

Dharma Vs. State

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Court : Rajasthan

Decided On : Aug-11-1975

Reported in : 1975(8)WLN508

Judge : Kan Singh and; P.D. Kudal, JJ.

Appeal No. : D.B. Criminal Jail Appeal No. 786/1971

Appellant : Dharma

Respondent : State

Disposition : Appeal rejected

Judgement :

P.D. Kudal, J.

1. Accused-appellant Dharma has filed this appeal from Tail against the judgment dated 31st July, 1971 by the learned Sessions Judge, Balotra. The accused-appellant has been convicted under Section 302, IPC, and sentenced to imprisonment for life, and a fine of Rs. 500/-, and in default of payment of fine to undergo further rigorous imprisonment, for six months. The accused-appellant was also convicted under Section 323, IPC, and sentenced to one year's rigorous imprisonment. Both the substantive sentences were ordered to run concurrently.

2. The prosecution story is that the accused-appellant Dharma married to Mst. Nenu daughter of Chaitan. Chaitan died and was survived by his widow Mst Sua. The marriage of Mst. Nenu with Dharma was performed on the 'Akha Teej' of Smt. 2023, Ganesh, the younger brother of Met. Nenu was married to the daughter of Boda, who is closely related to Dharma. After residing for some time, with Dharma Mst. Nenu came back to her mother, and later on, did not go with Dharma. Mst Nenu's mother insisted that the wife of Ganesh be sent first, and then Mst. Nenu be taken away. Mat Sua has also one daughter Anchi who was married to Rewta, Rewts was trying to ease the relationship between Dharma and Mst. Sua. Dharma came to Mst. Sua for taking away Mst, Nenu once or twice but on one pretext or the other Mst. Nenu was not sent. On the last attempt, Mat Sua told Dharma that as Diwali festival was very near, he may take Mst. Nenu the day following the Diwali. At that time, Rewta was also there. Rewta went away with his wife Mst. Anchi, but Dharma stayed there. Mst. Sua and Mst. Nenu were sleeping in the 'bara' of Baga, while Dharma used to sleep in the house of Mst. Sua Early in the morning Mst. Nenu came for milching the cattle when the accused appellant told her that she is evading to go back with him on one count or the other, and that they today he shall murder her. The accused appellant Dharma then attacked Mst. Nenu with a 'Kissi' as a result of which she fell down of the ground, and then Dharma caused her death by throttling. Mst. Sua also received some injuries while trying to same Mst. Nenu. A report containing these allegations was lodged by Har Chanda at 8.30 P.M. on 24-10-1970, at the Police Station, Guda.

3. Another report was lodged by the accused-appellant himself at 8.15 PM on 24-10-1974 at the Police Station, Barmer. In this First Information Report, the accused appellant stated that he was married to Mst Nenu on Akha Teej of Mst. 2023, and that he had paid Rs. 1000/- to Mt. Sua on account of this marriage. Later on, he had heard that Mst. Nenu and Mst. Sua were of loose character, and that, they were selling their flesh for monetary gains. In these circumstances, the accused appellant was not inclined to send his wife to her father's place. Mst. Nenu was not sent to Mst. Sua for three years. But on the persuasion of Ganesh and Rewta she was sent. On 24-10-1970 at about 11 AM Dharma insisted that his wife should be sent, on which Mst. Sua said that he should return, otherwise, he would be beaten by shoes. Mst Nenu had a 'kodal' in her hands. When Mst. Sua

and Mst. Nenu started for the fields despite Dharma's persuasion he snatched the 'kodal' from the hands of Mat. Nenu, and struck her on her head with force three or four times, as a result of which Dharma believed, Mst. Nenu had died. The Police started investigation, and challenged the accused under Section 302, IPC. In the committing Court the accused appellant stated that Bhooring hand killed. Mst. Nenu, The accused pleaded not guilty before the committing Court, and thereafter he was committed to the Court of Sessions. The prosecution examined 14 witnesses and produced 16 exhibits, Ex. P/1 to Ex. P/16, and the statement of Mst Sua in the committing Court as produced as Ex. D/1.

4. On behalf of the accused-appellant, Mr. Rajendra Lodha appeared as Amicus Curiae. It was contended on behalf of the accused appellant that the accused his not committed any offence, as he attacked Mst. Nenu with a 'kassi' under a sudden and grave provocation, as Mst. Sua was not sending his wife Mst. Nenu on one pretext or the other, and that despite repeated attempts Mst. Nenu was not sent. It was also contended that the accused-appellant further harboured an impression that Mst Nenu is having illicit connections wan one Bhoorsingh, and that both the mother and the daughter, that is, Mst. Sua and Mst. Nenu were selling their flesh for monetary gains, Despite repeated requests and staying at true house of Mst. Sua as his wife Mst. Nenu was not sent, the accused appellant got a sudden and serious provocation tinder which he attacked Mst. Nenu reulting in her death. It was also contended that the confessional statement made by the accused appellant before the police is not hit by the provisions of Section 25 of the Indian Evidence Act, or by the provisions of Section 162, Cr PC (old) and as such can be used in favour of the accused If those statements are used, then the accused is entitled to the exception of acting under grave and sudden provocation.

5. On behalf of the State, it was contended that there is overwhelming evidence that the accused-appellant Dharma murdered Mst. Nenu by giving her 'kassi' blows. It was further contended that the accused appellant has himself admitted so in the FIR lodged by him at the Police Station, Barmer It was also contended that there was no occasion for grove and sudden provocation, and that the accused appellant Dharma was not entitled to strike Mst. Nenu with 'kassi' resulting in her death. It was fur her contended that even if Mst. Nenu was not herself going with

him on one pretext or the other, then too; there was no occasion for the accused-appellant Dharma to have assaulted Mst. Nenu with a 'kassi' resulting in her death.

6. We have considered the respective contentions of the learned Counsel for parties, and have seen the record of the case carefully. It appears that the trouble arose when the wife of Ganesh was not sent. Dharma and Ganesh were married in a 'Atta Satta Marriage', which is commonly prevalent in the villages. Mst. Sua insisted that the wife of Ganesh should be sent first before Mst. Nenu is set. The accused-appellant in his statement before the committing Court has said that the murder of Mst. Nenu was committed by Bhoor Singh. There is no evidence on record on this aspect of the matter. The accused appellant has also stated that Mst. Sua was having illicit connections with Bheekhsingh, the elder brother of Bhoorsingh, and that Bhoorsingh was having illicit connection with Mst. Nenu. He has further stated that only the betrothal of Ganesh has taken place, and no marriage has been performed, and that under such circumstances, the question of sending Ganesh's wife to Mst. Sua's place does not arise.

7. PW/7, Dr. Madan Lal Kalla, who performed the post mortem examination, has stated that the following injuries were found on the body of Mst. Nenu:

1. Cut wound on the scalp 6' distant from the base of the nose. It was 2' x 2' x skin deep.
2. Cut wound on the scalp 8' distant from the base of the nose 3' x 2' skin deep sagittally on the vertex.
3. Cut wound on the right palm in between the index and middle finger. It was 2' x ' skin deep.
4. On the medial side of the right elbow there was a bruise 3' x 1' with ecchymosis black in colour and broken bangles which she was wearing. Nail markings on the neck over trachea with reddish blue ecchymosis present.
5. Bleeding external clotted.

6. Eyes protruding out. Sight pupil dilated and left eye eaten by maggots. On the right side chest there is a redish blue ecobymosis present.
7. Wound on the scalp present. Skull not broken, vertebrae healthy. Corresponding the two wounds on the scalp there were blush redish two sagittally bleeding markings on the meninges. Brain had undergone putrefaction.
8. In the opinion of this witness, the cause of death was due to the injuries sustained on the scalp causing bleeding, shock and strangulation of the neck causing asphyxia.
9. PW/2 Mst. Sua stated that the accused appellant had caused these injuries to Mst. Nenu by striking 'kassi' blows. She has denied that she used to send Mst. Nenu to the house of Bhoorsingh. She is an eyewitness to the assault which was made by the accused appellant Dharma over Mst. Nenu and has narrated that Ganesh was married to the niece of Dharma, and that as the wife of Ganesh was not coming, she was not sending Mst. Nenu. She has further stated that in the morning Mst. Nenu had gone for matching the cattle. The accused Dharma told her that as she was littering hire and there and as she was avoiding to go with him he would murder her. PW/5 Bhoorsingh has been examined as a 'motbir'. He has stated that he had no illegal connections with Mst. Nenu and as Dharma used to beat her, he had advised Met. Sua not to send Mst. Nenu PW/2 Prem Singh was the SHO. Police Station, Guda on 24/10/1970. He conducted the investigation, and at the information given by the accused, the 'kassi' was recovered.
10. The fact, that Mst. Nenu was hit by 'kassi' by the accused-appellant Dharma, has been proved by the overwhelming evidence. Even the accused appellant had lodged the confessional first information report at the Police Station, Banner at 8.15 PM on 24/10/1970. Under these circumstance, in view of the overwhelming evidence produced by the prosecution, we are satisfied that it was the accused appellant Dharma who assaulted Mst. Nanu. with a 'kassi' resulting in her death.
11. The basic point for consideration is, whether, in the facts and circumstances, the accuse-appellant Dharma got such a sudden and grave provocation in which he assaulted Mst. Nenu resulting in her death Further whether the first information

report lodged by the accused-appellant Dharma at 8.15 P.M. on 24/10/1970 can be used in favour of the accused-appellant according to the provisions of Section 25 of the Indian Evidence Act, and Section 162, Cr.P.C. (old) Section 25 of the Evidence Act reads as under:

25. No confession made to a police officer, shall be proved as, against a person accused of any offence.

12. Section 162, Cr.P.C. (old) reads as under:

162. Statements to police not to be signed : use of such statements in evidence:

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any enquiry, or trial in respect of any offence under investigation at the time when such statement was made;

Provided that when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved may be, used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1) of 1872, and when any part of such statement is so used, any part thereof may also be used in the reexamination of such witness, but for the purpose of only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Section 32, Clause (1) of the Indian Evidence Act, 1872 (1 of 1872), to affect the provisions of Section 27 of that Act.

13. A careful perusal of these sections would reveal that any statement made to a Police officer during investigation shall not be used against the accused. Investigation starts after the first information report has been lodged. If there is any confession of the accused in the first information report, it can not be said that

such a confession is during the course of investigation. The matter came up for consideration in *Re Mottal Thevar* AIR 1952 Mad. 587, wherein it has been held that where the accused immediately after the crime goes to the Police-station and confesses, such statement forms the first information resort of the offence, and that statement can be used in favour of the accused though the statement cannot be used as against the accused under Section 25 of the, Indian Evidence Act. In *Lal Khan v. Emperor* AIR 1948 Lah. 45, it was held that where an accused person himself makes statement which is taken down as a first information report, the statement is inadmissible against the accused as it amounts to a confession to a Police Officer. But there is no bar to using such a confession in favour of the accused. In the present case, the confession made by accused appellant to the Police in the first information report lodged at 8.15 P.M. at the Police Station, Barmer can therefore, be used in favor of the accused appellant though, such a statement cannot be used against him Section 25 of the Evidence Act provides that no confession made to a Police Officer, shall be proved as against a person accused of any offence. There is nothing in the most unsatisfactory state of law as regards confessions to Police officers to stop the user of such a confession in favour of an accused person. The resultant impasse created by Sections 25, 26 and 27 of Evidence Act and Section 162, Cr PC (old) is to about out as legally inadmissible not merely any confession made to Police officer but anything said to a Police officer by an accused person in the course of an investigation. These provisions of law were felt necessary as held by the Privy Council in *Kotayya v Emperor* ILR 1948 Mad. 1 wherein it was observed that a practice which had become a tradition with investigating Police officers of working into confessions such incriminating adjectival clauses relating to all sorts of discoveries, deserves to be discontinued. Section 25 of the Indian Evidence Act says that no confession made to the Police Officer shall be proved as against the accused person reused of an offence. The confession, therefore, does not prohibit the use of it in favour of the accused. To us, it therefore appears that the proposition of law is well settled to the effect that the confession made by an accused to the Police before the investigation has been started, can be used in his favour. In the first information report lodged by the accused appellant at the Police Station, Barmer, he had stated that his wife was not being sent on one pretext or the other, and that he had

heard rumors that his wife and his mother-in-law were selling their flesh for monetary gains, and that despite repeated efforts his wife was not sent. These circumstances are definitely mitigating circumstances. But, in our considered opinion, these circumstances cannot constitute such sudden and grave provocation so as to justify a murderous assault on Mat. Menu by the accused appellant.

14. We, however, feel that the assault made by the accused appellant on his wife Mst. Nenu, was under extraordinary circumstances as he had made every attempts to take back his wife, and her return was avoided on one pretext or the other, and that he harboured an honest impression that hi* wife was being sent to Bhoorsingh for monetary gains. In view of these circumstances, we feel inclined to recommend to the State Government to consider the caase of remitting the sentence of the accused-appellant. A sentence of seven years' rigorous imprisonment would meet the ends of justice, in the circumstances of the case.

15. For the reasons stated above, there is no force in this appeal, which is hereby rejected. The sentence and conviction of the accused, are hereby sustained but it is recommended to the State Government to remit the sentence of the accused appellant to seven years rigorous imprisonment only. The Registrar of High Court shall send a copy of this judgment along with the copy of the FIR lodged by the accused appellant at Police Station, Barmer to the State Government for consideration.