Rex Vs. Moti

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SooperKanoon Citation : sooperkanoon.com/478010

Court : Allahabad

Decided On : Jul-30-1951

Reported in : AIR1953All792

Judge : Malik, C.J. and ;Bind Basni Prasad, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 164, 164(3), 364 and 533; Evidence Act, 1872 - Sections 26

Appeal No. : Criminal Appeal No. 1119 of 1949

Appellant : Rex

Respondent : Moti

Advocate for Def. : Prakash Chandra, Adv.

Advocate for Pet/Ap. : Shri Rama, D.G.A.

Disposition : Appeal allowed

Judgement :

Malik, C.J.

1. A dacoity was committed at the house of one Lakkhan Singh on the night between 15th and 16th of October, 1947, in village Kukargaon, district Mathura. A report of the dacoity was made at the police station, which is at a distance of two

miles from the place of occurrence, at 2-30 A.M. on the early morning of 16-10-1947. It was mentioned in the first information report that fifteen or twenty dacoits had raided the house of Lakkha Singh, Mukhia, they had fired guns and after successfully committing the dacoity they had left the village. A list of properties that were removed by the dacoits was furnished to Sheodan Singh, Sub-Inspector, on 16-10-1947, when he went to make the investigation and when he prepared the site plan Ex. P30. Eight persons were sent up to stand their trial in the court of session under Sections 395/397 of the Penal Code. Maharaj Singh, accused, was in addition prosecuted under Section 412 of the Penal Code. By an order dated 7-6-1949, the learned Sessions Judge acquitted all of them. The Government has filed this appeal against Moti on the ground that he was wrongly acquitted.

2. Moti accused was arrested on 15-3-1948. He is a resident of village Karkauli, district Mathura, which is at a distance of five miles from Kukargaon where the dacoity took place. The house of Moti accused was searched on 16-3-1948, and four things were recovered from his house which, it was said, the dacoits had removed at the time when the dacoity was committed. Those articles are Nos. 9, 12 and 37 of the list Ext. P18 which was, as we have already said, furnished to the police on 16-10-1947, and item No. 24 of the same list under the heading 'ornaments.' It is not necessary for us to deal with articles Nos. 9 and 12 as they were not satisfactorily identified and we may, therefore, omit those two from consideration. One of the articles recovered was a durrie, Ext. II, which had blue and red stripes and the other was a Moradabadi engraved tumbler, Ext. I. These articles were put up for identification by Lakkha Singh and his wife, Srimati Anandi, on 24-5-1948. The tumbler Ext. I and the durrie Ext. II were correctly identified by Lakkha Singh as well as by Srimati Anandi, who made no mistakes in the identification.

3. The accused in the court of the Magistrate did not make a statement and he reserved his answers for the court of session. He was asked pointedly by the Magistrate whether the durrie Ext. II and the tumbler Ext. I were recovered from his house and whether they formed part of the property that had been looted. The answer given by the accused was that he would give his statement in the court of session. In the court of session, he denied that the durrie and the tumbler were

recovered from his house.

4. The prosecution produced Lakkha Singh and Srimati Anandi. Lakkha Singh stated in his examination-in-chief that the tumbler Ext. I and the durrie Ext. II belonged to him and that he had identified the two articles when the identification was held. Srimati Anandi identified these two articles and said that they were her property. In the cross-examination of Lakkha Singh not a single question seems to have been asked to challenge this part of his statement. Srimati Anandi was asked some questions in cross-examination and her answer so far as they related to Exts. I and II were as follows :

'One used new 'gilas' was stolen. It was used for a month or two. I myself purchased this 'gilas'. I did not tell the description of the durrie stolen.'

The learned Sessions Judge has discarded the statement of Srimati Anandi on the ground that she did not produce the voucher in support of her contention that the tumbler had been purchased by her a month or two before the dacoity. We feel astonished that the learned Sessions Judge should have given that as a ground for rejecting the testimony of Srimati Anandi. When a person goes to purchase a lumbler in the bazar, especially in a village, a voucher is hardly, if ever, given, and even if it is given it is hardly ever preserved. Moreover, no questions were put to her in cross-examination to dispute her title nor was she asked about the voucher or its production.

5. Three witnesses were produced by the prosecution to prove the recovery of these articles from the house of Moti and they were Onkar Singh, P. W. 24, Sheodan Singh, P. W. 32, and Samman Singh, P. W. 34. Onkar Singh said in his examination-in-chief that the durrie, Ext. II, and the tumbler, Ext. I, were recovered from the house of Moti, that the recovery list Ext. P29 was prepared in his presence and was signed by him and that the other witness, Samman Singh; also attested it. The evidence of Samman Singh was more or less similar. Learned counsel appearing for the accused did not cross-examine the two witnesses. The reason given by the learned Sessions Judge for discarding their testimony is that as these witnesses were not cross-examined he could not accept their evidence. When we read the judgment we thought that there was some mistake probably in

the copy that had been prepared for the use of the Court, We, therefore, examined the original and found that the learned Judge had said that 'the witness was not cross-examined at all. So I do not believe him.' It is a most astounding proposition and if this is to be laid down as the general rule then no accused person need ever cross-examine any witness for the prosecution and that would be a sufficient ground for discarding the testimony of the prosecution witnesses. Having carefully considered the evidence we are satisfied that Exts. I and II belonged to Lakkha Singh, that they were removed from his house in the course of the dacoity and that they were recovered from the house of Moti accused.

6. The accused Moti is said to have made a confession before Sri K.A.P. Stevenson, Magistrate, first class, Mathura. This confession is Ext. P16. It has not been included in the paper book that has been prepared for the use of the Court. The original confession made by the accused was before the learned Sessions Judge as Sri Stevenson has deposed with reference to that document. What has happened to it since it is difficult to say. It may be that as it contained matters which related not only to this case but to other cases it was withdrawn from this record, after the case was decided by the lower court, and placed on the record of some other case. A copy of the document was, however, available on the record and was placed before us. The document begins as follows :

'Main ne Moti Ram se sawal kiya aur usko samjhaya ki woh az khud bayan kar raha hai jo uske khilaf istemal ho sakta hai aur woh bayan karne ke liye majbur nahin hai.'

After having recorded the statement the learned Magistrate took the signature or the thumb impression of Moti and then appended the following certificate.

'I have explained to Moti, son of Bhola, that he is not bound to make a confession and that his confession may be used as evidence against him. I believe that the confession was voluntarily made. It was taken in my presence and written by me. It has been read over to Moti and admitted by him to be correct. It contains a full and true account of the statement made by him.

22-3-'48

Sd/ S. D. O., Saidabad.'

As we have already said, before the Magistrate the accused reserved his reply to the court of session.

In the court of session he stated as follows:

'I was sitting outside my house at the door. I was caught by Sheodan Singh and Pheru Singh. They abused me. They threatened me and asked me to confess about the dacoity, Second day I was challaned. I remained in jail for one night. Pheru Singh and Sheodan Singh took me from jail to the kothi of the Tahsildar. I was kept there in the night. In the morning they took me to Saidabad. The police officers asked me to name the persons told by them. The police officer forced me to drink some medicine and then I became unconscious. I remained unconscious for five or six days and I regained consciousness in jail. Pheru Singh burnt my body by lighting a match. Pheru Singh took me to several villages in a motor car. Ex. P16 read over. I did not make this statement before the Magistrate. .....'

The accused, therefore, before the learned Sessions Judge said that Ext. P16, which was the confession, was not made by him. The statement read as a whole probably means that the police first pressed on the accused to make a confession and later they gave him something to drink and he became unconscious and while he was in a state of unconsciousness they took his thumb impression on the paper Ext. P16.

7. The learned Sessions Judge gave four reasons for discarding this confession and for holding that it could not be relied upon. The reasons given by him were these: (1) The Magistrate did not inform the accused that he was a Magistrate, first class. (2) He did not enter in Ext. P16 that he was a Magistrate first class and that no policeman was present there. (3) The accused was making the confession of his own free will was not entered in Ext. P16, and (4) After the confession the accused was taken away by C. I. Pheru Singh and S. I. Sheodan Singh.

The third objection seems to be clearly incorrect as there is a note both at the beginning as well as at the end of Ext. P16 which we have quoted and which goes to show that the Magistrate was satisfied and made a note to that effect that the confession was made by the accused voluntarily.

As regards objections Nos. 1 and 2, it is true that in Ext. P16 it is not recorded that no policeman was present at the time when the confession was made before the Magistrate and the Magistrate instead of writing that he was a Magistrate, first class, wrote that he was a Sub-Divisional Officer. It also does not appear from Ext. P16 that the Magistrate had informed the accused that he was a Magistrate first class. These are, however, defects which do not make the confession inadmissible in evidence. They may only detract from its evidentiary value. The learned Magistrate, Sri Stevenson, stated in the witness-box that when the accused was brought to him he kept the accused, for about two hours inside his tent and the policemen were removed from the tent and that the policemen were not visible from the place where the accused was sitting.

The law relating to confessions and how they are to be recorded is contained in Criminal P. C., and Evidence Act. The relevant portion of Section 164, Cr. P. C., is as follows :

'164(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in Section 364 and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

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

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him, and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him.

Sd/ A. B.

Magistrate.'

It is not necessary that a confession under Section 164 should be recorded only by a Magistrate, first class. Sub-section (1) of Section 164 authorises a Magistrate, first class and any Magistrate of the second class, especially authorised by the Government, to record a confession. It does not appear to be necessary that the person making the confession should be informed that the person recording the confession is a Magistrate of the first class or of the second class, especially authorised by the Government to record the confession. It is very necessary that the courts, before which confessions are placed as evidence against the accused, should be satisfied that the confession is the voluntary confession of the accused and it is to ensure that that Section 164(3) was enacted. The accused should know that the confession that he was making was before a Magistrate. He should make the confession in such circumstances as to guarantee the fact that he was not making the confession by reason of threat or fear or inducement held out by the police,

It is to secure that end that a Magistrate has to explain to an accused person that he was not bound to make a confession. He is required to question the accused and satisfy himself that the confession that is going to be made before him is a voluntary confession. Though the section does not, in so many words, require it, yet unless the accused person is told that he is before a Magistrate and under his protection and that he is no longer in the custody of the police, it is not likely that he would have the courage to give correct answers to the questions that a Magistrate has to put to him under Section 164(3).

8. The relevant sections of the Evidence Act relating to confession are Section 21, which makes an admission relevant, Section 24, which lays down when a confession caused by inducement, threat or promise is irrelevant in criminal proceedings, Section 25, which provides that no confession made to a police officer can be proved against a person accused of an offence, Section 26, which makes it clear that no confession made by a person whilst in the custody of a police officer is admissible in evidence unless it is made in the immediate presence of a Magistrate, and Section 29, which lays down in what circumstances a confession otherwise relevant does not become irrelevant because of promise of secrecy, etc. Though a confession made in the immediate presence of a Magistrate while an accused is still in police custody is admissible under Section 26, the fact that the accused was in police custody at the time when he makes the confession detracts to a large extent from the evidentiary value.

9. Learned counsel appearing for the State has placed great reliance on Section 364 of the Code of Criminal Procedure. According to him, the learned Magistrate should have recorded in the form of questions and answers the questions put to the accused under Section 364 (3) (sic) to satisfy himself that it was a voluntary confession. He has further raised an objection to the fact that the confession recorded is a long narrative and has not been divided into questions and answers.

10. The second part of the objection has no substance. All that the Section 364 requires is that the whole of the examination, including the questions put to the accused and answers given, has to be recorded in full in the language in which the accused has been examined. Where an accused person makes in the form of a narrative the whole of his confession, without any question being put to him to elicit facts, it is not possible for the Magistrate to record the confession in the form of questions and answers. As regards the first part, which related to answers to the questions put under Section 364(3), (sic) it is no doubt correct that the Magistrate should have recorded the questions that he put to the accused and the answers that he elicited from the accused. The observations in -- 'Prag v. Emperor', AIR 1930 Oudh 449 (A) which were quoted with approval by Sir Shah Muhammad Sulaiman, Chief Justice, in -- 'Emperor v. Muhammad Ali : AIR1934 All81 as follows, are very important :

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

Though, therefore, the Magistrate would have been well advised to record the questions that he had put to Moti accused to satisfy himself that he was making a voluntary confession and the answers given the mere fact that he did not, though it may detract from the value of the confession, does not in cur view make it inadmissible, unless we are satisfied that the omission was not curable under the provisions of Section 533 of the Code. Section 533(1) provides that

'If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the. statement and, notwithstanding anything contained in the Indian 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.'

11. Great reliance is placed by learned counsel on the decision of the Privy Council in -- 'Nazir Ahmad v. King Emperor . We do not think that case supports the contention of learned counsel that the story of the accused, even if it is made to the Magistrate in the narrative form, Should not be recorded by the Magistrate as it was made but should be split up in the form of questions and answers, nor does that case lay down that, if a Magistrate has failed to record the questions put by him to the accused under Section 164(3) prior to taking down the confession, the confession must be treated as inadmissible. The facts of Nazir Ahmad's case (C) were very peculiar. There the Magistrate had not followed the provisions of the Code. He had merely made short notes of the statement made by the accused

and later from those notes he dictated to his stenographer a note which the prosecution wanted to be treated as the statement of the accused. The Magistrate had destroyed the notes that he had made. The Magistrate came into the witness-box to prove that what he had dictated to the stenographer was a correct reproduction of what the accused had said to him & of which he had taken notes at the time of the statement.

Their Lordships held that the statement dictated to the stenographer could not be treated as a confession of the accused or a statement under Section 164 and was, therefore, not admissible in evidence. Section 533 was relied upon to prove that the defect was cured under that section. Their Lordships, however, held that no question of the operation or scope of Section 533 arose on the facts of that case and, therefore, refused to express any opinion on the scope of Section 533. It was held in -- 'Muhammad Ali's case' (B) that if a Magistrate had satisfied himself that the confession was being made voluntarily by an accused person and that it was explained to the accused that he was not bound to make the confession and it could be used as evidence against him and the Magistrate had made a summary, of those questions and answers instead of recording them Such a defect was curable under Section 533 of the Code. We have, therefore to consider whether the materials on the record go to show that the confession was being made voluntarily and the accused had been warned that he was not bound to make a confession and any confession made by him could be used in evidence against him.

12. The confession in this case is a very long document and it not only deals with the dacoity in question but with a large number of other incidents with which the police was, at that lime, not concerned and reading this long confession of about six pages one cannot help feeling that the whole of this statement could not have been made either as a result of tutoring or by reason of fear of the police. The accused, as we have already said, had been arrested on 15-3-1948. We have not got the exact date when he was sent to jail as an under-trial prisoner. It was probably very soon after his arrest that he was sent to jail custody. On 21-3-1948, he was taken from the jail to a Magistrate, Sri Kalendri Dayal. We shall have to deal with his evidence later. Sri Kalendri Dayal made certain investigations in the

company of the accused and went to the place pointed out by the accused on the 21st and on the 23rd and it was in-between those two dates i.e. on the 22nd, that the accused made the confession before Shri Stevenson.

Sri Stevenson has admitted that two police officers had brought the accused for recording his confession and after his confession was recorded the same two police officers took him away. Sri Stevenson was examined as a witness for the prosecution and as already mentioned he said that after the accused was brought to him the policemen were removed from his tent and the accused was made to remain sitting there for two hours before his statement was recorded and that he had explained to the accused that he was not bound to make a statement, that any statement made by him would be used against him and that he could be convicted on his own confession. Though it would have been better if the Magistrate had written down in the form of questions and answers all that had transpired, we have no reason to discard the evidence of the Magistrate and the defect in our view is cured by Section 533, Criminal P. C., though by reason of the defects already pointed out the confession must be said to have lost much of it's evidentiary value.

13. More important than Ex. P. 16 is the evidence furnished by Sri Kalendri Dayal Magistrate, P. W. 1, and Ext. P. 43, the note made by the said Magistrate. The accused was produced before him from jail custody on 21-3-1948, and the accused took the Magistrate to the various places connected with the dacoity, pointed out the house where the dacoity had been committed, the manner in which the dacoits had scaled the wall, the place where the dace its had divided the booty and so on. It is a very detailed report and, though at one stage learned counsel said that anything said by the accused in the presence of the police was not admissible, he did not object to the admissibility of the evidence furnished by the conduct of the accused. As we have already said under Section 26, Evidence Act, a statement made by an accused person in the immediate presence of a Magistrate is admissible even if he be in the custody of the police. Though we may not place much reliance on the statement made by the accused to the Magistrate, Sri Kalendri Dayal, the fact, that he took the Magistrate to the right house in village Kukergaon where the dacoity was committed, showed him the manner in which the dacoits had scaled the wall and similar other conduct of the accused was good

evidence against him.

14. Lastly, we have the evidence of, one witness, Raghubir Singh, who identified the accused in the identification parade held in jail on 26-4-1948. The accused with several others, was put up for identification in the district jail at Mathura. Raghubir Singh identified the accused and made no mistakes. There is a note by the Magistrate about the identification to the effect that the witness identified the accused quickly, that is, the witness does not appear to have taken much time or hesitated to identify the accused. It was not claimed that the witness knew the accused from before. The learned Sessions Judge has discarded the evidence of Raghubir Singh as in his cross-examination Raghubir Singh said that he saw the dacoits in the light of the lantern which they had and in the light of the torches which were with them.

This statement Raghubir Singh made in his examination-in-chief. He further said in his examination-in-chief that at Mathura he identified one dacoit and at Agra he identified two other dacoits. In his cross-examination by Sri B.C. Bhargava, the witness repeated what he had said in his examination-in-chief that the witness had recognised Moti dacoit in the light of the lantern and that one dacoit had a lantern. The learned Sessions Judge thought that it was not likely that the dacoits would carry a lantern and even if they did carry one it was not likely that they would throw the light of the lantern on the faces of the dacoits so that they might be identified by the villagers.

Whether Sri Raghubir Singh was right that the dacoits were carrying a lantern or he was wrong it is not possible to say because no other witness seams to have been asked about it. The fact, however, remains that out of a large number of persons who were in jail several of whom were accused persons Raghubir Singh had no hesitation in walking up straight to Moti and identifying him as one of the dacoits who had taken part in the dacoity at the house of Lakkha Singh. The cumulative effect of the entire evidence on the record, to our minds, proves without any doubt that Moti was guilty and he was one of the dacoits who had taken pan in the dacoity at the house of Lakkha Singh on the night between the 15th and the 16th of October, 1947.

15. We, therefore, set aside the order of thelearned Sessions Judge, allow this appeal, convict Moti under Section 395, Penal Code, and sentence him to seven years rigorous imprisonment.He is acquitted of the charge under Section 397.Penal Code, as it is not established that he usedany deadly weapon or caused any grievous hurtto any person at the time of committing thedacoity.