

Dewan Chand and ors. Vs. the State

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SooperKanoon Citation : sooperkanoon.com/525518

Court : Orissa

Decided On : Sep-22-1964

Reported in : AIR1965Ori66; 1965CriLJ458

Judge : S. Barman and ;G.K. Misra, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3, 24 and 30; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 164 and 342; Indian Penal Code (IPC) - Sections 34 and 302

Appeal No. : Criminal Appeal No. 41 of 1964

Appellant : Dewan Chand and ors.

Respondent : The State

Advocate for Def. : G. Rath, Govt. Adv.

Advocate for Pet/Ap. : S.B. Patnaik, Adv.

Judgement :

Barman, J.

1. The four accused appellants were convicted on a charge of murder of the wife of the accused Dewan Chand punishable under Section 302/34 Indian Penal Code in an open shop verandah by read side in Bhawanipatna town on the night of

March 10-11-1963 and were all sentenced to imprisonment for life. The four accused persons are intimately connected with one another in the manner hereinafter stated. The motive for the murder is apparently frequent quarrels between accused Dewan Chand's wife deceased Kartar Kuar and his concubine the accused Nila Goudari.

2. The prosecution case is this: The accused persons are all residents of Bhawanipatna town. The deceased, a lady of 55 years was the married wife of accused Dewan Chand. Accused Nila Goudani is said to be Dewan Chand's concubine for the last 12 years. Accused Nabin Goud is the son of the accused Nila Goudani by her former husband. Accused Krushna Gouda is accused Nila's foster brother. Dewan Chand was running a shop near a cinema house in a room of the house of P. W. 1 Atma Singh let out to him. The shop had an open verandah in its front by road side. Dewan Chand, Nila and the deceased used to sleep together in the shop house. About 15 days prior to the occurrence they had shifted to a house newly constructed by Dewan Chand which is at a distance of about a furlong from his shop. After this shifting, the deceased however used to sleep at night alone in the verandah of the shop house; Dewan Chand and Nila used to sleep in the new house. It is said that Nila and the deceased were very often quarrelling and Dewan Chand used to ill-treat and assault the deceased. Then ultimately what happened on the fatal night ending with the murder of the deceased, in the manner it was done by all the accused persons herein is stated as hereinafter follows:

3. On the night of March 10, 1963 the deceased wife as usual was sleeping alone on the verandah of the shop house. At about 2 A. M. the same night the concubine accused Nila Goudani called his son Nabin and foster brother Krushna; the three along with Dewan Chand went to the shop house where the deceased was sleeping. The prosecution case is that at the direction of Dewan Chand his concubine the accused Nila tied a piece of cloth in the mouth of the deceased; the other two accused Nabin and Krushna caught held of her hands and legs respectively; Dewan Chand gave several blows with a tangia on her head, face and chest as a result of which she died instantaneously. It is said that accused Dewan Chand covered the dead body with a piece of cloth and made over the

Tangia to Nabin to keep the same after fixing a new handle to it. Thereafter the four accused persons left the scene of the murder, as seen by some witnesses hereinafter discussed.

4. The following morning on March 11, 1963 at 8 a.m. the accused Dewan Chand along with his landlore Atma Singh P. W. 1 went to the Police station and lodged the First Information Report to the effect that in the previous night he (Dewan Chand), Nila and the deceased took their meals; the deceased went to sleep in the verandah of the shop house; in the morning when he went to his shop, he found his wife the deceased lying dead on her cot in the verandah with a gaping cut injury on the left temporal bone and that there had been profuse bleeding and accumulation of blood below the cot. Immediately the police took up the investigation and the Investigation officer P. W.17 arrived at the spot and found several cut injuries on the left side of her head, face and chest. Accused Nabin and Krushna were arrested on March 12, 1963 and the other two accused Dewan Chand and Nila were arrested on March 13, 1963.

Accused Nabin and Krushna made confessions before a Magistrate on March 13, 1963. Accused Nila who was arrested on March 13, 1963 also made a confession before the Magistrate on March 14, 1963. Accused Dewan Chand also made a statement before the Magistrate on March 14, 1963 but he denied his complicity or connection with the crime. He said that the deceased after food went to the shop to sleep; he went to bed; in the morning he found that his wife the deceased was killed; that he did not know anything more. All the four accused appellants were in due course committed and sent up for trial before the Sessions Judge who convicted and sentenced them all as aforesaid.

5. The prosecution case is primarily based on the retracted confessions of the three accused persons Nila, Nabin and Krushna; and the circumstantial evidence including the evidence of P. W. 10 and P. W. 19 who had seen the accused persons coming out of the house where the murder had taken place at an unearthly hour at about 3 a.m. on the night. The prosecution case is that there is sufficient corroboration evidence which shows or tends to show that the story in the confessions that the accused persons committed the crime is true, not merely

that the crime had been committed but that it was committed by the accused persons.

6. Let us first take the case of accused Dewan Chand. He did not confess having committed the crime. He said that the deceased after taking her meal went to the shop to sleep; he went to her bed in his own house; in the morning he came to the shop and found his wife the deceased killed; he did not know anything more. Each of the other three co-accused persons however directly implicated accused Dewan Chand in having committed the murder.

7. The question is; is such confession of the three accused persons by itself sufficient for conviction of the accused Dewan Chand? Their Lordships of the Supreme Court in a recent decision in *Haricharan Kurmi v State of Bihar*, AIR 1964 SC 1184 had clarified the position thus: A confession cannot be treated as evidence which is substantive evidence against a co-accused person; in dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. The principle is that where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 of the Evidence Act may be thrown into the scale as an additional reason for believing that evidence.

In the words of Sir John Beaumont in *Bhuboni Sahu v. The King*, 76 Ind App 147 at p. 155 ; AIR 1949 PG 257 at p. 260 a confession of co-accused is obviously evidence of a very weak type; it does not indeed come within the definition of 'evidence' contained in Section 30; it is not required to be given on oath, nor in the presence of the accused and it cannot be tested by cross-examination. Thus though confession may be regarded as evidence. In generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that. In dealing with a case against an

accused person, the Court cannot start with the confession of the co-accused persons; it must begin with other evidence adduced by the prosecution and after it had formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

8. Is there other independent evidence sufficient to sustain the conviction of accused Dewan Chand? On consideration of the evidence our answer is in the negative. There is no eye-witness implicating the accused Dewan Chand in the crime. The circumstantial evidence is also not enough to connect Dewan Chand with the murder of the deceased. The accused Dewan Chand had lodged the First Information Report with the Police the following morning after the murder. In his statement under Section 342 Criminal Procedure Code he totally denied the charge of murder against him; he said that the prosecution witnesses falsely deposed against him out of grudge. One of the passer-by witness of the night P. W. 10 did not even mention having seen Dewan Chand along with accused Nila whom the witness had seen that Right.

We have carefully considered the evidence of all the material witnesses. We are not satisfied that there is sufficient other independent evidence to directly connect Dewan Chand with the crime. In the absence of such other independent evidence it is not permissible to turn to the confession of the other three co-accused persons which is obviously evidence of a weak type. Thus the other evidence against Dewan Chand being not satisfactory, the Court cannot turn to those portions of the confessions referring to Dewan Chand's participation in the crime. In this view of the position the conviction of the accused Dewan Chand cannot be sustained.

9. Coming to the case of other three accused persons, their confessions before the Magistrate were, in substance, the same.

10. Accused Nila Goudani who was arrested on March 13, 1963 was produced before the Magistrate on March 14, 1963 at 12 noon and she made the confession at 4 P.M. the same afternoon. The material portion of her confession is this:

'I am the concubine of Dewanchand for the last 12 years. The deceased was the 1st wife of Dewan Chand. The deceased quarrelled with me on Sunday. Dewan Chand asked the deceased not to quarrel. The deceased went to the shop to steep. I gave a tangia to Dewan Chand as he threatend mo to kill. He asked me to call my son and brother. We all went to the shop. It was about 2 a.m. As per his direction tied the mouth of the deceased. He gave tangra strokes and ashed Nabin and Krishna to catch the hands and legs. She died. A man went and we hid. Dewan Chand said not to tell the fact. We went to our houses. He asked Nabin to put a new handle to the Tangia.'

11. Accused Nabin Gouda was arrested on March 12, 1963. He was produced before the Magistrate on the following day March 13, 1963 at 12 noon. He made the confession at 4 p.m. in the afternoon as follows:-

'On Sunday I and Krishna had been to the forest and came in the evening. At night 2 A. M. Nila called me and Krishna saying that there is golmal in the house. Then Dewan Chand came with a Tangia. We went to the shop where the deceased was steeping. Nile tied a cloth in the mouth of the deceased. As per the direction of Dewan Chand I caught her hands and Krishna caught the legs. Devan gave tangia blows on her head and chest. Dewan covered her body also. When going a man was coming and we hid near a truck. Then we went. Dewan threatened us and also gave money. We went to our house. I informed the fact to my wife. Dewan gave the washed tangia and asked me to put another handle.'

12. Then accused Krishna Gouda who was also arrested on March 12, 1963 was produced before the Magistrate on March 13, 1963 at 12 noon. He made the confession at 4 p.m. in the afternoon as follows:-

'On Sunday I and Nabin had been to the forest and returned at dusk time. After food we slept. Nila called first Nabi who called me. Diwanchand came with a tangia. Nila and Diwan were ahead of us and we followed them. The deceased was sleeping on the verandah of the shop. Nila tied the mouth of the deceased. As per the direction of Diwan Chand, Nabi caught hold of the hands of the deceased and I caught the legs. Diwanchand gave Tangia blows on her head and chest and she died. A man was going and we hid near a truck on the road. We went to our

houses. The washed tangia was given to Nabi. Dibanchand threatened us not to tell about the incident to anybody.'

13. All these confessions were retracted by the accused persons. Where a confession is so retracted subsequently, the proper approach is to consider each confession as a whole on its merits and use it against the maker thereof, provided the court is in a position to come to an unhesitating conclusion that the confession was voluntary and true; and though a retracted confession, if believed to be true and voluntarily made, may form the basis of a conviction, the rule of practice and prudence requires that it should be corroborated by independent evidence.

14. Were the confessions voluntary The defence comment is that the accused persons did not have sufficient time for reflection. The defence also vaguely suggests undue police pressure on the accused Nila for extorting confession from her. Each of the accused persons was produced before the Magistrate the day after the arrest. They all were given four hours time for reflection before the confessional statements were recorded by the Magistrate. The defence comments are without substance for reasons hereinafter discussed.

15. The accused Nila in her statement said that she was arrested on Monday, that is, March 11, 1963 and was kept in the police station till March 14, 1963 when she was produced before the Magistrate. The defence suggestion is that she was under police influence for 3 days from March 11, 1963 before she was produced before the Court on March 14, 1964. The Investigating officer P. W. 17 however said that she was arrested on March 13, 1963. There is nothing to disbelieve the evidence of the investigating officer. No question was put to him in cross-examination why accused Nila was not examined and arrested earlier immediately after the police had examined her on March 11, 1964. P. W. 10 who said having seen the accused Nila on the night of the murder. Apparently the accused Nila's statement as to the date of her arrest is not correct. The learned Government Advocate explained that the police was evidently watching the movements of the accused Nila until she was arrested on March 13, 1964. There is nothing to show that after arrest any of the accused persons was unnecessarily detained by the police. They were all produced before the Magistrate, within about 24 hours from

the time of arrest.

16. There can be no doubt that, when an accused person is produced before the Magistrate, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. There is nothing in law as to how many hours must be given for reflection; it all depends on facts and circumstances in each case. Prima facie whether or not the confession is voluntary would be a question of fact and this Court would be reluctant to interfere with a finding on such a question of fact unless this court is satisfied that the impugned finding has been reached without applying the true and relevant legal tests in the matter.

17. Considering the findings of the learned Sessions Judge from aforesaid points of view, it appears that he accepted the confession of the accused persons as voluntarily made and substantially true. There is nothing to indicate that the Sessions Judge was wrong in accepting the evidence of the Magistrate who recorded the confessions: nor is there anything to show that any rule relating to the recording of a confession was violated. It appears that each of the accused persons was produced before the Magistrate at 12 noon on the respective dates, and they all were given time till 4 p. m. to think over the matter; and then after the necessary caution and questioning, their respective confessions were recorded. When examined under Section 342 Criminal Procedure Code they said to the effect that they were assaulted, tortured by police and were asked to make confession according to their instruction. No attempt was made to prove or substantiate any of these suggestions. In fact there was not enough time for the police so as to be able to extract a confession from the accused persons. We therefore reject the defence plea that the confessions were not voluntary. We see no reasons for holding that the finding of the learned Sessions Judge is any way vitiated.

18. Then the further question is : Were the confessions of the three accused persons true? For that general corroboration is essential. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged.

As Lord Reading C. J. in *R. v. Baskerville*, (1916) 2 K. B. 658 while laying down the basic principles in this context observed that it would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or secret murder, as in the present case, would never be brought to Justice. Thus the rule is now firmly established that a retracted confession cannot be used against a co-accused without substantial and independent corroboration both as to the crime and the criminal.

19. Is there general corroboration in the present case? In our opinion there is strong circumstantial evidence against each of the three accused persons Nila, Nabi and Krushna to establish their complicity or connection with the crime. The reasons for our taking this view are as hereinafter stated.

20. The motive of the three accused persons for murdering the deceased is proved by P. Ws. 1, 2 and 7. They all mention about frequent quarrels between the

deceased wife and the concubine accused Nila. It is in evidence that the deceased wife was also on occasions assaulted.

P.W. 1 Atma Singh was the landlord who had let out for rent the shop where the murder took place. The witness, said that the accused Nila and the deceased Kartar Kuar were frequently quarrelling; that the husband accused Dewan Chand was quarrelling with his wife (deceased); that the accused Dewan Chand and accused Nila were illtreating the deceased.

P. W. 2 Ajit Singh, son of P. W. 1 Atma Singh who used to stay in the upper storey of the shop house also said that the accused Nila was not pulling on well with the deceased and was quarrelling now and then; that three or four months prior to the occurrence the accused Dewan Chand assaulted the deceased who reported the matter at the Police Station. The witness further said that again two or three days prior to the occurrence the deceased complained before the witness that she was assaulted by her husband.

P.W. 7 Bar Office Peon is another direct witness regarding the unhappy relationship between the accused Nila and the deceased. He said that on March 10, 63 (Sunday) at about 2 p.m. he met the deceased near his house going on the road crying and complaining that she was assaulted by the accused Nila and that she (deceased) would report the matter to the police. The witness gathered from the deceased that the accused Nila had misappropriated the money remitted by the deceased's son; that she did not give her food, ill-treated her, and when the deceased demanded the return of the money the accused Nila assaulted her. The witness further said that two or three months prior to the death of the deceased, she had been assaulted by the accused Nila with sticks in the presence of the witness because the deceased, on account of her old age refused to take a bundle of soiled cloth from the accused Nila and wash the same.

The evidence of these witnesses clearly establishes that there was bitter feelings between the concubine accused and the wife deceased.

21. The medical evidence of the doctor P.W. 18 clearly establishes that the deceased was killed with a tangia, and as to the manner in which the deceased

was killed in that some of the accused persons had caught hold of the deceased's hands and legs as stated in the confession. The doctor p.w. 18 found on the deceased the following external and internal injuries which are these:

1. Cut injury $2\frac{1}{2}$ x $\frac{1}{2}$ x bone deep on the base of left side of nose.
2. Cut injury $3\frac{1}{2}$ x $1\frac{1}{2}$ x bone deep on the left cheek (left malar bone).
3. Cut injury irregular shape $3\frac{1}{2}$ x $1\frac{1}{2}$ x bone deep in front of left ear (on the left temporal bone).
4. Cut injury 4' x $\frac{1}{2}$ ' x bone deep on the back of left side of head and back of left ear.
5. Cut injury 3' x $\frac{1}{2}$ ' x bone deep on the top of left side of head.
6. Cut injury 3' x $\frac{1}{2}$ ' x muscle deep of the inner aspect of left breast
7. Cut injury $1\frac{1}{2}$ ' x $\frac{1}{2}$ ' x muscle deep on the upper aspect of left breast.
8. Marks of about 7 finger nails on the left palm of left hand.
9. Abrasion of right knee.
10. The nasal bone corresponding to injury No. 1 got crushed and wound communicating with nasal cavity.
11. The bone of left cheek got crushed and separated from sutures, communicating with mouth cavity, correspondent to injury No. 2.
12. The left temporal bone correspondent to injury No. 3 got crushed and the temporal parietal suture got separated, it is communicating with the skull cavity.

The doctor opined that injury No. 8, namely marks of about 7 finger nails on the palm of left hand of the deceased, could have been caused by somebody holding the palm with fingers, and injury No. 9, namely abrasion of right knee could have been caused by coming in contact with rough surface or by struggling when the knee was held by somebody.

The doctor also opined that injuries 1 to 7, namely all cut injuries, could have been caused with an axe or a knife. He also gave his opinion in his reply to the requisition of the investigating officer dated March 15, 1963 that the injuries were possible by means of the tangia sent to him and that all the Injuries were ante mortem in nature. The doctor further said that any of the three tangias Mos. III, IV and V could cause the injuries in question. The doctor also said that at the time of inflicting of the injuries the deceased must be lying with her body turned to the light side.

22. All that the doctor said sufficiently corroborate the material portions of the confessions, namely, that at the time of the murder the deceased was sleeping, that she was killed with a tangi with which the strokes were given on different parts of her body including head and breast; that two of her accused persons caught hands and legs of the deceased. This, in our opinion, is sufficient corroboration of those portions of the confessions to which they relate.

23. Moreover, the fact that four persons had participated in the murder is corroborated by P. W. 19 Hari Singh, a contractor, who was staying in the vicinity of the place of occurrence. The material portion of his evidence is that at about 3 a. m. on the night of occurrence he found one male and a female moving near the shop where the murder took place. After sometime the witness found one female wearing a rose coloured Saree and three males going on the road towards the Nuapada side. It is to be noted that it was the Nuapada side where accused Sila and her paramour accused Dewan Chand were residing at the time in the newly constructed house. The witness said that it was a moonlit night and there was an electric post near the shop; that he could identify the accused Nila among them. There can be no mistake about the witness having seen one female and three males. He said that the male and the female were standing near the shop when the witness first saw them, and that they were looking towards him. His evidence was further corroborated by the recovery of a rose coloured Saree M. O. XXVIII which the female accused Nila was wearing at the time. It contained blood stains. The Saree was seized on March 13, 1963 as appears from the seizure list Ext. 3/10 In the presence of seizure witness p.w. 9.

24. That apart, the recovery of the blood stained Tangia M.O. IV with a new handle from the house of accused Nabin is a further corroboration of the confessions. The investigating officer P. W. 17 searched the house of accused Nabin and seized the tangia M. O. IV which contained a new handle M. O. IV/1 and the blade M. O. IV/2. The investigating officer seized the tangia as it contained Wood stains. The chemical report is that blood too small for serological test had been detected in the stains on the axe blade. The evidence that the tangia contained a new handle is significant. It corroborates that part of the confession where it is mentioned that the accused Dewan Chand had asked accused Nabin to put a new handle to the tangia.

25. It is also in evidence that the accused Dewan Chand had blood stains on his lungi M. O. VI and shirt M. O. VI/1. The investigating officer P.W. 17's evidence is that on March 13, 1953 he arrested the accused Dewan Chand and from his person he seized a lungi M. O. VI and a shirt M. O. VI/1 which contained blood stains. These serve as a general corroboration of the confessions of the three accused persons where they mentioned that accused Dewan Chand had participated in the crime in the manner stated therein. It is to be noticed that this portion of the confessions could not be used against accused Dewan Chand, as discussed above, by reason of the initial want of other independent evidence against accused Dewan Chand. Therefore, in support of the prosecution case against Dewan Chand, we could not turn to this portion of the confessions mentioning about Dewan Chand's participation, in the murder.

26. There is further corroboration of the confessions in that all the three accused persons mention that a man was coming their way on the night of the murder and that on seeing the man the accused persons hid near a truck. The man referred to in their confessions is P. W. 10 Subas Chandra Bisi--Sadar Block office Peon. The witness said that he and three others had gone to Purunapara of Bowanipatna town to witness a Natch (dance) performed that night; that when returning home at about 3 a. m. that night he saw a truck standing by the side of the road near the shop where the murder had taken place; that on his left side he found that accused Nila came out of the shop-house and very quickly proceeded towards the truck and disappeared from his sight. There could be no mistake about the witness

having identified the accused Nila because, as the witness said, it was a moonlit night and he could see her eyes, ears and nose; that she had veiled her head. The evidence of this witness is a further corroboration of that portion of the confession mentioning about a man coming their way on the night of the murder.

27. In this view of the case, we are satisfied that on the confession of the three accused persons, Nila, Nabin and Krushna as generally corroborated by strong circumstantial evidence as hereinbefore discussed, their conviction and sentence on the charge of murder must be upheld. As regards the accused Dewan Chand, although the three co-accused persons implicate him in the murder, but by reason of the initial want of other independent evidence his conviction cannot be sustained only on the confessions of the co-accused persons.

28. In the ultimate analysis of the entire position read with all the material evidence in this case, we are satisfied that the three accused persons Niia, Nabin and Krushna committed murder by intentionally causing the death of the deceased in furtherance of the comma intention of them all to kill the deceased and thereby committed an offence punishable under Section 302/34 Indian Penal Code.

29. In the result, therefore the appeal of the accused appellant Dewan Chand is allowed; accordingly the order of conviction and sentence passed on him by the learned Sessions Judge is set aside; he is acquitted and directed to be set at liberty forthwith. As regards the other three accused persons Nila, Nabin and Krishna the order of conviction and sentence on them by the learned Sessions Judge is upheld and their appeal is dismissed.

Misra, J.

30. I agree.