

Ram Kumar Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-22-1997

Reported in : 1998CriLJ1267

Judge : G.P. Mathur and ;K.D. Shahi, JJ.

Acts : Indian Penal Code (IPC) - Sections 302 and 304; Code of Criminal Procedure (CrPC) , 1974 - Sections 164, 227, 228, 228(1), 228(2), 229, 230, 231 and 235

Appeal No. : Criminal Appeal No. 948 of 1991

Appellant : Ram Kumar

Respondent : State of U.P.

Advocate for Def. : D.G.A.

Advocate for Pet/Ap. : R.K. Goswami, Adv.

Disposition : Appeal allowed

Judgement :

G.P. Mathur, J.

1. Ram Kumar has preferred this appeal from Jail against the judgment and order dated 16-1-1990 of Sri S. N. Singh, Sessions Judge, Uttar Kashi, by which, he has

been convicted under Section 302, I.P.C. and has been sentenced to imprisonment for life.

2. A written F.I.R. was lodged at 1 p.m. on 13-5-1989 at P. S. Dharasu by Abdul Hameed alleging that his brother Sadik Ahmed was working as tailor. At about 12.15 p.m. the appellant Ram Kumar, who was working as chaukidar in the Electricity Department, came to the room of Sadik Ahmed and assaulted him by a garasa. The incident was seen by Imam Bano and Johra Khatoon and when they raised an alarm Ram Kumar ran away from the place of occurrence and entered into quarter No. D.T. 57. Some police personnel and public men arrived at the scene and caught hold of Ram Kumar along with the Garasa. The condition of Sadik Ahmed was precarious and he had been carried to Uttar Kashi Hospital. On the basis of the F.I.R. a case was registered as crime No. 18 of 1989 under Section 302, I.P.C. at P. S. Dharasu. Sadik Ahmed succumbed to his injuries and an autopsy was held on his body at 9.15 a.m. on 14-5-1989. The post-mortem report shows that a large number of incised wounds were found on the body of the deceased. The case was investigated and a charge-sheet dated 12-7-1989 was submitted against the appellant. The learned Magistrate took cognizance of the offence on 22-7-1989 and committed the case to the Court of Sessions by his order dated 4-8-1989. Learned Sessions Judge recorded a confession of the accused on 16-1-1990 and on the same day pronounced verdict convicting the appellant under Section 302, I.P.C. and sentencing him to imprisonment for life.

3. Sri Vinod Prasad who has appeared as amicus curiae has submitted that the conviction of the appellant is wholly illegal and contrary to law as it is based solely upon his confession which could not have been recorded on the date which was fixed for recording of prosecution evidence. Learned counsel has further urged that in a murder case a finding of guilt can only be recorded on the basis of the evidence adduced by the prosecution and not on the confession of the accused and in these circumstances the conviction of the appellant is liable to be set aside.

4. The record shows that after the case had been committed to the Court of Sessions by the learned C.J.M. on 4-8-1989 it was placed before the learned Sessions Judge on 7-8-1989 on which date he passed an order for registering the

Sessions trial and fixed 18-8-1989 as the next date of hearing. On 18-8-1989 charge under Section 302, I.P.C. was framed against the appellant who pleaded not guilty and claimed to be tried. The order sheet shows that on the same date 6-9-1989 was fixed for prosecution evidence. The Presiding Officer was on leave on the said date and therefore 4-10-1989 was fixed for recording of evidence. On 4-10-1989 a letter was received from the Superintendent Jail that the appellant was ill and was undergoing treatment in Dehradun Hospital. The Presiding Officer was also absent on that date and therefore, 16-11-1989 was fixed for recording evidence. On 16-11-1989 the learned State Counsel moved an adjournment application on the ground that prosecution witnesses had not come. This application was allowed and 16-1-1990 was fixed for recording of prosecution evidence. On 16-1-1996 the appellant was produced in Court and straight away his confession was recorded.

5. In his confession the appellant has stated that he was an employee of the Electricity Department. The officers of the Electricity Department, Pradhan and Joshiji teacher and some others were making efforts to commit his murder by administering poison to him and declaring him as mad. The deceased Sadik Ahmed and his brother were also members of this conspiracy. On the date of incident he was going to the market in Chinyali Saur when Sadik Ahmed met him on the way and an exchange of hot words took place between them. Thereafter both had a fight and he killed him by a garasa which he was carrying. He further stated that he did not know as to how many blows he gave by garasa. The confession was recorded in reply to a question put to him and the same has been signed by the appellant.

6. The record shows that the prosecution did not examine any witness nor any evidence was adduced in the case; The conviction of the appellant is based solely upon his confession as there is no other evidence on record to connect him with the crime in question. The first question put to the appellant while recording his confession is that he was expression his intention to make a confession. It is not clear from the record as to how the so called intention of the appellant was communicated to the court. When the case was taken up on 18-8-1989 for framing of charge, the appellant had made a statement that he was not in a position to

afford a counsel in defence and therefore, a counsel may be appointed for him at state expense. The record does not show that any counsel was appointed as amicus curiae to defend the appellant.

7. The main question which arises for consideration is whether a confession could be recorded by the learned Sessions Judge after charge had been framed to which the appellant had pleaded not guilty. The specific provision for recording of confession is Section 164, Cr.P.C. which finds place in Chapter XII of the Code relating to Information to the Police and their Powers to Investigate. It lays down that any Magistrate may record any confession or statement made to him in the course of investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry trial. The language of the section shows that power has been given to a Magistrate to record a confession during the course of an investigation or thereafter but before the commencement of the inquiry or trial. Obviously this section has no application to the facts of the case. As stated the confession has not been recorded by a Magistrate and it has been done after the commencement of the trial. Chapter XVIII of the Code deals with trial before a Court of sessions. Section 227 empowers the court to discharge the accused if upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution the Judge considers that there is no sufficient ground for proceeding against the accused. The stage was also over in the case as an order of discharge was not passed. A charge was framed against the appellant under Sub-section (1) of Section 228 and in accordance with sub-section (2) the appellant was asked whether he pleaded guilty of the charge or claimed to be tried. Section 229 provides that if the accused pleads guilty the Judge shall record the plea and may, in his discretion, convict him thereof. As mentioned earlier the appellant did not plead guilty and claimed to be tried and therefore, Section 229 did not apply and the appellant could not be convicted under this section. It may be noticed that even if the accused pleads guilty, it is not obligatory upon the Judge to convict him on such a plea as a discretion has been given to the court either to convict or not to convict even if the accused pleads guilty and such a discretion has to be exercised on judicial considerations. The next stage is Section 230 which is of importance for the case

in hand. It lays down that if the accused refuses to plead or does not plead or claims to be tried or is not convicted under Section 229, the Judge shall fix a date for examination of witnesses. Section 231 provides that on the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution. A judgment of conviction can be given under Section 235 only after taking the evidence for prosecution, examining the accused and giving opportunity to him to enter upon his defence and to adduce any evidence which he may have in support thereof. A scrutiny of the provisions referred to above will show that if after framing of charge the accused pleads not guilty and claims to be tried, he could be convicted only after the prosecution has adduced evidence and opportunity has also been given to him to lead evidence in his defence. If the prosecution does not lead any evidence, a finding of conviction can not be recorded after framing of charge if the accused pleads not guilty and claims to be tried. In the present case the accused pleaded not guilty after the charge had been framed against him and therefore, his conviction without the prosecution adducing the evidence and proving its case, is wholly illegal and contrary to law. The conviction of the appellant is, therefore, liable to be set aside on this ground alone.

8. There is another aspect of the matter which is also of considering importance. It has been settled by a catena of decisions not to act upon a plea of guilty in case of serious offences like murder. A layman accused when he pleads guilty is likely to be more concerned with the physical act and not advert to the various ingredients constituting the offence. Whether the acts constitute murder is a mixed questions of law and fact. To a common man there is no difference between killing and murder but in law the act of the accused may amount to an offence under Section 302, I.P.C. or 304 Part I, I.P.C. or under Section 304, Part I, I.P.C. and the sentence to be awarded in each case will differ. For deciding the nature of the offence the court should have before it the details of the occurrence, the motive and the circumstances under which the act was, done and for this purpose it is not only desirable but essential that the entire evidence be placed before the court.

9. The principle that in a serious case a finding of conviction should not be recorded on the plea of guilty, was stated a century ago by this Court in *Queen Empress v. Bhadu* (1896) ILR 19 All 120 in the following words :

In this country it is dangerous to assume that a prisoner of this class understands what are the ingredients of the offence under Section 302 of the Indian Penal Code, and what are the matters which might reduce the act committed, to an offence under Section 304. Even in England it used to be the practice of some Judges, and probably is still, although they were not bound to do so, to advise persons pleading guilty to a capital offence to plead not guilty and stand their trial.

The accused is charged with a capital offence, and it need hardly be pointed out that the usual practice in such cases is not to accept the plea of guilty, but to proceed to record evidence and base the order of conviction or acquittal according to the reliability or unreliability of that evidence.

Again in *Dalli v. Emperor* AIR 1922 All 233 (1) it was held as follows :

In a case of murder it has long been the practice not to accept the plea of guilty. After all murder is a mixed question of fact and law and unless the court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried.

In *Mst. Sukhia v. Emperor*, AIR 1992 All 266 it was held as follows :

The Rule is that when an accused is on his trial on a capital charge, it is not expedient that the court should convict him even upon a plea of guilty entered before the trial Court itself. As a matter of practice the Court should in its discretion, put such a plea on one side and proceed to record and consider the evidence, in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same.

Similar view was taken by Calcutta High Court as early as in the year 1885 in *Netai Lusker v. Queen Empress* ILR II Cal 410 and by Bombay High Court in *Emperor v. Chinia Bhika Koli* (1906) 3 Cri LJ 337.

10. Almost all the High Courts of the country have taken the view that the court should not act upon the plea of guilty in serious offences but should proceed to take the evidence as if the plea had been one of not guilty and should decide the

case upon the whole evidence including the accused plea. We do not consider it necessary to refer to those decisions in detail. As mentioned earlier the appellant had pleaded not guilty and as such there was no occasion for the court to record a finding of conviction as contemplated by Section 229, Cr.P.C. The prosecution having led no evidence to prove its case, the conviction of the appellant has to be set aside.

11. Sri Vinod Prasad has contended that the incident having taken place more than eight years back in May, 1989, the case should not be sent back for retrial and the accused should be acquitted. In our opinion it will not be proper to acquit the accused in a case like this merely on the ground that he is under custody for about 8 1/2 years. Since no evidence was recorded we do not know whether the accused is a person of sound mind or not or whether he committed the crime when he was deprived of power of self-control on account of some sudden and grave provocation. In absence of complete facts it will not be fair to acquit the accused only on the ground that the learned Session Judge did not follow the correct procedure and the appellant has undergone more than 7 years. The question as to whether the accused had committed the crime and if so what is the nature of the offence committed by him can only be decided after evidence has been adduced. In these circumstances, the proper course would be to direct a retrial of the appellant.

12. In the result the appeal succeeds and is hereby allowed. The conviction of the appellant and the sentence imposed upon him by the judgment and order dated 16-1-1990 is set aside. The case is sent back to the learned Sessions Judge who shall try the appellant again after framing the charge afresh and in accordance with law. The record does not show that the appellant had engaged any counsel. The learned Sessions Judge will appoint a competent-lawyer to defend the appellant as *amicus curiae*.

13. Office is directed to send a copy of this judgment and complete trial Court record to learned Sessions Judge and another copy to the learned C.J.M. Uttar Kashi who will send the same to the appellant for his information.

