

Sidheshwar Nath Vs. Emperor

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Court : Allahabad

Decided On : Dec-11-1933

Reported in : AIR1934All351; 152Ind.Cas.174

Appellant : Sidheshwar Nath

Respondent : Emperor

Judgement :

King, J.

1. This is an application in revision against the appellate order of the learned Sessions Judge of Agra, upholding the conviction of Sidheshwar Nath under Section 394, Penal Code. The case for the prosecution was that on 4th January 1933, at about 5 p.m., Rup Narain, who is a postal overseer, was taking a bag containing cash, amounting to over Rs. 4,000 in value, from the branch post office to the head office. When he had reached a gate of the Thomason Hospital he was assaulted by a man who seized the bag and hit Rup Narain over the head with some weapon and attempted to snatch away the bag. Rup Narain resisted vigorously and cried for help whereupon some bystanders came to his assistance and the robber ran away. He was chased, but managed to make good his escape by climbing over a wall and entered the Kalibari temple. Rup Narain made a report of the occurrence the same evening at 7 p.m. He stated that he did not know the name of his assailant, but he gave a description of him as being of wheat

complexion, long face, average height, moustaches clipped, wearing a Gandhi cap, a white kurta and a white dhoti and about 20 to 25 years of age. The accused was arrested the same night at about 1 a.m. It appears that his name was mentioned to the police by P.C. Bhattacharya, one of the prosecution witnesses, who had not witnessed the actual assault, but had been in the Kalibari temple through which the assailant escaped. The fact of the attempted robbery is not disputed. It is the case for the defence that the accused was not the robber and has been implicated by mistake.

2. The evidence upon which the accused has been convicted consists of the identification made by Rup Narain in jail, and of Rup Narain's evidence in Court, supported by a confessional statement made by the accused to Mr. Evans the City Magistrate. The rest of the prosecution evidence does not implicate the accused, but is distinctly in his favour. The eye-witnesses, namely Daniel Liaqat Ali, Yakub Ali and Bhattacharya all deposed definitely that the accused was not the assailant. They were declared by the prosecution to be hostile witnesses and have been cross-examined on behalf of the prosecution, but their evidence is distinctly in favour of the accused and tends to show that the actual robber was some person other s then the accused. Liaqat Ali and Yakub Ali were sent to identify the accused in jail and they did pick out the accused, but they have explained that they did not pick him out as being the robber but as being Sidheshwar Nath whom they had been asked by the Tahsildar Magistrate to identify. However this may be, they are clear on the point that Sidheshwar Nath is not the culprit and that they only picked him out in jail because they were asked to identify Sidheshwar Nath and they did so as they knew him from before. The accused made a confessional statement to Canon Holland, the principal of the College, but his evidence was not recorded, as the Magistrate ruled it out as inadmissible because the confession was made to Canon Holland while the accused was in police custody, and when no Magistrate was present. The principal contention of the learned advocate for the applicant is that the unrecorded confession made to Mr. Evans could not be proved by the oral testimony of Mr. Evans.

3. It appears that Mr. Evans, who was the City Magistrate of Agra, was asked by the police by telephone to come to the kotwali for the purpose of conducting

identification proceedings in connexion with the attempted robbery on Rup Narain. He came to the kotwali at about 9 a.m., and on arrival came to know that no identification proceedings would take place, but the accused was brought to him in a room at the kotwali for the purpose of having his confession recorded. The accused was at first very doubtful about the use which might subsequently be made of his statement. When the Magistrate told him 'that any statement of confession that he might make would be used in evidence against him he refused to have his statement recorded. Mr. Evans therefore did not attempt to record any statement, but he had an informal conversation with the accused in the room at the kotwali for about half an hour. No police officer or other person was present during this conversation. The accused did not make any direct admission of his guilt, but he did make certain statements from which some inference regarding his guilt might be drawn. He stated that he had exceeded the limit of the instructions he had received from the C.I.D. Authorities. His explanation was that he had been instructed by the C.I.D. Authorities to gain the confidence of a medical student, named Sujan Singh. This Sujan Singh told the accused to get money in order to procure arms and ammunition. He stated that in order to win the complete confidence of Sujan Singh he had done whatever he had done.' He also inquired from Mr. Evans that when a police informer is implicated in an offence what action would be taken against him. He also told Mr. Evans that he was a police informer.

4. The question is whether this oral statement or confession made to Mr. Evans, but not recorded by him in accordance with the provisions of section 164, Criminal P.C., could be proved against the accused. It has been held by the Court below that the confession was obviously voluntary, and in view of the fact that the accused refused to have any confession recorded and that he spoke freely with the Magistrate alone for over half an hour and from the nature of his statement we have no doubt, but that the confession must have been voluntarily made. Under Section 21 Evidence Act, the confession, being a species of admission, would be relevant and could be proved as against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession.

5. In the first place reliance has been placed upon Section 26, Evidence Act. Under that section it is laid down that no confession made by any person whilst he

is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. The accused was at the time in the custody of the police and he was actually in a room at the kotwali. It is argued that the language of the section permits proof of a confession made to some third person in the immediate presence of a Magistrate but does not apply to a confession made to the Magistrate himself. In our opinion there is no force in this contention. It seems to us clear that if a confession is made to a Magistrate himself then that confession, is obviously made 'in the immediate presence' of the Magistrate, and the requirements of Section 26 are satisfied. The learned Counsel for the applicant has not been able to refer us to any authority which clearly supports his contention. On the other hand we find that a Bench of the Calcutta High Court in *Queen-Empress v. Nilmadhab Mitter* (1888) 15 Cal. 595 (F.B.), took the view that a confession made by an accused person in police custody to a Magistrate himself is obviously not excluded by Section 26. We also think that the legal position is obvious and that the confession made to Mr. Evans is not excluded by Section 26, Evidence Act.

6. It has further been contended that Section 91, Evidence Act, bars the proof of the confession by oral testimony. The argument is that the Magistrate was bound to record the confession under Section 164, (Criminal P.C., and that as the confession was a 'matter required by law to be reduced to the form of a document' therefore no oral evidence could be given in proof of such matter. Section 164 in terms does not make it obligatory upon a Magistrate to record a confession. If an accused person makes a confession during a police investigation, or before the commencement of the inquiry or trial, then it is open to a Magistrate of any of the classes specified in that section to record the confession, and if he does so he is bound to record it in the manner laid down in that section. It has been argued that this section should be interpreted as meaning that if the Magistrate is satisfied that the accused is making the confession voluntarily and is not doing so under any inducement, threat or promise or coercion then he is bound to record the confession. We cannot accept this interpretation. The language of the section leaves it optional to the Magistrate to record the confession or not as he thinks fit. He is not bound to record it even if he be clearly of opinion that the person is willing to make a perfectly voluntary confession.

7. Reliance has been placed upon the language of Section 533, Criminal P.C., in support of the contention that a confession is a matter which is required by law to be reduced to the form of a document. Section 533 provides that if a Court, before which a confession of an accused person recorded under Section 164 or Section 364 is tendered, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, then the Court shall take evidence that such person duly made the statement recorded

and notwithstanding anything contained in the Evidence Act, 1872, Section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

8. It is argued that the reference to Section 91 shows that in the contemplation of the Legislature a confession must be a matter required by law to be reduced to the form of a document as otherwise Section 91 would have no application. So far as statements of accused persons recorded under Section 364 are concerned it is clear that such statement must be reduced to the form of a document. Under Section 364 whenever the accused is examined by any Magistrate the whole of such examination must be recorded in full. The Magistrate has no option in the matter. He is bound to record both the questions and answers. As regards confessions recorded under Section 164, the position is different. We have already pointed out that the terms of Section 164 leave it optional to the Magistrate to record a confession or not to record it. At first sight therefore Section 91, would seem to have no application to confessions recorded under Section 164. It may be however that the Legislature, which in enacting Section 533 was only contemplating confessions which had actually been recorded, was thinking of the certificate and other necessary matters which have to be reduced to writing if a confession is recorded under Section 164. It might be, for instance, that a Magistrate recording a confession under Section 164 might omit to add the certificate which he was bound to add under the provisions of that section. In such a case it might be held that such a certificate was a matter required by law to be reduced to the form of a document and therefore in view of Section 91, no evidence could be given to prove the facts which should have been stated in the certificate. For that reason a reference to Section 91, would be necessary for the

purpose of giving effect to the provisions of Section 533 even in respect of confessions recorded under Section 164. In our opinion the mere reference to Section 91, Evidence Act, contained in Section 533, Criminal P.C., cannot be taken to imply that a Magistrate hearing an oral confession made by an accused person in the course of an investigation is bound to record the confession in the manner laid down in Section 164. The language of that section is 'may record' not 'shall record.'

9. For the applicant the case of *Emperor v. Gulabu* (1913) 35 All. 260, has been cited. In that case it was held that a confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of Section 91, Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under Section 364 of the Code, and Section 533 of the Code has no application to a case where no record whatever has been made of such a confession. We think that the facts of this case are distinguishable. In the ruling cited the tahsildar Magistrate was holding an inquiry after having cognizance of an offence upon a complaint. He sent for a number of persons and had their statements recorded in his presence. He also interrogated the accused, but did not make any record of his statement. When the case subsequently was committed for trial the tahsildar was called as a witness for the purpose of proving the confession said to have been made to him by the accused. The Sessions Judge ruled that this could not be done. Their Lordships held that the Judge was right in excluding such evidence. It must be noted however that in that case the tahsildar Magistrate who interrogated the accused was bound to record his statement under Section 364, Criminal P.C. If he failed to record the statement as required by law, then it was held that the statement could not be proved by oral testimony.

10. The facts of the present case are different, as Mr. Evans was not bound to record the confession made to him by the accused, as he might have done, under Section 164 of the Code. In another case decided by a Bench of this Court in *Nathu v. Emperor* : AIR1929 All855 , it was held that a statement made to a Magistrate in the presence of a Sub-Inspector and a Constable who had the accused under arrest at the time, and not recorded by the Magistrate under

Section 164, Criminal P.C., is not admissible in evidence. It appears that the alleged confession was made to a Deputy Magistrate by the accused who was at that time under arrest and in the presence of a Sub-Inspector and a Constable. No record was made of his statement under section 164. The learned Judges held that as the statement was made in the presence of a Sub-Inspector and a Constable who had the accused under arrest the statement was not admissible in evidence. No reference was made to the provisions of Section 26, Evidence Act. It seems to have been assumed that if no record was made under Section 164 then the alleged confession could not be proved by oral testimony.

11. No reasons are given in support of this view. In the case of *Emperor v. Maruti Santu More* A.I.R. 1920 Bom. 322, the two learned Judges took conflicting views on this point. Shah, J., held that a confession-made to a Magistrate during the course' of an investigation which was not reduced to writing was inadmissible in evidence and could not be proved by oral testimony. Hay ward, J., on the other hand held that an oral confession made to a Magistrate is prima facie relevant under Sections 21 and 26, Evidence Act, though it has to be proved by oral testimony and not by the production of any writing duly recorded by the Magistrate under Section 80, Evidence Act. Shah, J., took the view that the effect of Section 164 of the Code is that although a Magistrate has the power to refuse to record a confession, if he is not satisfied that it is voluntarily made, he has no such option where he is satisfied that it is voluntarily made. We do not think that the section should be read in this sense. It seems to us that the language of this section does not make it necessary for a Magistrate to record a confession even if he is of opinion that it is voluntarily made. Hay ward, J., took the view that the Magistrate was not bound to record a confession under Section 164 and therefore the oral confession made to him was not a matter required by law to be reduced to the form of a document and therefore it could be proved by oral evidence.

12. In *Legal Remembrancer v. Lalit Mohan Singh Roy* A.I.R. 1922 Cal. 342 the Calcutta High Court held that the word 'statement' in Section 164 of the Code, is not limited to a statement by a witness, but includes that made by an accused and not amounting to a confession. Such statements must be recorded under the section and cannot be proved orally by the Magistrate when not so recorded. Their

Lordships cited certain authorities in support of this view, but did not give any reasons. The leading case of the Calcutta High Court, which has been followed in subsequent decisions, is *Queen-Empress v. Bhairab Chunder* (1898) 2 C.W.N. 702. The question whether a confession made to a Magistrate, but not recorded by him could be proved by the Magistrate's oral testimony was not directly in issue. In that case a Magistrate holding a preliminary inquiry under Section 159, Criminal P.C., questioned the accused persons and recorded their statements. He purported to record their statements, not as confessions under Section 164, but as statements of accused persons under Section 364. The statements were not confessions of guilt, but contained admissions of certain facts from which inferences adverse to the accused might be drawn. At the trial in the Sessions Court the Judge rejected the recorded statements as inadmissible in evidence.

13. The prosecution then wanted to examine the Magistrate to prove by oral evidence that the accused made statements similar to those recorded. This was disallowed by the Judge and in the High Court no exception was taken to his order. The question before the High Court was whether the Judge was right in holding that; the statements purporting to have been recorded under Section 364 were inadmissible. The learned Judges held that the Magistrate while holding a preliminary inquiry had no authority to examine the accused under Section 864. Such examination can only be conducted after the inquiry or trial has commenced, and only for the purpose of enabling the accused to explain any circumstance appearing in evidence against him. If the Magistrate recorded the statement under Section 364, he did so without jurisdiction and the statements could not be proved. The learned Judges further held that the statements could not be proved as confessions recorded under Section 164. The statements did not purport to have been recorded under Section 164 and even if they could be regarded as confessions the learned Judges found that they had not been made voluntarily. The question decided in this ruling is quite different from the question now before us. This ruling does not seem to us an authority for the view that when an accused person makes a voluntary confessional statement to a Magistrate before the commencement of the inquiry or trial, thou the Magistrate is bound to record it under Section 164 and if he does not so record it then it cannot be proved by the Magistrate's oral testimony.

14. The learned Assistant Government advocate has referred us to several cases in which High Courts have taken a contrary view. In *Pedda Obigadu v. Emperor* A.I.R. 1922 Mad. 40, a Bench of the Madras High Court held that under Section 164, Criminal P.C., it is not obligatory on a Magistrate holding an investigation or preliminary inquiry under Section 159 of the Code, to record in, writing a confession made to him by an accused person and such confession may be proved by the oral testimony of the Magistrate. This case is directly in point and the previous authorities have been fully considered. The Allahabad case *Emperor v. Gulabu* (1913) 35 All. 260, was referred to and distinguished. The case of *Queen-Empress v. Bhairab Ghundar* (1898) 2 C.W.N. 702, was also referred to, but it was pointed out that the case was not really helpful in considering the value of unrecorded confessions. They approved of the reasoning of Hay ward, J., in the case of *Emperor v. Maruti Santu More* A.I.R. 1920 Bom. 322, when he observed:

If it was intended to make oral statements which would be relevant when made to private persons, irrelevant when made to Magistrates, then there would surely have been express provision that such statements should not be proved except by writings duly recorded by Magistrates and it would not have been left to mere implication from the provisions relating to the manner of proof of such writings when recorded by Magistrates under Section 533 of the Code.

15. We find ourselves in agreement with the views expressed by the learned Judges in this case. The Lahore High Court has consistently adopted the same view. We need only refer to the latest case of *Jag Raj v. Emperor*, A.I.R. 1930 Lah. 534. In this case it was held that a confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody, who is not produced before the Magistrate with a view to record his confession, can be proved by oral testimony of the Magistrate when it has not been reduced to writing. In absence of any provision of law, making it obligatory, on the part of a Magistrate to record a confession, it is not a matter required by law to be reduced to the form of a document. It is true that in the case before us the accused was produced before the Magistrate with a view to having his confession recorded, but we think there : thin fact is not a sufficient ground for distinguishing the ruling. The general principle laid down in this ruling is that as it is not obligatory on a Magistrate to

record a confession under Section 164, therefore oral proof of an unrecorded confession made to a Magistrate before the inquiry or trial is not excluded by the terms of Section 91, Evidence Act. In this ruling a number of previous decisions of the Lahore High Court have been referred to and it appears that in the Punjab the same view has consistently been taken. We agree to that view and find that it is supported by the preponderance of authority.

16. It has been argued that the Legislature has laid down elaborate safeguards for the recording of confessions under Section 164 and it could never have been intended that a Magistrate should if he wished, abstain from recording a confession, but should content himself with proving the confession by oral testimony simply from his memory. Such a course would seldom be desirable. A Court obviously could not place such reliance upon a Magistrate's testimony in proof of an unrecorded confession, which he heard perhaps some weeks or months previously, as it could upon a recorded confession which was recorded at the time and in detail. Nevertheless, we think that an unrecorded confession made by an accused person, to a Magistrate before the inquiry or trial is relevant and it can be proved by the Magistrate's oral testimony in the absence of any express provisions to the contrary, and in our opinion, there are no such provisions to the contrary. The weight to be attached to such oral testimony in proof of an unrecorded confession is a different matter.

17. We agree with the Court below therefore in holding that the confession made to Mr. Evans could be proved by Mr. Evens' oral testimony. The next question is whether, treating this confession as admissible, the guilt of the accused has been established beyond reasonable doubt. Sitting as a Court of revision, we do not usually interfere with findings of fact, but the circumstances of this case are very peculiar. There were undoubtedly several eyewitnesses to the robbery which was committed in daylight in a frequented thoroughfare and all the witnesses except Sup Narain have positively declared that the accused is not the robber. For the purpose of upholding the conviction, it is necessary in the first place, to rely upon the identification of the accused by Rup Narain. The learned Sessions Judge has stated that in the identification proceeding held by Mr. Anis Ahmad Tahsildar on 10th January 1933, Rup Narain picked out the accused Sidheshwar as his

assailant. This is not quite correct. It appears from Rup Narain's own evidence that when he went to jail for the purpose of identifying the robber, the accused and four other persons were paraded before him and he failed to pick out the accused on the first round. Then apparently he was asked by the Tahsildar to identify Sidheshwar if he could; whereupon he picked out the accused. Rup Narain himself has admitted in cross examination:

I did not identify in first round. I was told to identify Sidheshwar if I could. I then did so.

18. This certainly casts some doubt upon the value of the identification of the accused as the robber. It was always the case for the defence that Rup Narain knew Sidheshwar by sight before and therefore there was nothing surprising if he could pick him out when asked by the Tahsildar to do so. The Tahsildar says he cannot remember whether he asked the witness to identify Sidheshwar if he could. There are several other remarkable features in this case, such as the alleged false moustache worn by the robber, and the part played by Sujan Singh which we do not propose to discuss. But considering that the conviction of the accused rests firstly, upon the testimony of Rup Narain and, secondly, upon the confession, we are compelled to observe that the value of Rup Narain's evidence as against the accused is heavily discounted by the fact that he failed to identify the accused as his assailant at first and that, according to his own statement, he only picked out the accused when he was asked to identify Sidheshwar.

19. As to the confession, we have already given the gist of it. It cannot be taken to amount to an admission of guilt in respect of the charge as framed. We think it may be safely inferred from this confession that the accused had entered into a conspiracy to help Sujan Singh to commit robbery for the purpose of procuring arms and ammunition, Sujan Singh is one of the persons who was present at the scene of the robbery and according to the finding of the Court below he was 'the brain of the whole plot' and he pretended to be helping to catch the robber, although in fact he was helping him to escape. However this may be the confession is very vague. Taking it to be a confession of having as a police informer, acting under the instructions of the C.I.D., entered into a conspiracy with

Sujan Singh to obtain money by means of robbery, it certainly does not show what part he took in carrying out the plot. The accused only said that in order to win the complete confidence of Sujan Singh 'he had done whatever he had done.' This cannot amount to a confession that he actually seized bag of money and hit the postal overseer over the head, as alleged by the prosecution.

20. In this connexion we note that when Mr. Evans was giving evidence regarding this confession he was asked whether the talk was voluntarily made and free from police influence, but for some reason or other, this question was disallowed. We fail to understand why an important question like this should not have been put to the witness, but we are satisfied from the circumstances as mentioned before, that the talk with Mr. Evans must have been perfectly voluntary. One convincing feature is that the accused gave out that he was a police informer and that he was acting under instructions from the C.I.D. authorities although he had exceeded those instructions. It is quite impossible to suppose that he could have made a statement of that sort under the influence and tuition of the police. We may add that it is not denied by the prosecution that the accused was a police informer at one time, although it is said that he was discarded because he had been a failure.

21. The result is that we are not satisfied that the charge has been brought home beyond doubt to the accused. It may be that there has been a conspiracy to tamper with the prosecution witnesses in order to obtain his acquittal. If so, this is a matter for regret, but on the record as it stands we think that there is room for reasonable doubt and that the vague confession and the doubtful identification by Rup Narain are not enough to prove the charge, when all the other important prosecution witnesses emphatically deny the guilt of the accused. We accordingly allow the application and set aside the conviction and sentence. The fine if paid will be refunded. The bail bonds will be discharged.