Khalli Behera Vs. the State

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Court : Orissa

Decided On : Aug-16-1950

Reported in : AIR1951Ori78; 16(1950)CLT186

Judge : Jagannadhadas and ;Panigrahi, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 164, 164(3) and 339(2); Evidence Act, 1872 - Sections 24

Appeal No. : Criminal Appeal No. 25 of 1950

Appellant : Khalli Behera

Respondent : The State

Advocate for Def. : Asst. Govt. Adv.

Advocate for Pet/Ap. : Dibyasinga Misra, Adv.

Disposition : Appeal dismissed

Judgement :

Panigrahi, J.

1. This is an appeal directed against a conviction Under Section 302/149, Penal Code, by the Additional Sessions Judge, Ganjam Nayagarh. The occurrence in respect of which, the appellant, Khalli Behera, was charged took place on the night

of 11-10-1949 at about 7 P. M. on the Grand Trunk Road between Berhampur and Golanthra when the deceased, a jutka driver by name Kalia Behera, was attacked by a number of persons and done to death, The appellant, along with a number of other persons, was arrested on 12-10-1946, the day after the occurrence. Two days later, he was produced before a Magistrate as he was willing to make a confession. On 15-10 1949 his confessional statement was recorded. On 19-11-1916 he was charge-sheeted along with the other accused. On 19-12-1949 he was tendered pardon and he executed a bond agreeing to make a true and full disclosure of all the facts he knew about the occurrence and that he was willing to be exa mined as an approver. He was actually examined as an approver on 17-2-1947 in the Court of the Committing Magistrate. The case was later committed to the Court of Session and the approver was again examined as a witness (P. W. 13) in that Court, in Sessions case no. 10 of 1947. The appellant was examined on 3-7-1947 in the Sessions Court when he went back completely upon his earlier statements. The Public Prosecutor of Ganjam thereupon certified, under Schedule 39, Criminal P. C. that the appellant had forfeited the pardon and that he was liable to be put on his trial. The case which has given rise to this appeal is a sequel to the failure of the appellant to abide by the terms of the bond which he had executed. The appellant pleaded that he had not forfeited the pardon and that he was not guilty of the charge of murder.

2. The learned Additional Sessions Judge who tried the case held that the confession of the appellant made three days after his arrest was true and was supported by the other evidence in the case. He therefore accepted the appellant's confessional statement as evidence against him in spite of the fact that it was retracted later. He also relied upon the deposition of the appellant before the Committing Magistrate on 17-2 1947 as the facts mentioned therein had been corroborated by the other oral evidence. He held that the reasons given by the appellant for retracting the confession and the deposition were a tissue of falsehood and accordingly found the appellant guilty of the charge of murder and sentenced him to transportation for life.

3. Mr. Dibyasinga Misra who appeared amicus curiae for the appellant has urged in an able and painstaking argument that the confessional statement should be

ruled out as inadmissible as it was not voluntary, that the deposition made by the appellant as approver amounts to a departure from the facts stated in his confessional statement inasmuch as it makes mention of a large number of details omitted in the confession and that the deposition itself, having been induced by the hope of a pardon, should not have been admitted in evidence.

4. That a confession, though retracted, can be the basis of a conviction, cannot be disputed as a matter of law. The Courts, however, look for corroboration of the statements made in the retracted confession, before acting upon it, as a rule of prudence. It is not necessary to refer to all the cases that were cited at the Bar as the point has been well recognis9d by all the High Courts. As the learned Sessions Judge has summarised the evidence relating to the factum of the occurrence, as alleged by the prosecution, I shall only briefly give an outline of the broad facts deposed to by the witnesses.

5. It is established that the deceased Kalia Behera was decoyed by Dhanu, who was one of the parsons charged along with the appellant, from Berhampur and that the deceased was also accompanied by one Nartu Jagayya when he started on his ill-fated journey. That a number of people had been waiting on the road-apparently anticipating the arrival of the jutka is spoken to by Jagayya. The appellant, in his confessional statement, said that Bhubani, Trinath, Bhima, Mangalu and Matta Sima were waiting for the jutka with lathis at the scene of occurrence and that Dhanu came in the jutka, and got down at the spot. This is corroborated by Jagayya's evidence though he doss not give the names of the people assembled at the spot. The appellant's further statement that the cloth of the deceased slipped from him and that Bhubani picked it up and threw it by the side of a screwpine bush nearby is corroborated by the recovery of the cloth itself from the identical spot where, according to the appellant, it had been thrown away. The cloth has also been identified to be that of the deceased by the father of the deceased who was examined in the case. The confessional statement further states that after the deceased fell down he was stabbed with a knife. The post-mortem certificate shows that the deceased had received not only lathi blows but also knife injuries. According to the appellant, Dhanu gave a knife blow and a shirt belonging to Dhanu, suspected to contain blood-stains, was seized. The Serologist

has certified those blood stains to be of human origin. In the confession the appellant states that he gave a stick blow. In his deposition before the Committing Magistrate he said:

'Accused Bhubani gave us lathis and I was given a khantabadi by him .... I subsequently gave the khantabadi to Trinath and he handed over the Khantabadi at Bhubani's house.'

The khantabadi was subsequently recovered from Bhubani's house and exhibited in the case. In his confessional statement the accused implicated Dhanu and Bhima. It was proved at the trial that a shirt belonging to Dhanu and a white cloth and a bundle of thread belonging to Bhima were seized and later certified by the Serologist to have contained human blood. It would thus appear that not only have the broad facts attending the death of the deceased Kalia Behera been proved but also the part actually taken by the appellant in the murder has also been corroborated by the evidence on record. The confessional statement of the accused has therefore been corroborated in material particulars not only with regard to the occurrence and the general aspects of the murder, but also with regard to the part played by the appellant. His presence at the scene of occurrenoe and his complicity in the crime have been satisfactorily established by the evidence on record.

6. In his examination before the Court of Session in S. C., 10 of 1917 (Ex. 19.4) the appellant completely denied any knowledge of the occurrence but he admitted that his statement of confession made to the Magistrate had not been made under the influence of the Police. He said :

'I made a statement before the Magistrate three days after the occurrence. I told him that I did not know anything about the occurrence. By that time nobody tutored me.'

At another place he said :

'It was only in connection with my examination at the Committing Court that I was tutored.'

It cannot therefore be seriously contended that the statement that he made before the Magistrate Under Section 164, Criminal P. C., was not voluntary or that it had been brought about by any undue influence or pressure. The Magistrate who recorded the confession and who was examined as P. W. 18, says that, he warned the appellant that he was not bound to make a statement and that whatever he said may be used as evidence against him. The appellant is said to have replied; 'I am going to make a voluntary statement of all that I know'. The appellant was again asked by the Magistrate 'Why do you agree to confess your guilt before me'? and he replied: 'whatever I know I will speak'. It is pointed out by the learned counsel for the appellant that inasmuch as the appellant was not specifically asked that his statement might be used as evidence against him, even if he re tracted, the confession could not be voluntary and should not have been acted upon. Oar attention was drawn to the case reported in Gurubarn Praia v. The King, 1 Cut. 207: (A. I. R. (86) 1949 Orissa 67: 51 Cr. L. J. 72). That case is no authority for invalidating a confession on the mare ground that the accused was not specifically warned by the Magistrate recording his confession that his confessional statement, even if retracted later, may be used as evidence against him. Section 164, Criminal P. C., says that the Magistrate is bound to explain to the accused that the statement which he makes may be used as evidence against him. I see no reason to superimpose a further qualification to what is already contained in the Statute. It was also urged that the statement was taken at the house of the Magistrate (P. W. 18) and that on that ground it is vitiated. There is no specific rule that I know of which prohibits a Magistrate from recording a statement under Schedule 64 either at his house or in camp, wherever it may suit him. In fact it may be necessary in some oases to record a statement outside the Court so that the accused may be altogether free from any influence or fear.

7. Whatever may be said with regard to the admissibility of the confession recorded under Schedule 64, the statement of the appellant, as approver, made in the Court of the Committing Magistrate cannot be assailed on any ground. This statement is marked as Ex. 19. It was recorded in the course of the enquiry by the Committing Magistrate and not under Schedule 64, Section 337 (3), Criminal P. C. lays down that:

'Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.'

Exhibit 19 is, therefore, a statement of a witness and not the confession of an accused. Admittedly this was preceded by pardon tendered and accepted. There is no substance in the contention that this evidence is also tainted because the accused made the statement with the hope of getting release from the charge. Section 337 is enacted to meet a contention like the one urged before us. A person who accepts the tender of pardon accepts also the grave risk of not departing from the truth, on pain of being charged with the offence if he abused the privilege granted to him. Section 339 (2), therefore, provides that

'the statement made by a parson who has accepted a tender of pardon may be given in evidence against him at such trial.'

This provision is accordingly in the nature of an exception to Schedule 64, Criminal P. C., and Schedule 4, Evidence Act. I am, therefore, satisfied that Ex. 19 could be legitimately used against the accused though retracted later. In this statement, the appellant repeated what he had stated before the Magistrate under S.164 and added one more detail. He repeated the statement that he had been given a khantabadi by Bhubani, that he along with his associates waited on the road for the arrival of the jutka from Berhampur, that Dhanu came along with the deceased jutka, driver, and that along with others he himself beat the deceased with a lathi. He implicates Bhima as having assaulted the deceased with a lathi. He says that the cloth worn by the jutka driver slipped and that ill was thrown away by Bhubani and that Dhanu stabbed the deceased on his abdomen with a knife. The only new fact that he added for the first time was the receipt of Rs. 25 from Bhubani. Ha has also confirmed his earlier statements that he gave the hhantabadi to Trinath and that Trinath later handed it over at Bhubani's house. His presence at the scene of occurrence and that part he took in the occurrence have been corroborated, as I have already indicated earlier. The cloth of the deceased was actually seized from the place where, according to the appellant, Bhubani had thrown it. With regard to the weight to be attached to the find of the cloth I may quote the observations of

the Judicial Committee in Bhuboni Sahoo v. The King, 1949-2 M. L. J. 194 at p. 197 : (A. I. R. (36) 1949 P. C. 257 : 50 Cr. L. J. 872) :

'With regard to the cloth, as already noticed, the evidence of the approver was that the appellant threw the cloth over a hedge and it was proved at the trial that the cloth was found in the place pointed out by the approver. This fact no doubt was of value as supporting the credibility of the approver's story.'

So far as the approver's story relating to the Khantabadi, is concerned, it is an equally valuable piece of evidence against himself though it was not of much evidentiary value against Bhubani from whose house it wag recovered. The presence of human blood on the clothes of Dhanu and Bhima is another important piece of evidence which implicates the appellant and proves beyond doubt his participation in the crime.

8. We are satisfied that the appellant has forfeited the pardon tendered to him and that his confessional statement and his later statement, as approver, though retracted, have been corroborated in material particulars. Agreeing with the learned Sessions Judge, therefore, we uphold his conviction and sentence and dismiss this appeal.

Jagannadhadas, J.

9. I agree that the conviction and the sentence should be upheld and the appeal dismissed.

10. I wish, however, to add that I consider quite improper on the part of the Magistrate to have recorded the confessional statement of the accused under Schedule 64 at his house without assigning any reason. This is all the more a latter for comment, since it appears that the learned Judge on that very date recorded the confessional statement of another accused in the main case, named, Dhanu in open Court just only 20 minutes earlier. The confession of (sic) appears to have been recorded at 2 p. m. and that of this accused at 2. 20 p. m. (sic) day. No reason for the same has (sic) either in the examination or cross-(sic) of the Magistrate, P. W. 18. Rule 11, (sic)(2) General Rules and Circular Orders,

Criminal, which I presume was in force at the time within the confession was taken states as follows'.

'Confessions should be recorded in open Court and during the court and except when unusual circumstances require a different procedure, as for instance, (sic) as record will be detrimental to public interest or when the recording of the confession in open Court is rendered impracticable by reason of the fact that the Court is closed for two or more successive days on (sic) of holidays.'

11. In spite, however, of room for the above comment, I have satisfied myself that on the record there is no ground for rejecting the confession as not being voluntary. There also the clear evidence afforded against himself by the deposition of the accused as approver in the Committing Magistrate's Court.