

Baboo Ram Vs. the State

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Court : Allahabad

Decided On : Apr-23-1994

Reported in : 1996CriLJ483

Judge : D.K. Trivedi and ;R.K. Agrawal, JJ.

Acts : [Evidence Act, 1872](#) - Sections 27; [Indian Penal Code \(IPC\), 1860](#) - Sections 149 and 302

Appeal No. : Criminal Appeal No. 498 of 1993

Appellant : Baboo Ram

Respondent : The State

Advocate for Def. : G.A.

Advocate for Pet/Ap. : N. Mohan, Adv.

Disposition : Appeal allowed

Judgement :

R.K. Agrawal, J.

1. On 23-4-1994 we had allowed both the appeals and had rejected the reference made by the Additional Sessions Judge, Barabanki for confirming the death sentence, and had passed the following orders:-

'For the reasons to be recorded later on, the appeal is allowed and the order of conviction and sentence passed by the Sessions Judge is set aside and the reference made by the Sessions Judge is hereby rejected. The accused is in jail. He shall be set at liberty forthwith if he is not wanted in any other case.'

We are now giving the reasons for the same.

2. Accused Babu Ram has been convicted for an, offence under Section 302/149 I.P.C. and has been sentenced to death by the I Addl. Sessions Judge, Barabanki on 29-10-93 for committing murder of his father, mother and brother in the night of 24/25-11-90, . in village Kundelwa, P.S. Mohammadpur, District Barabanki. The case is based on circumstantial evidence and extra judicial confession alleged to have been made by accused Babu Ram.

3. Deceased Devi Dayal, deceased Smt. Champa Devi were parents and Sitaram was brother of accused Babu Ram. These three deceased persons were living separately from accused Baburam though in the same house. According to the prosecution accused Babu Ram wanted partition of the property from his father Devi Dayal, who was not agreeable for the same. In the night of 24/25-11-90, Ram Saharey, P.W. 1, uncle of the accused and brother of deceased Devi Dayal, who has got his house near the house of accused, along with his family members were witnessing the T. V., At about 11 in the night they heard cries of Baburam. There upon Ram Saharey along with Jagatram, Ram Sumiram P.W. 2 and others went to the house of the accused, who told them that his parents and brother Sitaram had gone to Mahadeva Mela, but they had not come back and that some miscreants had entered into his house and had taken away his belongings. On this information Ram Saharey and others tried to locate those culprits, but none was visible. They came back to their house as it had become quite late.

4. In the morning Ram Saharey P.W. 1 along with Tarawati P.W. 6 (sister of the accused). Shitla Prasad P.W. 7 (Bahnoi of the accused, husband of another sister of the accused) went to the house of the accused and enquired from him about the incident in detail after expressing about as to how all the three persons had together gone to Mahadeva Mela leaving the house all alone. After hectic and deep enquiry from accused Baburam he started weeping and stated before them

that on account of property matter he along with Lal Saheb (brother-in-law of his brother-in-law i.e. Sale Ka Sala) and 4-5 associates of Lal Saheb, whose names he did not know, committed murder of his parents and brother and had buried their dead bodies inside the house in the verandah. On getting the said information all of them went inside the house, the accused removed mud and wooden planks from that place and all of them took out the three dead bodies and brought the same in the Court-yard. Thereafter Ram Saharey, P.W. 1 prepared the F. I. R. Ext. Ka 1 and lodged the same at P.S. Mohammadpur, on the same day i.e. 25-11-90 at about 11.30 a.m. and a case was registered accordingly.

5. Station Officer Dayanand Singh P.W. 5 started investigation and he interrogated Ram Saharey P.W. 1 at the police station and came on the spot. He inspected all the three dead bodies which were lying in the Court-yard of the house. He prepared Panchnama in presence of Surya Prakash Singh P.W. 3 and others and also prepared other relevant documents and sealed the dead bodies and sent them for post mortem. He had taken into custody the blood-stained and ordinary clay from the place where the dead bodies were lying. He interrogated Ram Sumiram P.W. 2, Smt. Tarawati P.W. 6, Shitla Pd. P.W. 7. He inspected the site and prepared the site-plan Ext. Ka. 19. Accused Baburam was present on the spot. He was taken into custody and was interrogated in the night of 25/26-11-90 and he stated that he could produce the 'Fawra' (spade), Kudal, and Sadri (which he was wearing at that time) as he had hidden them below the Chhappar of his house. On the pointing out of accused Baburam, Fawra, Kudal and Sadri were recovered from the Chhappar in presence of witnesses including Shatroghan P.W. 4. Fard Ext. ka. 31 for the recovery of the same under Section 27 of the Evidence Act was prepared. The Investigation Officer had prepared the site-plan Ext. ka 25 of the place from where the said articles were recovered.

6. Dr. Vinod Bhattacharya, P.W. 8 had conducted the post mortem on the dead bodies and had prepared post-mortem reports Exts. ka. 22 to ka. 24. which give the following details:-

Smt. Champa Devi

Ante-mortem injuries:

1. Lacerated wound 5 cm x 3 cm x bone deep (cavity) over the right eye, eye-ball was missing and base of socket, right frontal bone and right parietal bone fractured.

2. Incised wound 3 cm x 1 cm x muscle deep over the root of right side of neck, 15 cm below injury No. 1.

On internal examination the doctor found the stomach empty, small intestine containing liquid faecal and gas, and large intestine also contained faecal and gas. According to the doctor the death was caused due to shock and haemorrhage as a result of ante-mortem injuries.

Devi Dayal

Ante-mortem injuries:

1. Incised wound 3 cm x 1 cm x bone deep over the right mastoid process, 1.5 cm. behind from right ear (bone cut), direction oblique.

2. Incised wound 2.5 cm x 1 cm x muscle deep right side of neck, 6 cm below injury No. 1, oblique.

3. Incised wound 1.5 cm x 1 cm x muscle deep over right side of neck, 2 cm below the right angle of mandible, horizontal.

4. Contusion 4 cm x 3 cm over front of right shoulder joint.

5. Incised wound 3 cm x 1 cm x cavity deep left side of chest, 10 cm from left nipple at 7 'O' clock position, oblique.

6. Incised wound 2.5 cm x 1 cm x cavity deep over the left side of abdomen, 7 cm below injury no. 5.

7. Incised wound 3 cm x 1 cm x cavity deep (chest) over right side of chest, 9 cm below the post axillary fold, oblique.

8. Incised wound 2.5 cm x 1 cm x cavity deep (abdomen) on the right side of abdomen, 11 cm below injury No. 7, obliquely placed.

On internal examination the doctor found the stomach empty, small intestines containing liquid faecal and gas and large intestine was found lacerated containing faecal matter and gas. In his opinion the death was caused due to shock and haemorrhage as a result of ante-mortem injuries.

Sita Ram

Ante-mortem injuries:

1. Lacerated wound 5 cm x 2 cm x bone deep over the left side of temple region, 5 cm from left eye. underlying bone fractured, verticle.
2. Incised wound 2 cm x 1 cm muscle deep over the left side of face, 1.5 cm left to injury No. 1, oblique, underlying bone fractured.
3. Incised wound 2.5 cm x 1.5 cm x muscle deep over the left upper lip, 1.5 cm from left angle of neck.
4. Incised wound 1.5 cm x 1 cm x muscle deep over left side of chin, horizontal.
5. Incised wound 2.5 cm x 1.5 cm x cavity deep (chest) over the lower part of right chest, 10 cm from right nipple at 7 'O' clock position, horizontal. On internal examination the doctor found the stomach empty, small intestine containing liquid faecel and gas and large intestine also contained faeces and gas and according to him death was caused due to shock and haemorrhage as a result of ante-mortem injuries.
7. After completing investigation the Investigating Officer submitted charge-sheet Ext. ka. 26 against six persons, namely, Babu Ram, Lal Saheb, Sangam, Ramdeo, Chandrika and Ram Singh. All the accused persons pleaded not guilty and alleged that they had been implicated falsely. Accused Baburam has stated that he had not at all made any extra-judicial confession.
8. In support of its case prosecution examined Ram Saharey P.W. 1, Ram Sumiran P.W. 2, Smt. Tarawati P.W. 6 and Shitla Prasad P.W. 7, regarding recovery of the dead bodies, recovery of articles and extra judicial confession made by accused Baburam. Ram Saharey, P.W. 1 and Ram Sumiran P.W. 2 had

turned hostile. Surya Prakash Singh P.W. 3 is a witness of Panchanama and Shatroghan P.W. 4 is a witness of Fard of recovery. S. C. Dayanand Singh P.W. 5 is the Investigating Officer and Dr. Vinod Bhattacharya had conducted the postmortem on the dead bodies of aforesaid persons.

9. Accused Saburam had examined Moharram Ali P.W. 1 to depose that the S.O. was beating Baburam and at that lime all the three dead bodies, Fawra and Kudal were lying there. Smt. Tarawati and Shitla Prasad, had come on the spot at about 10-11 a.m.

10. The learned Sessions Judge convicted and sentenced the accused Baburam as mentioned above, but acquitted all other accused persons. Accused Babu Ram has, therefore, preferred Appeal No. 498 of 93 through a counsel and Criminal Appeal No. 506 of 93 from jail. The learned Sessions Judge has made reference No. 3 of 1993. All these three cases are being disposed of together by this judgment.

11. There is no direct evidence in this case about the incident. Prosecution case is based on circumstantial evidence as well as extra judicial confession alleged to have been made by the accused before the witnesses. The Court has to be very cautious in appreciating the circumstantial evidence if the case is based merely on such evidence. The Court would record conviction only if the links and chain are complete pointing to the guilt of the accused and negative the hypothesis of the innocence of that accused. It is is also made clear that if the circumstantial evidence admits of two inferences, the one in favour of the accused must be accepted. We have therefore, to examine the evidence in this case as to whether the prosecution has been able to establish the guilt of the accused without any reasonable doubt.

12. The main contention raised on behalf of the State was that there was extra judicial confession of the accused before his near relatives and there could be no reason to disbelieve the statements of those witnesses. It cannot be disputed that extra judicial confession is a weak type of evidence and such confessions are not usually considered with favour by the Courts but at the same time it cannot be said that such confession, if inspires confidence, must not be accepted. In the instant

case, the alleged extra judicial confession made by the accused has been retracted and it is alleged by the accused that he had not made any such confession. It is true that it would be open for the Court to convict the accused on the basis of his even retracted confession but Courts usually require some corroboration to the confessional statement before recording conviction of that person. This is the caution which the rule of prudence requires from the Courts to observe. It may also be mentioned that corroboration must not only be of general nature but must also be in respect of material particulars. It may be very difficult to come to the conclusion for the guilt of the accused unless the retracted confession is corroborated by credible independent evidence. In a case reported in : AIR 1953 SC459 , Puran v. State of Punjab, the Hon'ble Supreme Court has observed that the rule of corroboration must be followed even in a case of normal retraction. It is not prudent to base conviction on the strength of retracted confession alone. As a matter of caution the Court requires corroboration to the retracted confession.

13. In a case reported in : 1994 CriLJ3071 , Shankar v. State of Tamil Nadu, based on Judicial confession, which in fact stands on much better footing as compared to the retracted extra-judicial confession, the Hon'ble Supreme Court has laid down that as a rule of prudence which was sanctioned itself to the rule of law, the Courts, do look for corroboration before acting upon the retracted confession. It has been observed :

'The judicial confessions are those which are made before a Magistrate or in Court in due course of legal proceedings and when such a confession is retracted, the Courts have held that apart from the statement being voluntary it should be true and should receive sufficient corroboration in material particulars by independent evidence. The rule of prudence namely requiring corroboration does not mean that each and every circumstance mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated. It is sufficient if there is general corroboration of the important incidents, just like in the case of an approver's evidence and it is not necessary that the corroborative evidence itself should be sufficient for conviction. It may not be necessary to refer to remaining aspects governing the use of retracted confession for the purposes of this case. Suffice it to say that it is also laid down

that it is not illegal to base a conviction on an uncorroborated confession of an accused person but as a rule of prudence which has sanctified itself to the rule of law, the Courts do look for corroboration before acting upon and accepting the retracted confession and what amount of corroboration would be necessary in a case would be question of act to be determined in the light of the circumstances of the case.'

14. We have now to examine the present case in this light.

15. Existence of motive may not be very much material in a case which is based on direct evidence as it may be argued that motive is hidden in the heart and mind of the accused and it would be difficult for the prosecution in every case to extract the said motive and to bring the same on record. However, in a case which is based on circumstantial evidence, motive plays an important role and absence of motive would go a long way to weaken the prosecution case. Existence of motive for the accused to commit the offence may be a material corroboration of his retracted confession. In this case the accused has been charged for committing murders of his parents and younger brother. The only whisper made in this case on behalf of the prosecution that the accused wanted his father to give his share in the property but his father had told him that he would do so after marriage of his daughters and the younger son. There is, however, no convincing evidence on this point to hold that the accused wanted partition to which his father did not agree.

16. Ram Saharey P.W. 1 is the real uncle of the accused (who of course has been declared hostile by the prosecution) has stated that there was no dispute between the accused and his father regarding property. The other witness Ram Sumiran P.W. 1, who has also been declared hostile, has stated that nothing has been brought to his notice that accused Buburum had demanded land (sic). He stated that the accused's father had given some land to the accused for some time for cultivation.

17. The prosecution has, however, relied upon the statement of Smt. Tarawati P.W. 6, sister of the accused. She has stated that whenever she used to visit her father's house, her father used to tell her that Baburam (accused) was insisting for partition of the property. In our opinion, the vague assertion on the part of Tarawati

would not be enough to come to the conclusion that the accused was very much sour against his father and would go to the extent of committing his murder. Nothing has been brought on record on behalf of the prosecution that any untoward incident had taken place between the accused and his father over partition of the property prior to the incident. It may be observed that in any case the accused had absolutely no motive to commit the murder of his mother and his younger brother aged about 16 years, we are, therefore, not inclined to accept the finding of the learned Trial Judge regarding existence of motive on the part of the accused for committing the murder.

18. Much reliance has been placed On the recovery of the dead bodies by the witnesses at the instance of the accused. It is alleged that the accused has confessed that he along with Lal Saheb and 4-5 other persons, after committing murders, had burried the three dead bodies in the verandah of his house and that the accused had taken out the dead bodies in presence of the witnesses after removing the mud and wooden planks and the said dead bodies were kept in the court-yard and the Investigating Officer found the dead bodies lying in the court-yard. It is true that Smt. Tarawati P.W. 6 and Shital Prasad P. W. 7 have stated that the dead bodies were recovered at the instance of the accused from the verandah and thereafter were kept in the Court-yard. Other witnesses, namely, Ram Saharey P.W. 1, Ram Sumiran P.W. 2 and Shatroghan, P.W. 4 did not say that the dead bodies were recovered on the pointing out of the accused.

19. In order to test the veracity of the statements of Smt. Tarawati and Shital Prasad we have to see if any circumstance and other evidence have been brought on record, to corroborate their testimony. The Investigating Officer had prepared the site-plan of the place from where, he was informed, the dead bodies were recovered at the instance of the accused. In the site-plan or in the spot inspection note the Investigating Officer did not at all give particulars or the details of that place. Three dead bodies were said to have been burried in a pit. The said place must have been dug sufficiently. There is absolutely no mention in the site-plan or in the inspection note that the investigating Officer had found any pit which could admit three dead bodies. The Investigating Officer has also not reported that he had found sufficient amount of mudmorang near the pit. He has also not reported

nor he has taken into custody the wooden planks or the mud or morang from that very place where the dead bodies were said to have been burried by the accused. He has also not taken the blood stained earth nor he indicated in the site-plan that any blood was found at the place. These omissions would, therefore, in our opinion, clearly negative the theory set up by the prosecution that three dead bodies were burried in the verandah of the house of the accused. Examining the statements of these two witnesses, namely, Tarawati and Shital Prasad, in the light of these circumstances, we would not be able to persuade ourselves to accept the statements of these two witnesses, though they are the sister and brother-in-law of the accused.

20. The learned Trial Judge has presumed that the accused must have been in the company of the deceased in the night of murder, though there is absolutely no evidence on this point. It is not in dispute, rather it is admitted to the prosecution, that the accused was living separately from his parents though in a separate portion of the same house. The site-plan Ext. ka 19 itself indicates that the portion of the accused is quite separate from the portion where his parents and younger brother lived. The door of the Kothari of the accused used to be closed and as such there was no access from the Kothari of the accused to the portion of the house where the deceased were living. It is also relevant to observe that according to the site-plan the assailants had entered into the portion of the deceased after climbing over the roof of the house including the roof of the Kothari of the accused. This, therefore, suggests that the portion of the accused and the deceased were quite separate and there was no access from one portion to another. In these circumstances, therefore, in absence of any evidence on record, it cannot at all be said that the deceased were last seen in the company of the accused. The learned Trial Judge was, in our opinion, not justified in drawing inference of last seen against the accused.

21. It cannot also be said that the accused was in a position to allow an outsider to enter into the portion of the deceased as the assailants according to the site-plan itself, entered into the house of the deceased not through the portion of the accused but by climbing over the roof. The learned Sessions Judge has observed that since the murders were committed in the house of the deceased, this

circumstance would also go against the accused. We are afraid this reasoning of the Trial Judge is not correct specially in view of the admitted fact that the portion of the accused is separate from the portion of the deceased and there is no access from one portion to another.

22. It is also argued on behalf of the State, which has been accepted by the Trial Judge, that the accused had tried to keep the witnesses on wrong track by telling them that the victims had gone to Mahadeva Mela and had not returned back. For this, reliance has been placed on the statements of Smt. Tarawati and Shital Prasad, but other witnesses have not supported the prosecution case in this regard. Ram Saharey P.W. 1, who is scribe of the F. I. R., has deposed that nothing was said by the accused in this regard and that the F. I. R. was scribed by him subsequently at the instance of the police.

23. Smt. Tarawati and Shitla Prasad are residents of different villages which are at a distance of 5-6 kilometres from the village of the deceased and the accused. They deposed that they had come to the house of the deceased on getting information that the parents and brother of the accused were missing and when they came to the house of the deceased, the accused told the persons present there that his parents and brother had gone to Mahadeva Mela and did not return back. Persons present there indicated that all the three deceased never went outside the village together. If it was a fact it must be known to the accused also and as such, in our opinion, the accused would not have made such statement to the witnesses which could not be accepted and which prima facie appeared to be incorrect.

24. As per prosecution case the accused had told Ram Saharey that some bandits had entered into the house of his parents and had looted property in their absence as they had gone to Mahadeva Mela. Ram Saharey and other persons had come in the night itself, but they did not express any doubt that all the three could not go together. Strangely enough they also did not make any effort to find out if any property was looted from the house of the deceased. This circumstance, therefore, in our opinion, goes to indicate that no such statement was made by the accused and none had come there in the night and no such incident did take place in the

night. As such it cannot be said that the accused had put the witnesses on any wrong track and had given any such information to them.

25. According to the prosecution, murder took place in the night before 11 p. m. The post-mortem reports indicated that the stomachs of all the three deceased were empty, large and small intestines contained faecal matter and gases. These facts would go to indicate that murder must have taken place in the very early morning and not in the night.

26. Much reliance has been placed by the prosecution on recovery of Kudal, spade and blood-stained Sadari from the portion of the house of the accused at his pointing out. It has been alleged that the accused had made extra judicial confession' before the witnesses in the early part of the day and on that basis the F. I. R. was lodged at the police station at 11. 30 a. m. and the Investigating Officer had come on the spot, immediately and a Panchnama of the dead body prepared at 1.30 p.m. on 25-11-90. The Investigating Officer had come to know that the accused had allegedly made extra judicial confession but for the reasons best known to him he did not think it proper to interrogate the accused, who was present throughout on the spot. The accused was interrogated after mid night i e. in the night of 25/ 26-11-90 and on the basis of this statement the Investigating Officer had recovered the articles, mentioned above. This conduct of the Investigating Officer creates grave doubt regarding the genuineness of extra judicial confession as well as the statement leading to the recovery of the articles. It cannot at all be accepted that the Investigating Officer, if there was any extra judicial confession, would wait for such a long time of about 12 hours in interrogating the accused. This circumstance lends support to the statement of Ram Saharey that the F. I. R. was lodged subsequently at the instance of the police and that no extra judicial confession was made by the accused nor any recovery was made on the pointing of the accused. If such confession was made, the first act which the Investigating Officer could have done, was to interrogate the accused.

27. Shatroghan P.W. 4 is one of the witnesses of Fard recovery of the aforesaid three articles. He has, however, not supported the prosecution case nor he has

been declared hostile. He has deposed that he went on the spot, he saw Fawra, Kudal and one cloth lying there and those articles were taken into custody by the police and his thumb impression was obtained on a paper. His statement, therefore, does not establish that those articles were recovered at the instance of the accused.

28. Shital Prasad P.W. 7, who has been described as independent witness by the prosecution, has shown his interest against the accused by giving a false statement that the recovery of the articles, namely, Kudal, Fawra and Sadri was made in his presence on the pointing of the accused and he was one of the witnesses of Fard recovery. The Fard recovery Ext. ka 21, on the contrary shows that this witness Shital Prasad was not one of the witnesses of recovery nor any recovery was made in his presence. According to him the recovery was made at about 10-11 in the morning, whereas according to the prosecution, the recovery was made in the night of 25/26-11 -90. This clearly indicates that this witness Shital Prasad cannot be said to be an independent and reliable witness.

29. There now remains the solitary statement of the Investigating Officer Dayaram Singh regarding the recovery of the articles, referred to above. It would be quite unsafe in view of the aforesaid inconsistencies, to place reliance on his testimony. In our opinion therefore, the prosecution had not been able to establish beyond doubt that any recovery of articles under Section 27 of the Evidence Act was made.

30. The last and most important circumstance relied upon by the prosecution was regarding the extra judicial confession made to the witnesses. Except Smt. Tarawati and Shital Prasad, none of the prosecution witnesses have supported the prosecution case on this point. Learned counsel for the State has contended that Smt. Tarawati being the sister and Shital Prasad being the husband of another sister of accused Baburam, would be the last person to depose falsely that the accused had made extra judicial confession about his guilt for murdering his parents and brother. Normally one would accept this as convincing, but in view of the circumstances discussed above, it appears very doubtful if any such extra judicial confession was made by the accused. It does not appear convincing that

Smt. Tarawati and Shital Prasad who were residing in different villages at a distance of 5-6 kins, from the village of the deceased, would come to the house of the deceased in the early morning on getting information that all the three persons (deceased) had gone to Mahadeva Mela and had not returned back.

31. It is also quite improbable to believe that in the early morning an information would be sent to them about not returning of all the three persons from Mahadeva Mela. On the contrary it appears, and it also appears probable, that they had come on the spot after getting information about the murders. In view of this, in our opinion, there was absolutely no occasion for the accused to make any extra judicial confession as alleged by the prosecution. The Statements of these two witnesses Tarawati and Shital Prasad, that the accused had confessed his guilt, do not also find corroboration from the circumstances, which have been enumerated above. It is, therefore, quite unsafe to place reliance on the statements of these two witnesses specially when their presence at the relevant time is quite doubtful that any such confession was made by the accused.

32. The rule of prudence as has been discussed above, does require that for basing conviction on the strength of extra judicial confession, the Court must see corroboration by other circumstances and materials on record. In the instant case we find that the alleged, extra judicial confession, which is also doubtful, does not find any corroboration from any circumstance as discussed above. The findings of the learned Trial Judge to the contrary are erroneous and cannot be accepted.

33. All said and considered, therefore, we are of the view that the prosecution has not been able to prove beyond doubt the guilt of the accused. As such, the accused must be acquitted. Both the appeals stood allowed and reference rejected.