

Dhuli Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-03-1983

Reported in : 1983WLN(UC)66

Judge : G.M. Lodha and; S.C. Agrawal, JJ.

Appeal No. : D.B. Cri. Jail Appeal No. 172 of 1976

Appellant : Dhuli

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Doongar Singh

Judgement :

1. Mst. Dhuli has challenged her conviction under Section 302 IPC for murder of her husband Kalia.

2. One Vira reported to the police Station that yesterday when he was grazing his cattle, his sister Dhuli w/o Kalia met him. Dhuli told him that before six or seven days, her husband Kalia had gone to Gujarat. After two days of Kalia's departure to Gujarat, she was sleeping all alone in her house. In the mid-night she heard some noise in the house and saw that one person was taking the gram in his thela. She thought that the thief has come and therefore took out an axe and gave an axe-blow on the neck of that person on account of which he died. Thereafter, she lit the match stick & found that, that person was none-else but her husband

Kalia. She was terribly frightened at this and therefore, buried the dead body in the house and did not tell it to anybody in the village. Dhuli said that she has come to tell this incident story to Vira only.

3. Vira on this, sent Dhuli to the house of Babuji s/o Mothi Handi & then came to the Police Station for informing the police. The SHO registered case Under Section 302 and 201 Indian Penal Code and started investigation.

4. During the investigation on the information of Dhuli and at the instance of Dhuli the dead body of Kalia was recovered and the semi-burned pieces of clothes of Kalia were recovered. After the investigation the case was challenged and the Magistrate committed it to the Sessions Court. The Sessions Judge, Banswara after examining the prosecution evidence which consisted of P.W.1 Vira, P.W.2 Limba, P.W.3 K.C. Jain, P.W.4 Varji, P.W.5 Vada, P.W.6 Dipa, P.W.7 Prathviraj and P.W.8 Doctor Bajranglal Jahangir who examined the deceased, recorded statement of accused.

5. The accused Dhuli in her statement under Section 313 Cr.P.C. admitted that she gave statement Ex.P-4 before the Munsif-cum-Judicial Magistrate, Khushalgarh and she dug the place at the instance of the head constable of Police and therefrom the dead body of her husband was recovered. However, she insisted that she was mercilessly beaten by the Police before she gave the said statement Ex.P-4. She resiled from the confession which she had earlier made and which is Ex.P-4. She stated that her husband was murdered and the dead body was buried while she had gone to village Dokar to bring her son's wife. She further stated that there was dispute over Mat. Jambudi, the widow of her Jeth Laksi between her husband Kalia and Devar Dhulia. She stated that she had no knowledge who murdered her husband.

6. The learned Sessions Judge has relied upon the confessional statement Ex.P-4 and the extra judicial confession made to her brother Vira P W I Reliance has also been placed on the information leading to the discovery of pieces of the dead body of the deceased Kalia from her own house.

7. Before this court Mr. Doongar Singh, learned counsel for the appellant has submitted that the confession Ex.P-4 is not admissible in evidence nor it can be relied upon because it has been recorded in utter disregard and clear violation of the mandatory requirements of Section 164 and 281 of the Code of Criminal Procedure. In this connection Mr. Doongar Singh placed reliance upon the decision of *Moti v. The State of Rajasthan* 1978-80 Cr. L.R. (Raj Suppl.) 185 in which the principles in support of the requirements of the confessional statement have been discussed at length. It has been laid down by a Division Bench of this Court that if the Magistrate omits to record the questions put to the appellant and his answers there to on the basis of which he came to a conclusion that the appellant was making the confession voluntarily and further is doubtful whether the Magistrate at all put some questions, then it would be acting in violation of Section 281 clause (2) and Section 164 clause (2) of the Code of Criminal Procedure. Their lordships observed as under.-

The Magistrate omitted to record the questions put to the appellant and his answerst here to on the basis of which he came to a conclusion that the appellant was making the confession voluntarily. It is also doubtful whether the Magistrate had put any questions to the appellant to arrive at the conclusion that he was making the confession voluntarily. Under Section 164(2) of the Cr. P C. it is enjoined upon the Magistrate that he shall not record any such confession, unless, upon questioning the person making it he has reason to believe that it is being made voluntarily. Under Section 281(2) it is further obligatory on the Magistrate that the whole of such examination of the accused including every question put to him and every answer given by him shall be recorded in full. Thus in the absence of the record of the question put to the appellant and the answers given by him it is not possible to judge whether the confession was made valuntarily, it is, therefore, inadmissible in evidence. Moreover, the Magistrate did not state that he told the appellant that be would not be remanded to the police lock up, even, if he did not confess his guilt.

In the instant case a perusal of the original statement Ex.P-4 recorded by the Magistrate under Section 164 goes to show that the Magistrate was totally ignorart about the important requirements for recording the confession of an accused. He

did not put any question before recording the statement. He has put a note after the statement was recorded that he was explained to the accused that she is not bound to make a confession and if she makes it, it may be used as evidence against her. The following is the note placed by the Magistrate:

I have explained to Mst. Dhuli that she is not bound to make a confession and that if she does so, any confession she make, may be used as evidence against her and I believe that this confession was voluntarily made. It was taken by myself and read over to the person making it and admitted by her to be correct and it contains a full and true account of the statement made by her.

8. In our considered opinion this confessional statement has been recorded in flagrant disregard of law. There is no doubt that the Magistrate acted in a very perfunctory manner and he exhibited utter ignorance of the requirement of law in this respect. He only reproduced the note as contained in Sub-clause (4) of Section 164 . But he failed to notice that under Section 281 the record of questions and answers is to be kept and the same is required by Section 164 also. The manner of recording the confession according to Sub-clause 4 of Section 281.

9. Section 281 enjoins upon the Magistrate that he shall make memorandum of the substance of the examination of the accused and the whole of such examination, including every question put to him and every answer given by him shall be recorded in full.

10. It is obvious from a bare perusal of Ex. P-4 that the Magistrate has not recorded any question which he put to the accused for ascertaining whether the confession was voluntary. Contrary to it from the endorsement it appears that the Magistrate was in the impression that all that is required to be done is to tell the accused that she is not bound to make confession and if she makes it, it may be used against her for her conviction. After explaining this Magistrate thought that he has discharged his duties for the purpose of recording the statement. From the statement of P.W.3 K.C. Jain it appears that the only precaution which he took was to explain her that it was not necessary for her to make a confession and if she makes it, it can be used against her.

11. Even in the statement recorded in the Court Shri K.C. Jain, P.W.3 has not mentioned that he put any questions & obtained any answers in order to satisfy himself whether Mst. Dhuli was making a confession voluntarily and she was not in any threat or fear.

12. In view of the above, we are of the opinion that it would be very unsafe to utilise such confession against the accused and therefore, we hold that the statement of the accused Ex.P-4 recorded by the Magistrate under Section 164 Cr.PC on March 13, 1975, is not admissible in evidence nor any reliance can be placed upon it for the purpose of holding the accused guilty.

13. However, even after discarding this confession we find that the evidence of her brother Vira to whom she made extra judicial confession is trust-worthy and can be safely relied upon. In this statement, Shri Vira PW. I has stated that she told him that she has killed his brother-in-law as she thought that there was some thief. Vira is real brother of accused and he has given a graphic description in details of how his sister Mst. Dhuli came and thereafter what she stated and later on where she was kept and then information was given to the police. His statement is further corroborated by the First Information Report Ex.P. I which he has proved. We have no doubt that the statement of Vira is trust-worthy and it inspires confidence and there is no infirmity attached to it on account of which it cannot be believed.

14. Mr. Doongar Singh, learned Counsel for the accused also could not point out any infirmity in the statement of PW. 1Vira on account of which it deserves to be rejected. The statement of Vira is further supported by the recovery of the dead body as per the information given by the accused and at the instance of the accused and from the house of the accused. This has been proved by the SHO Prathviraj. He has stated that Dhuli gave the information that she has buried the dead body of her husband in the house and she can point out the place. She then led the police party and got the dead body recovered after digging the place herself. This statement is further corroborated by Veera PW5.

15. We are, therefore, convinced that it is proved on record by cogent trust-worthy evidence that Mst. Dhuli killed the deceased Kalia her husband and concealed the

dead-body in her house.

16. Next and the only important question which now, arises for consideration is what offence she has committed.

17. Mr. Doongar Singh, learned Counsel for the accused submitted that taking the confession at its best and every word of it to be true, all that is proved is that the accused Mst. Dhuli wanted to ward-off the theft which was being committed in her house by an unknown person and therefore, while exercising the right of private defence of property she gave an axe-blow which proved to be fatal. It is true that in this case except the evidence of extra judicial confession and the recovery of the dead body, there is no other evidence connecting the accused with the crime.

18. The prosecution has not produced any evidence to prove the motive or any other facts to show that, the story of detecting a thief is false and in fact Mst. Dhuli killed her husband consciously, knowing it well that she was killing her husband and with the intention or knowledge of killing him.

19. Some stray questions have been put to the witnesses by the counsel for the accused which goes to show that the deceased had some illegitimate connections with one Jambudi who was widow of Kalia's elder brother. However, nothing can turn upon it, because no relationship has been established of the alleged incident in the night and this relationship even if it was true. Though the Sub-Inspector of Police, the Investigating Officer, Prathviraj, in his statement stated that Dhuli committed murder of Kalia because Kalia used to give gram to Jambudi. However, a perusal of the statement shows that he had no direct knowledge of it and he derived his knowledge from Jambudi, Jambudi has not been examined by the prosecution and therefore, the evidence of SHO cannot travel beyond the category of hearsay evidence in this respect and cannot be used against the accused.

20. On a thoughtful consideration of the entire matter and the facts & circumstances of the case we are convinced that the submission of Mr. Doongar Singh that the accused gave an axe-blow to the deceased Kalia under the genuine and bona fide impression in the night that some thief was there and that the thief was taking away gram from her house in his thela, is tena-ale. As she was all

alone, we have got no hesitation in holding that she could have exercised the right of private defence of property against the deceased.

21. However, we find that as the facts stand, all that is shown is that the deceased was taking some gram in his thela and nothing else. There is no suggestion that the deceased had any weapon in his hands or with him. There is no suggestion that there was any serious apprehension of such bodily injury to the accused which might have caused grievous hurt or death. There is no suggestion that the deceased frightened the accused, In fact if the deceased would have spoken anything then the appellant would have detected immediately that he was noneelse but her husband.

22. Therefore, a serious question arises whether she was justified in causing such a serious injury by a deadly sharp weapon like an axe which again was used on the neck of deceased, in exercise of her right of defence of property.

23. We feel that in the facts and circumstances which have come on record she exceeded her right of private defence of her property.

24. Since she exceeded the right of private defence of her property, therefore she is guilty for committing culpable homicide not amounting to murder under Section 304 Part-I of the Indian Penal Code.

25. Consequently the conviction of the appellant under Section 302 IPC is set aside. Mst. Dhauli is convicted under Section 304 Part I IPC and she is sentenced to 8 years rigorous imprisonment. The appellant's conviction under Section 201 IPC and the sentence of 5 years rigorous imprisonment awarded by the trial court is upheld and confirmed. Both the sentences would run concurrently.

26. Before parting with this judgment, we may mention that the utter ignorance of law in respect of procedure for recording confession under Section 164 Cr. PC, exhibited by the Magistrate, has caused considerable concern to us. In his statement he has stated that he has not seen any printed forms for recording of confessional statement. We feel that before a Magistrate is called upon to discharge such important functions, a training course of atleast six months must

be provided. In the initial stage of appointment, atleast for 2 years, such Magistrates should be posted at a place where they can take guidance from Sessions Judge or Chief Judicial Magistrate at least. It should be enjoined upon the Sessions Judge or Chief Judicial Magistrate of that City or Town to give practical training, by permitting the newly appointed Magistrate to attend the former's court for at least one hour daily, during the first one year, A copy of this judgment be placed before the Hon'ble Chief Justice for appropriate administrative directions, in consonance with the above.

27. The appeal is partially accepted as indicated above.

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