

Ananta Dixit Vs. State

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Court : Orissa

Decided On : Mar-08-1984

Reported in : 57(1984)CLT429; 1984(I)OLR381

Judge : B.K. Behera, J.

Acts : [Evidence Act, 1872](#) - Sections 3 and 30; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 410

Appeal No. : Jail Criminal Appeal No. 336 of 1983

Appellant : Ananta Dixit

Respondent : State

Advocate for Def. : D.P. Sahoo, Standing Counsel

Advocate for Pet/Ap. : Ghanashyam Namtoar, Amicus Curiae

Disposition : Appeal allowed

Judgement :

B.K. Behera, J.

1. The appellant and another co-accused person, namely, Baina Das, stand convicted for commission of an offence of dacoity under Section 395 of the Indian Penal Code and sentenced thereunder to undergo rigorous imprisonment for a

period of five years by Mr. G. S. Patra, then functioning as the Additional Sessions Judge, Balasore, by his judgment and order of conviction dated the 30th September, 1983, solely based on the confession of one of the accused persons, namely Narendra Behera, who had stood trial previously with the other accused persons and not jointly with the appellant and the co-accused Baina Das and who had implicated himself and the appellant and the accused Baina Das in the commission of the crime of dacoity in the house of Dibakar Jena. (P W. 1) at village Keratapadia in the District of Balasore during the night of the 6th/7th November, 1975 in the course of which the culprits were alleged to have removed cash and other properties after-assaulting the inmates of the house being armed with dangerous instruments. On the basis of the first information report lodged by P. W. 1, investigation had been taken up by the Officer-in-Charge of the Nilgiri Police Station (P. W. 8) and on its completion, a charge-sheet was placed against the present appellant and the co-accused person Baina Das besides nine others. The appellant and the co-accused person were not available and were said to be absconding. The other accused persons involved in the same case were tried in batches in Sessions Trial Nos. 70 and 73 of 1977 which were disposed of on 13. 12. 1977. After the appellant and the co-accused Baina Das were apprehended, they were tried jointly being charged under Section 395 of the Indian Penal Code. To bring home the charge, the prosecution had examined eight witnesses of whom P. Ws. 1 to 4 and 7 had been examined to speak about the commission of dacoity and they had identified the appellant and the co-accused Baina Das in the court. P. W. 5, then the Subdivisional Judicial Magistrate at Nilgiri, had recorded the confessional statement (Ext. 2) of the accused Narendra Behera. P. W. 6. was a witness to some seizures in the course of investigation. P.W. 8. had investigated into the case. The appellant and the co-accused Baina had not examined any witness in their defence.

2. On a consideration of the evidence of P. Ws. 1 to 4 and 7, the learned trial Judge did not accept their evidence of identification and in my view, rightly so, in view of the reasons recorded by him in the body of the judgment. It is not necessary for this Court to catalogue the grounds given for discarding their testimony in this regard as the learned Standing Counsel has not challenged these findings recorded by the learned Judge. After disbelieving and discarding the

evidence of P.Ws. 1 to 4 and 7, the learned trial Judge considered the confessional statement of the accused Narendra Behera and found thus:

'Now remains the confessional statement of the co-accused to be considered. One Narendra Behera and 10 others including the two accused persons were charge-sheeted in one and the same G. R. Case No. 148 of 1975. The present two accused persons were absconding. Their case was therefore split up. After their apprehension they are presently facing their trial, prior to that Narendra Behera and others were tried in S. T. Nos. 70 and 73 of 1977 disposed of on 13-12-77. So it cannot be disputed that Narendra Behera was a co-accused. His confessional statements were recorded as per Ext. 2 by the S. D. J. M, Nilgiri examined as P. W. 5. In Ext. 2, the co-accused Narendra Behera confessed his guilt-before the S. D. J. M. P. W. 5 not only implicating himself but also implicating the present two accused persons as participants in the dacoity. In that statement Ext. 2 Narendra Behara gives out a detailed picture as to the manner in which dacoity was committed on the fateful night in the occurrence house. The evidence of the S. D. J. M. P. W. 5 clearly shows that this statement was made by Narendra Behera voluntarily without any threat or coercion from any source whatsoever. It further transpires that the learned Magistrate observed all legal formalities in recording the said confessional statement. The recovery of the stolen properties M. Os. I to XV in course of investigation by the I. O. P. W. 8 and the evidence of the P. Ws. 1, 2, 3, 4 and 7, who are inmates of the occurrence house, with regard to the commission of dacoity by the culprits Ined sufficient assurance to the truth of the confessional statement recorded by P. W. 5 in Ext. 2 From the con fessional statememt Ext. 2 which is true and voluntary, it can be safely concluded that both the accused persons were participants in the alleged dacoity. Hence both the accused persons are convicted under Section 395 I. P. C.'

3. It is thus that the order of conviction against the appellant and the co-accused person based solely on the confession of Narendra Behera who originally figured as one of the eleven accused persons and who had stood trial separately and previously was recorded and the appellant was sentenced as earlier stated. Thus the learned Judge could not do in view of the provisions contained in Section 30 of the Evidence Act which is the only provision dealing with the admissibility and

evidentiary value of the confession of a co-accused person.

4. The learned advocate appearing for the appellant has challenged the order of conviction on the ground that it could not have been recorded solely on the basis of the confession of a co-accused person who had not stood trial jointly with the appellant. The learned Standing Counsel has very fairly submitted that the order of conviction cannot be allowed to stand. It has been brought to my notice that the other co-accused person, namely, Baina Das, who also stood trial with the present appellant and who had been convicted, has not preferred any appeal against the order of conviction and sentence passed against him. In view of the serious infirmities in the order of conviction, I have put the learned Standing Counsel to notice and to submit before me as to why the order of conviction passed against the co-accused person should not also be set aside in exercise of the revisional jurisdiction of this court without issuing notice to the co-convict Baina Das as an order setting aside the conviction would be to his advantage. The learned Standing Counsel has submitted that the order of conviction passed against the non-appealing convict should also be set aside.

5. The order of conviction has been passed by the learned Additional Sessions Judge in flagrant violation of the clear provisions contained in Section 30 of the Evidence Act and without keeping in mind the fundamental principle that no order of conviction can be based solely on the confession of a co-accused person which can only lend assurance to the other evidence on which the conclusion guilt can be rested and that, too, when the confessing accused person is being tried jointly.

6. Section 30 of the Evidence Act reads:

'When more persons than one are being tried jointly for' the same offence, and a confession made by one of such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.'

Explanation.-'Offence', as used in this section, includes the abetment of, or attempt to commit, the offence.'

I would quote illustration (b) to this section: '(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said- A and I murdered C.

This statement may not be taken into consideration by the Court against A as B is not being jointly tried.'

7. As recorded by the learned trial Judge, the accused Narendra Bahera, whose confessional statement had been relied upon, had been tried earlier and not jointly with the appellant and the co-accused person Baina Das. A confession of the accused may be admissible and used not only against him but also against a co-accused person tried jointly with him for the same offence. Section 30 applies to a case in which the confession is made by accused tried at the same time with the accused person against whom the confession is used. The confession of an accused tried previously would be rendered inadmissible. Therefore, apart from the evidentiary value of the confession of a co-accused person, the confession of Narendra Behera was not to be admitted under Section 30 of the Evidence Act against the present appellant and the co-accused Baina Das,

8. I would next come to the evidentiary value of the confession of a co-accused person.

9. As provided in Section 30 of the Evidence Act itself, the court may take into consideration the confession of a co-accused person. With respect to the words 'may take into consideration', Jackson, J, observed in R. v. Chandra 25 WR. Cr 43:

'The section does not provide as has been repeatedly pointed out by this court. That such confession is evidence, still less does it say, that it may be the foundation of a case against the person implicated. The legislature very guardedly says that it may be taken into consideration and I think that the obvious intention of the legislature in so saying was that, when as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence of being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken

into consideration as bearing upon the truth or sufficiency of such evidence.'

Jenkins, C. J. observed in *R. v. Lalit and Ors.* 38 Calcutta 559: 15 CWN 598:

'Section 30 provides, that when more persons than one are being, tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by Section 21 relevant and may be proved as against the person making them: all that Section 30 provides is that the court may take them in to consideration, as against other person. This distinction of language is significant and it appears to me that its true effect is, that the court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of Section 5.'

The law in this regard has been laid down by the Supreme Court in the well-known case of *Haricharan Kurmi v. State of Bihar* AIR 1964 Supreme Court 1184. Their Lordships of the Supreme Court have observed and held:

'The question about the part which a confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of Section 30 of the Act. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such person is proved, the Court may take into consideration such confession as against such other as well as against the person who makes such confession. The basis on which this provision is founded is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking truth. Normally if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker

would implicate himself untruly, and so Section 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of confession. There is no doubt that the confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession particularly if it has been retracted. With that aspect of the problem, however, we are not concerned in the present appeals. When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in Section 30 is not evidence under Section 3 of the Act. Section 3 defines 'evidence' as meaning and including:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence:

(2) all documents produced for the inspection of the Court:

(11a) Such documents are called documentary evidence. Technically construed, this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the court permits or requires to be made before it; and clearly a confession made by an accused person is not such a statement: it is not made or permitted to be made before the court that tries criminal case, Part (2) of the definition refers to documents produced for the inspection of the court; and a confession cannot be said to fall even under this part. Even so, Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal courts and in that sense it may be described as evidence in a non-tactical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that

evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court, But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be accepted by the Court in dealing with a confession, because Section 30 merely enables the Court to take the confession into account.'

Their Lordships referred to the principles laid down by the Judicial Committee of the Privy Council in AIR 1949 Privy Council 257 *Bhuboni Sahu v. The King* and laid down:

'It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is riot 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 co-accused person; it must begin with ether evidence adduced by the prosecution, and after it has 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 which the judicial mind is about to reach en the said guilt other evidence. That, briefly stated, is the effect of the provisions contained in Section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of Madhya Pradesh*, 1952 SCR 526: (AIR 1952 SC 159) where the decision of the Privy Council in *Bhuboni Sahu's* case, 76 Ind App 147 (AIR 1949 PC 2577, has been cited with' approval.'

It has been laid down by the Supreme Court in AIR 1968 Supreme Court 832 *Haroon Haji Abdulla v. State of Maharashtra*, that a confession intended to be used against a co-accused person stands on a lower level than the evidence of an accomplice because the latter is at least tested by cross-examination while the former is not. The confession of a co-accused is not evidence, but if there is other evidence on which a conviction can be based, it can be referred to as lending

some assurance to the verdict. The confession of a co-accused can be used only in support of the other evidence and cannot be made the foundation of a conviction, as held by the Supreme Court in AIR 1970 Supreme Court 45 Mohd. Hussain Umar Kocha v. Dalipsinghji and Anr., In this connection and to the same effect, reference may also be made to the decisions of this court reported in 1978 Cri. L. J. 176 State v. Gourauga Sahu and 1982 Cri. L. J. 2162 Bijoy Kumar Mohapatra and Ors. v. The State.

10. The law relating to the admissibility and evidentiary value of the confession of a co-accused may now be summarised. Section 30 of the Evidence Act permits the reception of a confession of a co-accused person tried jointly. The confession of a co-accused person is not technically 'Evidence' and it cannot be treated as substantive evidence. Section 30 gives the court a discretion to use it against a co-accused when the condition as to its affecting himself and the other accused is fulfilled. The court has full discretion to exclude the confession altogether from consideration against a co-accused, if from the facts and circumstances, the court is disposed of to take that view. The words 'may take into consideration' have been designedly used and go to show that if there is other relevant evidence tending to prove the guilt of the accused, the confession of a co-accused may then be used only in support of other evidence. The confession of a co-accused cannot be made the foundation of a conviction. If there is no other evidence or if the other evidence is insufficient, the confession of a co-accused is to be excluded and cannot be taken into consideration against a co-accused. Such a confession cannot be added to supplement the evidence otherwise insufficient nor can it be used to fill a gap in the prosecution evidence. The evidentiary value of the confession of a co-accused is extremely weak and a conviction solely on its basis is bad and is unsustainable in law.

11. In view of the clear provisions made in Section 30 of the Evidence Act and the principles laid down by the Judicial Committee of the Privy Council, the Supreme Court and this Court, to which reference has been made in this judgment, it must be held that in the absence of any other substantive evidence pointing to the guilt of the appellant and the co-accused Baina Das, they could not legally be convicted only on the basis of the confession of a person who was accused of the

commission of the same offence and had been tried separately and not jointly with the appellant and the co-accused Baina Das. The order of conviction passed against the appellant and the co-accused Baina Das is, therefore, completely illegal and wholly misconceived.

12. No doubt, to err is human. The subject of law is, indeed, vast and there is no end to one's learning. After all, one learns from the cradle to the grave. When a doubt on any legal question arises, it should be resolved with reference to the statutes and the judge-made laws. As noticed in the instant case, the learned trial judge had not at all applied his mind both with regard to the admissibility and the evidentiary value of the confession of a co-accused person as provided in Section 30 of the Evidence Act. The confession of Narendra Behera was improperly admitted in evidence and made the foundation of the order of conviction although he was not a co-accused person tried jointly with the appellant and the other accused convict Baina Das. That apart, the settled principle of law that an order of conviction can be based solely on the basis of the confession of a co-accused person should not have been lost sight of.

13. As earlier indicated in the body of this Judgment, the other convict, namely, Baina Das has not preferred an appeal against the order of conviction and sentence passed against him. In the circumstances of the case and in view of the, patent illegality and impropriety noticed by this court in the order of conviction and sentence passed against him, the order of conviction passed against him must also be set aside, in the interests of justice.

14. In the result, I would allow the appeal and set aside the order of conviction and sentence passed against the appellant Ananta Dixit. In exercise of the revisional jurisdiction of this Court, I would also set aside the order of conviction and sentence passed against the non-appealing accused-convict Baina Das. The appellant and Baina Das be set at liberty forthwith.