

Dhuleswar Behera Vs. the State

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Court : Orissa

Decided On : Feb-09-1982

Reported in : 1982CriLJ2346

Judge : P.K. Mohanti and ;J.K. Mohanty, JJ.

Appellant : Dhuleswar Behera

Respondent : The State

Judgement :

P.K. Mohanti, J.

1. This is a prisoner's appeal against his conviction under Section 302, I.P.C. and the sentence of rigorous imprisonment for life. Accusation against the appellant was that he killed his paternal uncle Biswanath Behera by means of a tangia on 14-1-1977.

2. Prosecution case was that the appellant lost his father during his childhood and his mother courted a second marriage. The appellant was brought up by the deceased. About two years before the occurrence, the appellant and the deceased separated in mess and estate. Ten days before the occurrence, there was a quarrel between them as the deceased refused to purchase the share of the appellant and also declined to give consent for sale of his share of the land. In course of the quarrel, the appellant was alleged to have threatened the deceased

with dire consequences. In this background, it was alleged that on 14-1-1977 in the early morning when the deceased went near the village tank for easing the appellant appeared there and assaulted him with a tangia as a result of which he died. Then the appellant concealed the tangia under a nearby bridge and returned to his house.

3. During the trial, the appellant denied the occurrence and pleaded innocence.

4. In order to bring home the charge to the appellant, prosecution relied mainly on his judicial confession before the Magistrate (P. W. 1), his extra judicial confession before P. Ws. 4, 9 and 10 and the following circumstances:

(a) Immediately after the occurrence P. W. 4 saw the appellant running away from the tank with a tangia in his hand

(b) The wearing lungi of the appellant was found to contain human blood.

(c) Disclosure statement of the appellant leading to discovery of the tangia (M. O. I).

5. The learned Sessions Judge discarded the extra judicial confession on the ground that it is a weak type of evidence and is inadmissible in evidence having been made in presence of an ex-Gountia. He also disbelieved the aforesaid circumstances deposed to by P. Ws. 4, 9 and 10 : but convicted the appellant relying mainly on the judicial confession (Ext. 1).

6. The reasonings adopted by the learned Judge in discarding the extra judicial confession and in disbelieving the evidence of p. ws. 4, 9 and 10 are unsound. The learned Judge having overlooked the settled principles of law his findings have been erroneous In para. 13 of his judgment he observes that confession of an accused cannot be made the foundation of conviction and can only be used in support of other evidence. He also observes that the proper way is first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed, a conviction could safely be based on it and that if it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid, but cases may arise where

the Judge is not prepared to act on other evidence as it stands, even though, if believed, it would be sufficient to sustain the conviction and in such an event the Judge may call in aid the confession and use it to lend assurance to other evidence and then fortify himself in believing what without the aid of the confession he would not be prepared to accept. For this proposition he relies on : 1952 CriLJ839 Kashmira Singh v. State of Madhya Pradesh.

7. In the Supreme Court case referred to above, their Lordships while considering the evidentiary value of the confession of a co-accused and while construing the provisions of Section 30 of the Evidence Act laid down the principles as stated above. An accused can be convicted solely upon his own confession even if retracted, if the Court believes it to be true and voluntary. But a conviction should not be based merely on the confession of a co-accused, A Court would not ordinarily act upon a retracted confession to convict a co-accused without the strongest and fullest corroboration as to the crime and the connection of the co-accused with it. In the present case, there is only one accused who made a confession that he had killed the victim by assaulting him with a tangia. So, the provisions of Section 30 of the Evidence Act are not applicable.

8. There is no rule of law that no conviction can be made on the basis of an extra judicial confession. In the case of Panu v. The State (1977) 44 Cut LT 643 : 1978 Cri LJ 690 a Bench of this Court consisting of one of us laid down as follows:

8. The fact that a confession is extra-judicial and not judicial does not really make any difference. The only material difference between a judicial and an extra-judicial confession is that whereas the former is recorded by a Magistrate with all the formalities provided by Section 164, Criminal Procedure Code in order to facilitate ascertainment of the confession having been given voluntarily the aid of these formalities and the evidence of the Magistrate are not available in the case of an extra-judicial confession. All the same, if it could otherwise be ascertained that the extra-judicial confession has been made voluntarily and it was true, its probative value would be the same as that of a confession duly recorded under Section 164, Criminal Procedure Code. When an extra-judicial confession is found to be both true and voluntary there would strictly speaking, be no bar to the

conviction on the basis of that confession alone even though it was retracted by the accused subsequently.

9. In the present case, the extra-judicial, confession was made before P. Ws 4, 9 and 10. P. W. 4 is a co-villager of the appellant. It is not proved that he is either interested in the prosecution or hostile to the appellant, P. W. 9 is a common relation of the appellant and the deceased and there is no apparent reason why he would depose falsely against the appellant in a murder trial. P. W. 10 is an ex-Gountia of the village. The learned Sessions Judge observed that this witness is a person in authority even though he has been divested of the lagal power of Gountia. According to the learned Sessions Judge, the witness is a person in authority as the villagers consult him when they require his help. We are unable to appreciate this reasoning. The expression 'person in authority' used in Section 24 of the Indian Evidence Act has not been defined. Generally speaking a 'person in authority' is one who is engaged in the apprehension, detention or prosecution of the accused, or one who is empowered to examine him. After abolition of the Gounti system, the ex-Gountias do not exercise any influence or authority. By no stretch of imagination, they can be treated to be persons in authority. There is nothing to show that p. W. 10 had anything to do in connection with the case against the accused. The reasonings adopted by the learned Judge for discarding the extra-judicial confession are unsound. As we shall presently show, both the judicial and the extra-judicial confessions have been proved to be true and voluntary and can form the foundation of conviction.

10. There is absolutely no evidence on the record to show that any threat, coercion or undue influence was brought to bear upon the appellant before he made the confession. The evidence of the Magistrate (P. W. 1) and the record of confession (Ext 1) clearly show that the necessary formalities were observed before recording of the confession. The Magistrate disclosed his identity to the appellant and gave him time for cool reflection. He cautioned him that he was not bound to confess and that any confession made by him might be used as evidence against him. The Magistrate gave evidence that he reeorded the confession after he was satisfied about the volun-tariness of the confession. The evidence of P. Ws. 4, 9 and 10 does not also show that the extra judicial

confession was extorted from the appellant. P. W. 4 stated that he saw the appellant running away from the tank with a tangia in his hand and he found a dead body lying at a short distance from the tank with bleeding injuries. P. Ws. 9 and 10 gave evidence that they came to know from P. W. 4 that the appellant was running away from the tank with a tangia in his hand. They also found blood on the wearing banian of the appellant. Then they asked the appellant as to how his banian was stained with blood and the appellant told them that he had killed the deceased with a tangia. The appellant also told them that he had concealed the tangia under a bridge. Then he pointed out a place near the bridge wherefrom the tangia was recovered. We do not find any infirmity or inconsistency in the evidence of P. Ws. 4, 9 and 10. We see no reason to disbelieve their evidence. The wearing lungi of the appellant was seized by the police. After chemical examination and serological test human blood was detected on the same. All the above circumstances lend ample corroboration to the confessional statements of the appellant. It is in evidence of P. W. 9 that about ten days prior to the occurrence there was a quarrel between the appellant and the deceased as the latter did not agree to the proposal for sale of the half share of the appellant in the family properties. It is also in his evidence that in course of the quarrel the appellant had threatened the deceased with dire consequences. Thus, the prosecution has established that the appellant was prompted by a motive to do away with the life of the deceased. On a review of the entire evidence on the record, we are satisfied that both the judicial and extra-judicial confessions are true and voluntary. The conviction and the sentence are, therefore, unassailable.

10A. In the result, we dismiss the appeal and maintain the conviction and the sentence.

J.K. Mohanty, J.

11. I agree.