State thinks that to fabricate a false case in the interests of the prosecution is excusable, there seems to be no reason why Sri Mathura Singh should not be put on the mat and made to explain how he explains the lictitious evidence which he produced in this case. The way Sri Mathura Singh unlawfully arrested Ram Singh who was out on bail and then coerced him to make a confession is too apparent to be commented upon. The type of story given by Sri Mathura Singh cannot convince even a school boy much less a court of law.

It is impossible to accept that Ram Singh was not taken in custody and he was willingly and voluntarily going to the bungalow of Sri Mathura Singh. again and again as if he had no other desire except to put a rope round his neck, There is not the slightest doubt in our minds that Ram Singh was taken in custody by Sri Mathura Singh and then after he was subjected to the peculiar ways of interrogation which officers like Sri Mathura Singh know so well he was presented in a chastened mood before the Magistrate and the Magistrate who by his conduct showed that he was no better than a police officer cooperated with Sri Mathura Singh in producing the desired result.

12. The conviction of the appellant rests almost entirely on the statement made by him before Sri N. B. Singh on 23-10-1956. The trial court summing up the evidence against the appellant observed:

'There is no direct evidence to show that while Shankeri was changing into this disguise he was shot dead by the five accused and the only evidence is in Ram

Singh's statement Ext. P-2, in which he stated that he was one of the persons who shot Shankeri with a country made pistol.- The medical evidence clearly shows that the deceased received several wounds with a large sized gun or pistol fired thrice. This evidence is further corroborated by the statement made by Ram Singh in Ext. P-2. This document has been held to be admissible and clearly implicates Ram Singh in proving that he was one of the murderers. ..... The evidence against Ram Singh proves that he took away Shankeri and the deceased was last seen alive with Ram Singh and Phunnar. This evidence read with the state-merit of Ram Singh contained in Ext. P-2 clearly established that he was one of the murderers.'

13. It would be seen from the extract quoted above that there are only two pieces of evidence on the basis of which the trial court has convicted the appellant. The first piece of evidence is the statement of Shrimati Ramkali (P. W. 4) to the effect that the appellant and Phunnar had taken thedeceased with them on the night of the incident andthe second piece of evidence is the confessional statement of the appellant which the trial court has treated as an admission and not as a confession. It is obvious that if this admission or confession is ignored, there is no satisfactory evidence left against the appellant to connect him with the crime.

14. We will take the statement of Shrimati Bamkali first. Even if it is accepted, it is not sufficient by itself to prove the guilt of the appellant. Shrimati Ramkali made a similar statement against Phunnar accused and the trial court did not convict Phunnar on her statement alone. We are also of the opinion that the statement of Shrimali Ramkali on this point is not believable. It was not mentioned in the first information report that Phunnar and the appellant had taken the deceased with them that night. Even if it is accepted that this fact was not mentioned in the first information report because this document was dressed up by Sri Sultan Ahmad, who wanted to save Phunnar, we fail to undersand why this fact was not mentioned in any of the three complaints lodged by Kedar Nath Pande (P. W. 13), which he addressed to the district authorities.

The first complaint was sent on the 28th of July, 1956, to the S. P., Unnao, and the other two complaints were addressed, one to the S. P. of Unnao and the other to the S. P. In-charge C. I. D., I. B. U. P., Lucknow. These two complaints were sent

in October, 1956. In these complaints the name of the appellant was mentioned along with the other accused persons, but the particular role that he took the deceased away from his house that night was not given to him. The omission in these complaints makes it clear to us that this part of the prosecution case is an embellishment and has been introduced at a very late stage.

We, therefore, cannot believe Shrimati Ramkali when she states that it was the appellant and Phunnar accused who took away the deceased from the house that night. Shrimati Ramkali also appears to us to be an extremely untrustworthy witness and no reliance can be placed upon her words. This piece of evidence, therefore, has no evidentiary value and it must be discarded.

15. We now come to the second piece of evidence, namely the statement of the appellant recorded by Sri. N. B. Singh, Additional S. D. M., Unnao, on the 23rd of October, 1956. This statement is Ex. P. 2. We would incorporate an extract from this statement. It runs as follows:

'Shankeri left his gun standing by the tree and began to wear his uniform. When he was wearing pant Phunnar shot one bullet at Shankeri with his gun. I, Chhuttan and Lallu had got Addha i. e., country made pistol and bullet of 12 bore fits in them. Then I and Chhuttan fired one bullet each at Shankeri with our Addhas Shankeri fell down there and expired'.

16. A mere reading of the extract given above makes it clear that it was not only a confessional statement but it was a plenary confession which directly admitted guilt. It is, therefore, suprising that the trial court treated it as an admission and not as a eonfession. The word 'confession' has not been defined in the Evidence Act. Stephen in his Digest of the Law of Evidence defines it asfollows:

'A confession is an admission made at any time by a person charged with crime stating or suggesting the inference that he committed the crime.'

This definition was acceptable to Mahmood J., in Queen-Empress v. Babu Lal, ILR 6 All 509. Straight J., however, disagreed with this view in Queen-Empress v. Jagrup, ILR 7 All. 646. The view of Straight J. was followed in a majority of later

decisions and it was approved by the Privy Council. The Privy Council in Pakala Narayan Swami v. Emperor , made the following observations at page 52:

'.....it may be useful to state that in their lordships' view no statement that contains' self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact even a conclusively incriminating tact is not of itself a confession, e. g, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession.

Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's 'Digest of the Law of Evidence' which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to 'construe confession as a statement by an accused suggesting the inference that he committed' the crime.'

17. It would be seen from the observations of their Lordships of the Privy Council that the language used in the definition given by Stepnen is too wide and it includes non-plenary confessions also as confessions. In order to distinguish between a confession and an admission a simple test can be applied. It the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If on the other hand the statement falls short of it, it amounts to an 'admission.' Where there is a direct admission of guilt, it is not possible to treat the statement as an admission.

The statement of the appellant quoted above clearly amounts to a confession because he admitted that he fired a pistol at the deceased which hit him and which resulted in his death. It is, therefore, a plenary confession. There is no exculpatory part in this statement. According to Wigmore, a confession is an acknowledgment in express words by the accused in a criminal case, of the truth of the guilty act charged or some essential part of it. There are certain types of inculpatory statements which do not go to this extent.

An acknowledgment of a subordinate fact not directly involving guilt would be such a statement. So long as the inculpatory statement falls short of being an admission of guilt, it can be treated as an admission. There is distinction between making a statement giving rise to an inference of guilt and a statement which directly admits guilt. Where the admission extends only to the acceptance of a circumstance from which an inference of guilt can be drawn, but which is not conclusive to prove the guilt, it can be treated as an admission.

In State v. Novak, 109 Ia. 717 : 79 N. W. 465 (Am) (cited in 'Shankar On Evidence' Seventh Edition p. 216) Granger J., observed:

'Inaccurate use of such words as 'confessions' 'admissions' and 'declarations' has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term 'confessions'. A confession is a voluntary admission or declaration by a person of his agency or participation in a crime.'

18. In another American case State v. Guie, 56 Mont. 485, (cited in 'Shankar on Evidence' seventh Edition p. 217) Holloway J., observed:

'The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but, based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and by the very force of the definition, excludes an admission which of itself as applied in criminal law, is a

statement by the accused, direct or implied, of facts pertinent to the issue, and tending. in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorise a conviction.'

19. The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission. It is, therefore, obvious that the trial court went astray when it treated the statement of the appellant, Ex. P. 2, as an admission and not as a confession. It labelled it as an 'admission' but used it as a 'confession.'

20. One of the reasons which perhaps led the trial court to treat this statement as an admission was that this statement of the appellant was not recorded in the case against him, but in an inquiry against Sri Sultan Ahmad. Firstly the device adopted by Sri Mathura Singh to camouflage this confession as an 'admission' should not have deceived the trial court.

The character of the statement of an accused person is not affected by the fact that it is made in the case against himself or against someone else. It is the contents of the statement which determine its species and by merely giving the lable of 'admission' to a 'confession' it does not change its essential character and does not cease to be a 'confession'. It remains a 'confession' according to the requirements of law. As observed by the learned Judges in the State v. Kanbi Bhagwan Purshottam AIR 1955NUC (Sau) 5765:

'In order to determine whether a statement made by an accused to a police officer is merely an admission or confession the test is not whether the police officer was investigating some other offences and not the particular offence with which the accused is charged. If an inference of criminality of the person making the statement is to be gathered from the statement itself, and the prosecution does want the court t6 draw an inference of the criminality in the sense that the accused thereby admitted having received stolen property, then the statement does amount to a confession and is hit by section 25 and is not admissible in evidence.'

It was open to the Magistrate who was recording the statement of the appellant to warn the appellant at the stage when he round that he was making a confessional statement. It he had administered necessary caution to him and fulfilled the requirements of Section 164 Cr. P. C. at that stage, the statement of the appellant could have been used against him.

The Magistrate, however, administered no such caution and did not observe the procedure laid down in Section 164 Cr. P. C. He also gave him no time to think over the matter and the unholy haste with which he recorded the statement speaks more for his zeal than for his Judicial outlook. The statement of the appellant, therefore, becomes inadmissible under the law.

21. There was some conflict of opinion between the Indian Courts on the point whether the non-observance of the provisions of Section 164 Cr. P. C. was suificient to throw out a confessional statement made by an accused. There were some decisions to the effect that this defect was cured by Section 533 Cr. P. C. and its provisions were very extensively used by some of the courts. This controversy was set at rest by the Privy Council in Nazir Ahmad v. King Emperor . Their Lordships after referring to the conflict of opinion made the following observations:

'Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. .....

On the matter of construction Sections 164 and 364 must be looked at and construed together and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of Section 164 is to allow evidence to be put in a form in which it can prove itself under Sections 74 and 80, Evidence Act Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be

observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle.

Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what ho was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of Section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.'

Referring to the conduct of the Magistrate in recording such confessions their Lordships went on to observe:

'..... it is for obvious reasons most undesirable that the Magistrates and Judges should be in the position of witnesses in so far as it can be avoided. Sometimes it cannot be avoided, as under Section 533 but where matter can be made of record and therefore admissible as such, there are the strongest reasons of policy for supposing that the legislature designed that it should be made available in that form and no other.

In their Lordships' view it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under Section 162 of the Code; and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records under Section 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever.'

22. The observations of their Lordships make it perfectly clear that the provisions of Sections 164 and 364, Cr. P. C., are to be strictly followed by the Magistrates

and unless they follow the provisions of these two sections, the statements recorded by them cannot be admitted in evidence and their own evidence in respect of the statements which they recorded also becomes inadmissible. It is only when the formalities prescribed are observed that the statement of the Magistrate and the record prepared by him can be used in evidence.

The above decision of the Privy Council has been widely followed by all the High Courts and it has also been approved by the Supreme Court in Rao Shiv Bahadur Singh v. State of Vindh Pra. : 1954 CriLJ910 . Their Lordships of the Supreme Court observed at page 333:

'It was urged on behalf of the respondent that this statement was not a confessional statement and was therefore not hit by Section 164 and Shanti Lal Ahuja, the Additional District Magistrate, could therefore depose to such statement even though the same was not recorded as required by the provisions of Section 164 of the Criminal Procedure Code. There is authority however for the proposition that once the investigation had started any non-confessional statement made by the accused also required to be recorded in the manner indicated in that section and if no such record had been made by the Magistrate, the Magistrate would not be competent to give oral evidence of such statement having been made by the accused.

See and Legal Remembrancer, Bengal v. Lalit Mohan Singh Roy AIR 1922 Cal 342, followed in Abdul Rahim v. Emperor : AIR1925 Cal926 and Kara Mansukh v. Emperor AIR 1937 Nag 254. The statement made by the Appellant No. 1 therefore to Shanti Lal Ahuja, the Additional District Magistrate not having been recorded by him in accordance with the provision of Section 164 was inadmissible in evidence and could not be proved orally by him.'

23. The other decisions of the various High Courts which have followed this view are:

State v. Ram Autar : AIR1955 All138 , Mahfuz All v. State : AIR1953 All110 , Abdul Rahim v. Emperor, AIR 1945 Lah 105, Emperor v. Kommoju Brahman AIR 1940 Pat 163, In re Thothan AIR 1956 Mad 425, and Babbu v. State : AIR1954 All633 .

24. As Sri N. B. Singh did not follow the procedure mentioned in Section 164 Cr. P. C. the statement of the appellant cannot be used against him and Sri N. B. Singh cannot be permitted to depose on oath that the appellant made such a confession.

25. There are certain other major defects also which made this statement inadmissible in evidence. It has been mentioned by us above that the charge sheet against the appellant was submitted on 26-8-1956 and he was released on bail even earlier on 9-8-1956. The confession was recorded on the 23rd of October, 1956. It is, therefore, clear that it was recored after the charge sheet had been submitted.

While it is open to an accused person to con-less at any stage of the inquiry or trial, but a record of his confession under Section 164 Cr. P. C. cannot be made after a charge sheet has been submitted. If such a record has been made it cannot be taken in. evidence as a confession under Section 164 Cr. P. C. can be recorded only during the investigation of a crime and not subsequent to the closing of the investigation and the submission of the charge, sheet. This was the view expressed in : AIR1955 All138 .

26. This decision was again followed by another Divisional Bench of our High Court in Bachchan Lal v. The State : AIR1957 All184 . On this ground also the statement of the appellant is not admissible in evidence.

27. We are also of the opinion that the statement Ex. P. 2 is not a voluntary statement. We have no doubt in our minds that Sri Mathura Singh unlawfully took the appellant in custody and after subjecting him to coercion he succeeded in getting this statement out of him. We are also of the opinion that the appellant was in police custody when he made his statement before the Magistrate. It is inconceivable that the appellant himself voluntarily went to Sri Mathura Singh and willingly passed a night at his house and even after his statement was recorded he again went to the office of Sri Mathura Singh where he was arrested by Sri Kulshareshtha,

There is no doubt in our minds that since the 22nd of October, 1956, Sri Mathura Singh had taken the appellant in custody and he was using all sorts of methods to extort a coniessional statement from him. The crucial test is whether at the time when an accused makes a confession, he is a free man or his movements are controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession.

The immediate presence of a policeman or police officer is not necessary to prove that the accused was in the custody of the police. Even temporary absence of a policeman or a police officer would not terminate his custody and the accused shall be deemed to he in the custody of the police even in such circumstances. Two cases in point are 'Emperor v. Mt. Jagia' AIR 1938 Pat 308 and Ram Bharose Narbada Prasad v. Emperor AIR 1944 Nag 105.

In our view when the appellant was presented before Sri N. B. Singh, he was still in the custody of Sri Mathura Singh and his movements were not free. No statement made by the appellant under these circumstances can be held to be voluntary. We feel no hesitation in accepting the statement of the appellant in preference to the statement of Sri Mathura Singh and Sri N. B. Singh on this point.

Sri N. B. Singh by his conduct indicated that he was only functioning as a stooge of Sri Mathura Singh. By acting like this he has invited this comment and it is really a very sad state of affairs that the word of a Magistrate cannot be preferred over the word of an accused. Sri N. B. Singh also acted improperly when he recorded the statement of the appellant at his house. The explanation given by him is entirely unacceptable to us. It was observed by Jagannadhadas J., in Khalli Behera v. The State : AIR1951 Ori78 :

'I wish, however, to add that I consfder it quite improper on the part of the Magistrate to have recorded the confessional statement of the accused under Section 164 at his house without assigning any reason.'

The reason given by the Magistrate in this case are quite unbelievable and we cannot help inferring that he was acting not as a judicial officer, but in concert with Sri Mathura Singh.

28. That the confession was brought about by coercion, and unfair means can also be gathered from the general diary report Ex. P. 12 which was recorded on the 23rd of October, 1956, when the appellant was taken to jail. It is mentioned in this report that the appellant refused to take food when he was admitted to jail. This indicates that the appellant could not have voluntarily made these statements. He was suffering from a mental depression which made him refuse the food which was offerfed to him. This mental depression could not have arisen if the appellant himself voluntarily approached Sri Mathura Singh and made his confession. It seems to indicate that the appellant realized that he has been placed in a terrible position and this was causing depression. We are, therefore, of the opinion that the statement made by the appellant was not even voluntary and therefore, it has no evidentiary value.

29. For the reasons given by us above we have come to the conclusion that Ex. P2, the alleged admission of the appellant, is not admissible in evidence against him and, therefore must be discarded from consideration. It is a confession which was not recorded according to the provisions of law and, therefore, Sri N, B. Singh, the Magistrate, cannot be permitted to depose about it. It was also a statement which was extorted by unfair means.

Lastly we may observe that even if Ex. P 2 had been admissible in evidence and free from other infirmities we would not have departed from the well established rule of prudence namely that an accused should not be convicted on the basis of a retracted confusion alone, unless there is some corroborative evidence. There is nothing on the record to corroborate Ex. P2, except a mass of false and fabricated evidence.

30. As a result there is no evidence left againstthe appellant. We, therefore, set aside the orderof conviction passed against the appellant andacquit him. We have already rejected the referencemade by the Sessions Judge and passed an orderdirecting that the appellant should be released fromjail, unless wanted in connection with some othercase.

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