

**Abed Ali Jamadar Vs. State**

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**Court :** Kolkata

**Decided On :** Apr-22-1987

**Reported in :** 1988CriLJ354

**Judge :** Sankar Bhattacharyya and ;J.N. Hore, JJ.

**Appellant :** Abed Ali Jamadar

**Respondent :** State

**Judgement :**

**Sankar Bhattacharyya, J.**

1. The subject-matter of challenge in this appeal is the judgment and order dt. 30-11-83 passed by a learned Additional Sessions Judge, Howrah convicting the appellant under Section 302, Penal Code and sentencing him to imprisonment for life.

2. Shorn of details, the prosecution case was as under:

3. Manwara Bibi, deceased was married I to the appellant Abed Ali Jamadar round about the year 1976. For about a year and a half she lived in her matrimonial home in village Rajkhola within police station Panchla. Thereafter, following an estrangement between them, she left her matrimonial home and started living with her mother in the village.

4. Towards the latter part of Aug. 1979 there was village salish at the instance of the appellant to settle the controversy between him and his wife and it was decided in the salish that Manwara's mother would send her back to the appellant's house on condition that she would not be asked to do any work of Jari (lace) but would simply do household work.
5. Even after the salish Manwara's mother was hesitant to send her daughter to the appellant's house as she apprehended danger to her life but ultimately Manwara went to the appellant's house sometime in the last week of Aug. 1979.
6. On the night of Sept. 6, 1979 Manwara and her husband slept together in a room of the house. On the following morning she was found lying dead inside the room with her tongue protruded and marks of small round burn injuries on her face, nose, feet and other parts of the body.
7. Getting the news of her death the villagers came there and on interrogation, the appellant confessed before them that he committed the murder of the wife by strangulation. He further confessed that he caused the burn injuries with the blunt side of the heated needle used for lace work.
8. The appellant was thereafter detained by the villagers while Sk. Babulal (P.W. 1), uncle of Manwara, went to the Panchla Police Station and lodged the first information report at 10.30 a.m. On the basis of the first information report the police registered a case of murder, took up investigation and arrested the appellant. After his production in court, the appellant made a judicial confession before a learned Magistrate to the effect that he had murdered his wife.
9. On completion of the investigation the police submitted charge-sheet which, in the course, ended in committal of the case to the court of session.
10. The defence of the appellant was that he was not in his house on the night of occurrence and was falsely implicated in the case.
11. The prosecution examined all told 20 witnesses in support of its case, while the defence examined none.

12. The murder of Manwara is not challenged before us and has also been proved by overwhelming evidence. Sk. Babulal (P.W. 1), Haliman Bibi (P.W. 2), Sarifan Bibi (P.W. 3), Sahadat (P.W.4) Sohorab (P.W. 6), Janab Ali (P.W. 7), Yasin Ali (P.W. 11) and Asgar Ali (P.W. 12) saw the dead body of Manwara lying on a mat inside the appellant's room with her tongue protruded and small round burn marks on different parts of her body.

13. The autopsy on the dead body was conducted by Dr. S. N. Roy (P.W. 17), the then Sub-divisional Medical Officer of the Uluberia Hospital. He found the deceased's eyes open and protruding, the tongue protruding and small round burn injuries on the face, chest wall, nose and feet. Both the nostrils were found blocked with small pieces of cloth. There were marks of bleeding through the nostrils and one small abrasion was found on the chin.

14. On dissection the uterus was found to contain a full term dead female child. In the opinion of Dr. Roy, death was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature. The viscera was preserved and sent to the Forensic Science Laboratories but on chemical examination no poison could be detected in the viscera.

15. Though Dr. Roy was cross-examined at some length, nothing tangible could be elicited from his cross-examination to show that the opinion given by him as regards the cause of death of Manwara suffers from any infirmity or is otherwise unacceptable. The evidence of Dr. Roy, therefore, leaves no room for doubt that this was a case of outright and give some murder.

16. The next question - and the most crucial one - is whether the appellant is responsible for the murder.

17. In the absence of any direct evidence to the murder the prosecution rested its case wholly on circumstantial evidence. The circumstances relied upon by the prosecution in support of its case are set out below:

(i) the marriage between the appellant and Manwara deceased turned out to be unhappy and about a year and a half after the marriage she had to leave her

matrimonial home and go back to her mother's house where she stayed for another year and a half;

(ii) at the instance of the appellant there was a village salish and in accordance with the decision arrived at the salish, she came back to the appellant's house about 13 days before the date of occurrence;

(iii) on the night of 5-9-79 both she and the appellant slept together in the same room after bolting the door from within;

(iv) on the following morning, at or about 6.30 a.m., her dead body was found inside the room;

(v) on post-mortem examination of the dead body, the autopsy surgeon expressed the opinion that death was due to asphyxia as a result of strangulation and was ante-mortem and homicidal in nature;

(vi) the conduct of the appellant after the discovery of the dead body was found to be unnatural;

(vii) the appellant made an extra judicial confession before his neighbours shortly after the discovery of the dead body to the effect that he had committed the murder of his wife;

(viii) after his production in court, the appellant also made a judicial confession to the above effect which was recorded by a judicial Magistrate under Section 164, Cri.P.C.

18. It is settled law that in cases in which the evidence is purely of a circumstantial nature, the facts and circumstances from which the conclusion of guilt of the accused is to be drawn must not only be fully established beyond any reasonable doubt and the facts and circumstances should not only be consistent with the guilt of the accused but they must be in their effect entirely incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence.

19. We now advert to the evidence presented during the trial to see whether the facts and circumstances relied upon by the prosecution have been established beyond any reasonable doubt and, if so, whether they are such as cannot be explained on any other reasonable hypothesis except the guilt of the accused.

20. There seems to be no controversy that about a year and a half after the marriage between the appellant and Manwara. the relation between then became embittered as a result of which, she left her matrimonial home and started living with her mother in the same village. This fact was deposed to by the informant Sk. Babulal (P.W. 1), uncle of the deceased and a resident of the same village. According to him, Manwara and the appellant were not on good terms and there were frequent bickerings between them which compelled her to leave her matrimonial home and take shelter in the house of her mother Oliman Bibi. The above evidence finds corroboration from Haliman Bibi (P.W. 2) wife of Rafiq, the elder brother of the appellant. She stated in her evidence that the appellant and Manwara lived peacefully for about a year and a half after the marriage but thereafter the appellant started torturing her and her mother had to take her away to her house. Though Sk. Babulal and Haliman Bibi were cross-examined by the defence their evidence on the above point remained unchallenged. That apart, it was elicited from the cross-examination of Sk. Babulal (P.W. 1) that although the parents of the appellant wanted the appellant to lead a happy conjugal life with Manwara, the appellant did not want it.

21. The prosecution case about the salish to settle the dispute between the couple was also not challenged by the defence. Anwar Ali (P.W. 13), Noor Ali (P.W. 14) and Sahajamal (P.W. 15) were members of the salish and it appears from the evidence of Anwar (P.W. 13) that it was decided in the salish that Manwara would be sent back to the appellant's house but she would not be asked to do any work except household work. It further appears from the evidence of the aforementioned witnesses that even after the salish Manwara was not sent to her husband's house and the matter was brought to their notice by the parents of the appellant. When the parents of Manwara were asked why they were not sending her to her husband's house they expressed apprehension of danger to her life. Any way, she was ultimately sent to the appellant's house about 13 days before

the date of occurrence (vide evidence of Haliman Bibi (P.W. 2)).

22. From the cross-examination of the above witnesses it is seen that Manwara herself was not present in the salish but her parents who were present complained of ill treatment and torture of their daughter by the appellant. We have carefully gone through their evidence but find nothing to doubt their credibility. The first and the second circumstances relied upon by the prosecution have therefore been proved beyond the slightest shadow of doubt.

23. As regards the third circumstance, we may first of all refer to the evidence of the informant Sk. Babulal who, as pointed out already, happens to be the uncle of the deceased. His house and the appellant's house are situated in the same quarter of the same village. He deposed to the effect that the appellant and Manwara used to occupy one room, while the appellant's elder brother Rafiq and his wife Haliman Bibi used to occupy another room of their house. According to Haliman Bibi (P.W. 2) the house consisted of two rooms and a covered verandah. While she and her husband used to occupy one room, the other room was in occupation of the appellant and his wife and the covered verandah was in the occupation of her father-in-law and brother-in-law. This evidence, it may be mentioned, was not even challenged in cross-examination.

24. It next appears from the evidence of Haliman Bibi (P.W. 2) that after taking their meals on the night of occurrence the appellant and Manwara slept in one room after closing the door, while she and her husband slept in the adjacent room separated by a wall. It is also seen from her evidence that before going to bed, Manwara served food to her father-in-law and another relative who visited their house on that night.

25. On the next morning she was awakened by the voice of the appellant who was asking his aunt Sarifan Bibi (P.W. 3) to enquire why the 'daughters of rich men' (meaning herself and the deceased) had not left their beds. Hearing this, she and Sarifan Bibi entered the appellant's room and found to their horror that Manwara was lying dead on a chatai(mat) on the floor of the room.

26. In cross-examination Haliman Bibi stated that although Manwara came to their house about 13 days before the date of occurrence, the appellant did not sleep with her except on the night of occurrence. But the suggestion that the appellant did not sleep with his wife even on the night of occurrence was, stoutly derided by her. She also denied the suggestion that the appellant was not in his house on that night and returned home on the following morning,

27. The evidence of Halimdn Bibi has seen assailed by Mr. Maitra, learned defence counsel on a number of grounds which we shall presently discuss. The first ground urged before us is that she was given talaq at or about 11 A.M. on the very day on which the dead body of Manwara was discovered. She therefore, according to Mr. Maitra, had a strong motive for falsely implicating the appellant in the crime in question.

28. It transpires from the evidence of Sujat Ali (P.W. 9), father of Haliman Bibi, that Rafiq was a highly ill tempered person who used to assault Haliman frequently. Once he assaulted her even in his presence. According to him the talaq was given as the relation between his daughter and son-in-law was very bad.

29. In cross-examination it was not even suggested to Haliman Bibi that she had any animus against the appellant as his elder brother Rafiq had given her talaq. The only suggestion given to her was that she was deposing falsely against the appellant as she was related to Manwara. The relationship is not disputed because it is seen from the evidence of sujat (P.W. 9) that Aliraan Bibi, mother of Manwara, happens to be his sister. In other words, Manwara was cousin of Haliman. We are, however, not prepared to accept the position that merely because of this relationship she would go to the extent of falsely implicating her brother-in-law with whom she had no quarrel, on a grave charge of murder. On the contrary, we are inclined to think that she is a natural and probable witness as she, Manwara and the appellant lived in two adjoining rooms of the same house.

30. It would appear from the evidence of the Investigating Officer (P.W. 19) that after recording the first information report at 10.30 A.M. he left for the scene of the crime. Reaching there at 12.25 A.M. he made inquest on the dead body of Manwara and examined, amongst others, Haliman Bibi. Thereafter, he arrested

the appellant and brought him to the police station. We think it to be too obvious to point out that the statements made by Haliman to the Investigating Officer which incriminated the appellant incensed his elder brother Rafiq and was the immediate cause for the talaq.

31. The next ground of attack is that in her evidence Haliman tried to attribute a motive to the appellant for the murder of Manwara which she did not mention before the Investigating Officer. Haliman stated during trial that when Manwara came back from her mother's house she heard the appellant saying 'now I have brought you and got you within my clutches.' She, however, herself conceded in cross-examination that she did not make any such statement before the Investigating Officer. Another motive sought to be attributed by her to the appellant for the murder of Manwara is that the appellant had an intrigue with a girl of the village. It is contended by Mr. Maitra that the above evidence cannot be accepted first because, the name of the girl was not disclosed and secondly because, her evidence does not find corroboration from any other quarter. We are not much impressed by the above contention because normally, a married person would not indulge in such illicit love affairs openly and to the knowledge of his neighbours.

32. Even assuming that the motive for the murder sought to be attributed by Haliman to be unacceptable, are we to discard her evidence in toto? In this connection, our attention has been drawn by Mr. Maitra to the case of State (Delhi Admn.) v. V.C. Shukla : 1980 CriLJ965 where the Supreme Court observed that a witness who could go to the extent of making an intentionally false statement cannot be relied upon for the purpose of convicting the accused.

33. On a perusal of the judgment we find that in the case under reference, the witness himself admitted that certain statement made by him was false to his knowledge. The facts of the case before us, however, are completely different. Haliman Bibi nowhere admitted that her statements referred to above were false. One of the statements made by her was not made earlier before the Investigating Officer and the other statement was not corroborated by the other witnesses. It cannot therefore, be said with any amount of certainty that her statements were false, far less to her knowledge though, as a matter of prudence, we consider it

unsafe to act upon such evidence for the reasons stated already by us. We are, therefore, of the opinion that the observation of the Supreme Court which was made in a different context has no manner of application to the facts of the present case. Moreover, it is well settled that the maxim 'falsus in uno falsus in omnibus' is neither a sound rule of law nor of practice. In view of the above discussions we find ourselves unable to accept Mr. Maitre's contention that the evidence of Haliman Bibi should be discarded in its entirety.

34. In this context we may refer to the evidence of Sarif an Bibi (P. W. 3), aunt of the appellant, who fully corroborated Haliman Bibi as regards the last part of her evidence relating to the discovery of the dead body of Manwara. She said that in the morning of the date of occurrence the appellant called her and asked her to see what had happened to Manwara. At this, she went inside the appellant's room and found Manwara lying dead with Haliman sitting by her side. Sarifan further corroborated the evidence of Haliman that there are three rooms in the house of the appellant's father one of which was occupied by the appellant, the other room was occupied by his brother Rafiq and the third one was occupied by their father.

35. It should be pointed out that there is a slight discrepancy between the evidence of Haliman Bibi and Sarifan Bibi in that while according to Haliman Bibi she and Sarifan Bibi, when she went inside the appellant's room she found Haliman Bibi sitting there, The discrepancy, however, appears to us to be of no moment at all and, at any rate, does not impeach the credibility of the witnesses.

36. As pointed out already Sujat Ali (P.W. 9) is the father of Haliman Bibi. His evidence was that on the night of occurrence he came to village Rajkhola from Panchla to see his daughter. According to him, sometime between 10 and 11 A.M. he, Rafiq and Rafiq's father took their meals together, served by Manwara. After taking their meals while he was having talks with Rafiq's father the appellant and Manwara entered the appellant's room and bolted the door from within. His daughter Haliman and son-in-law Rafiq also went to sleep in the other room. He then left the house of Rafiq and went to the house of his sister Aliman Bibi where he spent the night. On the next morning, getting the news of Manwara's death he went to the house of Rafiq's father.

37. In view of the evidence discussed above, we find no reason to discard as untrue the prosecution case that on the night of occurrence the appellant and Manwara slept in the same room after bolting the door from within and in the following morning Manwara's dead body was found lying on a chatai (mat) on the floor of the room with her tongue and eyes protruding and blood oozing out of her nostrils.

38. We have discussed already at some length the evidence of the autopsy surgeon which indicates beyond the slightest trace of doubt that Manwara was murdered by strangulation and we do not wish to dilate on the subject any more.

39. As regards the conduct of the appellant it is seen from the evidence that even after Manwara was found to be dead he did not raise any hue and cry which was quite natural for a husband whose wife was found murdered. That apart, in the morning at about 5 A.M. he stealthily left the house and went to the house of Sk. Asgar Ali (P.W. 12) of the village to ask for some Jari work. At that time it was noticed by Asgar Ali and his brother Janab Ali (P.W. 7) that his eyes were red and his behaviour was somewhat abnormal.

40. It further appears that the appellant went to the tea stall of Ejad Bux alias Kalo Babu (P.W. 8) and had tea and biscuits there. Thereafter he came back his house and asked his aunt to see what has happened to his wife. Had he cared to go inside the room the door of which was open, he could have himself seen what had happened and there could be no point in his asking his aunt to see what had happened to his wife. At the top of everything, he did not even wait to see what had actually happened to his wife because it is seen from the evidence of Sarifan Bibi that the appellant was not seen after she came out of the room. The conduct of the appellant, therefore, reveals that knowing well that his wife had been murdered he feigned ignorance of the murder and wanted someone else to break the news of murder.

41. Although the prosecution has laid much stress upon the alleged extra judicial confession of the appellant, on a scrutiny of the evidence we find it difficult to hold that the confession, if any, was voluntary. We shall refer to only some of the circumstances which would patently make it clear that the confession could not be

voluntary.

42. First of all, we may point out that the informant Sk. Babulal said nothing in his evidence about the alleged confession nor did he make any mention of it in the first information report which was lodged at 10.30 A.M. It is, however, seen from his evidence that as soon as the news of Manwara's death spread, the villagers came to the appellant's house and surrounded him accusing him of the murder of his wife. This would also appear from the evidence of sahadat (P.W. 4) which goes to show that the villagers kept the appellant in confinement till the arrival of the police. It will be further seen from the evidence that the appellant was taken to different places by the mob and was assaulted by some of them. In such circumstance the confession, if any, can never be said to be voluntary and, that being the position we need not enter into the further question whether it was true. We, therefore, leave the matter at that.

43. The next and the most material piece of evidence for the prosecution is the judicial confession of the appellant which was recorded by a learned Judicial Magistrate under Section 164, Cri. P.C. The order sheet of the Magistrate's court indicates that the appellant was produced before him from police custody on 8-9-79 along with a prayer by the Investigating Officer for recording his confession. The learned Magistrate, after administering due caution to the appellant as required by Sub-section (2) of Section 164, remanded him to judicial custody till 9-9-79 with the direction to keep him in segregation so as to give him the opportunity for reflection and to produce him in court on 10-9-79.

44. On 10-9-79 after the appellant's production in court, the learned Magistrate again administered due caution to him. The appellant, however, though sufficiently cautioned, insisted upon making the confession and the learned Magistrate after reaching his satisfaction that the appellant was going to make the confession voluntarily, proceeded to record his statement.

45. The confessional statement which was recorded by the learned Magistrate in his chamber has been marked Ext. 3 by the court below. On an examination of the document we find that the learned Magistrate first of all disclosed to the appellant that he was a judicial Magistrate and not a police officer. He then enquired of the

appellant whether he was going to make the confession out of his own free will or at the tutoring of anyone, whether anybody had told him that he would be acquitted if he made the confession, whether anybody had told him that he would be harmed if he did not make the confession and whether anybody had compelled him to make the confession. It was also clearly explained to the appellant that he would not be remanded to police custody again even if he declined to confess, that if he made a confession but subsequently retracted it, it might not be of any help to him, that if he made any confession it might be used in evidence against him and on the basis of such confession, even capital sentence might be awarded to him. The learned Magistrate further enquired of him whether he was kept in segregation after his remand to judicial custody and whether, during this period, any outsider had met him. The learned Magistrate also pointedly asked the appellant whether he still wanted to make the confession after understanding its consequences to which the appellant replied that he wanted to confess out of repentance so that the soul of his deceased wife might find peace.

46. For proper appreciation of the position we give below the English rendering of the confessional statement of the appellant, as recorded by the learned Magistrate.

I was married a little over two years. After the marriage I came to know that she had intrigues with her next door neighbour but I did not see anything with my own eyes. Her mother's intention was to earn money by getting work of lace done by her. She did not care me properly. Be that as it may, I somehow carried on. In this way my wife went to her mother's house two to three times.

A few days before this incident my wife went away. At that time she was pregnant. She suddenly went away. I sent my mother to bring her but she did not come. I also went personally but she did not come. They were under the impression that I would marry elsewhere. But, swearing by the name of Allah, I say that I never had any such intention.

I informed the villagers. The villagers, in a salish, decided that she would come back on Sraban 1. I also undertook not to get any work of lace done by my wife. I could not tolerate the idea that sitting with other male persons my wife would do

work of lace in her mother's house.

Later on, after negotiations between my father, father-in-law and uncle, my wife came. After a few days my Fufu (father's sister) came. She said to me 'well you are leading a very happy conjugal life'. I told her that this was possible due to my efforts and I had much affection for her as she was bearing my child in her womb. My wife retorted 'so much affection for the child? false'. I said 'I will give you a blow. Ask Bubu (my friend) how often I speak about my child.' My wife became angry. She retired to bed within 7.30 P.M. after taking her meal. She became angry as I disclosed the ill feeling between my elder brother and sister-in-law on the one hand and the family of the father of my sister-in-law on the other. At or about 11 P.M. I 'went inside the room, closed the door and wanted food from my wife. She said that food had been kept for me. After taking food I lay down and asked my wife what had happened. She replied that she was indisposed. Thereafter she said that she would punish me by going to her father's house on the next day. I tried to make her understand but she did not. I then thought that in that event I would be punished tomorrow. If anyone said anything against me then my uncle-in-law would demand Rs. 1,000/- from me on account of Denmohar (dower). They would further demand return of articles. It also came to my mind that my mother-in-law used to say that she would get my wife re-married to her neighbour and she would lead conjugal life with him. I could not tolerate this. All of a sudden the 'Satan' roused in my head. I decided to do away with her. , So, I pressed her wind pipe with one hand and her mouth with the other hand. After a while, her body became cool. I shook her body and found her to be dead. At that time I noticed one bleeding wound and two other marks on her chin. I wiped off the blood and to remove the scar marks scorched the sites by applying the revet of a shoe which was fixed to the blunt side of my needle after heating it in the light of the lamp. But instead of producing blisters, it produced blackish spots. In the same way, I scorched other parts of her face, hand and feet.

The string on one side of the mosquito curtain got untied. I tied it up again and sometimes sat, sometimes lay down. I did this act between 2 and 2.30 A.M. Thereafter, during the whole night, I kept sitting and wept. Early in the morning I went to the tea stall and had tea and biscuits. At that time I happened to meet one

of the sons of my uncle-in-law. I had also a talk with him about my work.

Returning home I found that my elder brother, sister-in-law, father and mother had not yet left their beds. They brought me before the villagers and told them that I had murdered my wife. The villagers then assaulted me. They also assaulted my elder brother and my blind father.

I have done wrong but I did it at the spur of the moment. All of a sudden the 'satan' within me woke up. I shall accept whatever Allah ordains for me. What more can I say? Let my wife rest in peace.

47. The confession, as stated already, was recorded on 10-9-79. On 8-11-79 a petition was sent to the learned Magistrate by the appellant through the Jail Superintendent wherein he retracted the confession on the ground that he made it under tutoring by the police. We have noticed already that sufficient time for reflection was given to the appellant before recording his confession and also he was kept in segregation during his detention in jail. There is no material whatsoever even to remotely indicate that the, Investigating Officer of the case had any access to the appellant after his remand to judicial custody and before recording of his confession. We have also noticed that the learned Magistrate both before remanding him to judicial custody as well as before recording his confession, administered sufficient cautions and explained to him in no uncertain terms the consequences of making the confession. From the cautions administered, the enquiries made by the learned Magistrate and the reply given by the appellant we are satisfied that the confession was quite voluntary. It was the outcome of repentance and not the result of tutoring by the police. This would also be clear from the very text and tenor of the confession which contains minute details of everything that took place after Manwara came back to her husband's house and the details disclosed in the confession substantially fit in with the evidence laid by the prosecution, including . the evidence of the autopsy surgeon. We therefore, unhesitatingly hold, agreeing with the lower court, that the confession was not only voluntary but was also true.

48. In assailing the confession, Mr. Maitra has urged three points before us. In the first place he has referred to the evidence of the Investigating Officer (P.W. 19)

which is to the effect that he came to Sadar Court from Police Station Panchla on 10-9-79 that is, the date on which the confession was recorded. From this, Mr. Maitra wants us to hold that the sole object of the visit of the Investigating Officer to Sadar Court on 10-9-79 was to threaten the appellant to compel him to make the confessional statement as tutored by him.

49. The contention appears to us to be without any merit because it is seen from the evidence of the learned Magistrate (P.W. 16) that he recorded the confession in his chamber where the Investigating Officer could not have any access and also because, according to the Magistrate's own evidence, he satisfied himself before recording the confession that no police personnel was present anywhere in the vicinity of his chamber.

50. It is true that the Investigating Officer (P.W. 19) came to Howrah Court on 10-9-79 but the defence did not try to ascertain from him the purpose of his visit to Howrah Court. Also, it was not suggested to him in cross-examination that he came to Howrah Court on 10-9-79 to threaten the appellant to make the confession. The probability of the Investigating Officer coming to Howrah Court on that date in connection with some other case cannot be ruled out. Moreover, it will be seen from his evidence that when he reached the Howrah Court, at 4.10 P.M. he came to learn that the confession of the appellant had been already recorded. We, therefore, see no merit in the point canvassed by Mr. Maitra.

51. It is next contended by Mr. Maitra that the confession should have been recorded in open court and the learned Magistrate committed an irregularity in recording the confession in his chamber. In support of the contention Mr. Maitra has relied upon the decision of the Supreme Court in the case of *Ram Chandra v. State of Uttar Pradesh* : 1957 CriLJ559, where it was ruled that a confession recorded in Jail without adequate reasons therefor and in disregard of the instructions contained in the Government order was improper.

52. Having carefully gone through the judgment we are of the opinion that the above decision has no manner of application to the facts of this case. In the case under reference the accused was produced twice - first on July 17 and again July 22, 1952 before a Magistrate on a police report that he was willing to make a

confession but each time he declined to confess. While in Jail, he sent a letter on October 7 to the District Magistrate, Allahabad through the Superintendent of the Jail to the effect that he wanted to make a confession and asked for its being recorded at an early date. At or about this time he was kept in solitary confinement and the Investigating Officer of the case went to Jail on Oct. 8 and 9.

53. On receipt of the application the District Magistrate deputed Smt. Madhuri Srivastava, a Magistrate, to record the confession and the confession was recorded by her on Oct. 10, 1952. The recorded confession indicated that her questioning was very meagre and that she did not even attempt to ascertain why the accused was making the confession after such a long lapse of time. In cross-examination she stated that she thought it improper to record the confession in Court during court hours,' being unaware of the standing orders issued by the Government of Uttar Pradesh, the first rule whereof says that confessions may ordinarily be recorded in open court and during court hours unless for exceptional reasons it is not feasible to do so. One of those instructions also enjoined is that the Magistrate should enquire the reason why the accused is making the confession knowing that it may be used against him.

54. In the above context and in view of the instructions contained in the manual of Government orders, Uttar Pradesh, the Supreme Court observed that the Rule in the Government Manual to the effect that confessions may ordinarily be recorded in open court unless for exceptional reasons it is not feasible to do so is a very important provision which emphasises that the Magistrate in recording the confession is exercising part of his judicial function in the manner prescribed by law and that a confession taken in Jail without any adequate reason therefor and in disregard of the instructions contained in the Government orders was improper. The Supreme Court, though emphasising the desirability of recording confessions in open court as required by the Government orders, did not rule that a confession recorded in the Magistrate's chamber, if otherwise acceptable, is to be abjured merely because it was not recorded in the open court.

55. We have mentioned already that the confession recorded in the instant case does not suffer from any infirmity whatsoever. In such a situation we are not

prepared to discard the confession merely on the ground that it was recorded in chamber and not in open court. It is not unlikely that the learned Magistrate thought that his chamber was a better place for recording the confession inasmuch as, the police in mufti might have been present in the court room which it could not be possible for him to detect. On the other hand, his chamber was completely inaccessible to the police and there was, therefore, no chance of the police gesticulating to the appellant to make the confession or intimidating him in any other manner.

56. The last point urged by Mr. Maitra is that before recording the confession it was the duty of the learned Magistrate to inform the appellant of his right to consult and to be defended by a legal practitioner of his choice as enshrined in Article 22 of the Constitution and since this was not done, the confession should be excluded altogether from our consideration.

57. In urging the above point Mr. Maitra has drawn inspiration from the Division Bench decision of the Gauhati High Court in the case of State of Assam v. Rabindra Nath Guha 1982 Cri LJ 216 where, on the analogy of the decision of the Supreme Court in the celebrated case of Khatri v. State of Bihar, 1981 Cri LJ 470 (SC), the Division Bench observed that it is imperative for the Magistrate, before recording the confession of an accused, to explain to him his constitutional right to consult and to be Defended by a lawyer of his choice and in default of compliance of such obligation, the confession is vitiated as contravening Article 21 of the Constitution and cannot be accepted.

58. Mr. Maitra has placed strong reliance upon the Gauhati decision and vehemently argued before us that the confession of the appellant which was recorded by the learned Magistrate without informing him of his ; constitutional right to consult and to be defended by a legal practitioner of his choice is violative of Article 21 of the Constitution and, that being the position, the confession should be left out of consideration.

59. What we find in the Gauhati case is that the confession recorded by the learned Magistrate was discarded by the High Court on a variety of grounds. The accused was arrested on 14-12-76 and was kept in police custody till 17-12-76 in

gross violation of the provisions of Section 57, read with Section 167 of the Criminal P.C. The violation of the statutory provisions referred to above, was sought to be suppressed by the Investigating Agency by asserting that the accused was arrested on 16th, a claim which was found to be untrue and the investigation also was found to be tainted. The accused was produced before the Magistrate on 17th but the Magistrate, instead of making any enquiry as to why he was kept in illegal detention from 14th to 17th, completed the recording of the confession within 65 minutes of his production in utter violation of the Rules of the Gauhati High Court which enjoins that the accused shall be given at least three hours' time for reflection during which period he shall not be in contact with any police officer and shall not be permitted to converse with any person. Then again, certain columns of the printed form for recording of confession were left blank.

60. It was also found that the questions put by the Magistrate were misleading and one of such questions gave the accused the impression that if he confessed, no court would punish him. Also, the confession was found to be the outcome of pressure exerted by the police and untrue in all material respects.

61. It would thus appear that there were various grounds for discarding the confession, one of the grounds being that the accused was not informed of his constitutional right to consult and to be defended by a lawyer of his choice, before his confession was recorded by the learned Magistrate.

62. It may not be out of context to point out that Hansaria J., one of the learned judges constituting the Division Bench, while agreeing with the observations of Lahiri J., who delivered the judgment for the Bench, with regard to the other grounds for discarding the confession, reserved his thoughts on the subject of legal aid for some other occasion thereby, giving the indication that he had reservations with regard to the observation of Lahiri J. on the subject of legal aid. Therefore, the observation that a confession recorded without informing the accused of his right to consult and to be defended by a lawyer of his choice must be discarded as contravening Article 21 of the Constitution, cannot be said to be the unanimous observation of both the learned Judges constituting the Division Bench.

63. In Khatri's case (1981 Cri LJ 470) (SC) (supra) the legal effect of the confession of an accused recorded by a Magistrate without explaining to him his rights under Article 22 of the Constitution and Section 303 of the Cri. P.C. did not specifically come up for consideration. The broad question before the Supreme Court in the aforementioned case was with respect to the right of an indigent accused to free legal aid at the cost of the State from the time of his production in court and the obligation of the Magistrate or Sessions Judge to inform the accused of such right guaranteed to him by the Constitution. For proper appreciation of the point involved in the case we are extracting below the relevant portions of the observations made by the Supreme Court which run as under:

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21. The State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the state.

Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage.

The Magistrate or the Sessions Judge before whom the accused appears, is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State.

64. A judicial confession is a very strong piece of evidence and may form the sole basis for conviction if the court is satisfied, on a careful scrutiny of the evidence and the surrounding circumstances, that it is not only voluntary but is also true. A

confession which is voluntary stems from repentance and is a spontaneous and voluntary act of the accused who, out of remorse, wants to make a clean breast of the crime committed by him to purge his conscience. He does this at the dictates of his conscience, with full knowledge of the consequences.

65. Such being the nature of a voluntary and true confession, the question that poses itself is whether in the instant case, the appellant would have been benefitted at all if he had been informed before recording his confession, of his right to consult and to be defended by a legal practitioner of his choice.

66. The legal practitioner engaged by him or by the State might have at best advised him not to make any confession. He might also have explained to the appellant the legal consequences of making the confession and so on and so forth but could do nothing more. In other words, he could not prevent the appellant from making the confession, if the appellant was determined to confess his guilt being goaded by qualms of conscience.

67. Though the learned Magistrate did not advise the appellant not to make the confession which the learned Magistrate could not lawfully do, he nevertheless explained to the appellant the legal implications of making the confession, informed him that he was not bound to make the confession and further informed him that if he made the confession he might even be awarded capital punishment on the basis of such confession. We have discussed already this aspect in detail and pointed out that the appellant made the confession in spite of due cautions administered to him by the Magistrate as the appellant was impelled by the dictates of conscience to admit the crime which, according to him, was a sin and was also ready to face any consequence that might be ordained by Allah so that the soul of his wife might rest in peace.

68. Section 164 of the Criminal P.C. has been very carefully drafted to exclude the possibility of an accused making a confession under police pressure. In our opinion, if the provisions of Sub-sees.(2) and (3) are meticulously followed by the Magistrate not only in letters but also in spirit, the chance of the confession being vitiated by coercion is ruled out. In view of our foregoing discussions, even assuming that before recording the confession of the appellant the Magistrate

should have informed him of his right to consult and to be defended by a legal practitioner of his choice, we are unable to hold that any prejudice whatsoever was caused to the appellant for non-communication of the above information to him.

69. Moreover, in the instant case there is nothing to indicate that the appellant is an indigent person who was incapable of engaging a legal practitioner of his choice to defend him. On the contrary, it appears from the order sheet of the Magistrate's court that on his production before the Magistrate on 19-10-75 after recording of his confession, bail application was moved on his behalf by a lawyer and thereafter he was although defended by a lawyer of his choice. Even before this Court, he is being represented by a lawyer of his choice.

70. Regard being had to what goes above, with great respect to the learned Judges of the Gauhati High Court, we find ourselves unable to agree with the view expressed in Rabindra Nath's case (1982 Cri LJ 216)(Gau) (supra) that a confession recorded without informing the accused of his right to consult and to be defended by a lawyer of his choice, is to be discarded even if the confession is found to be voluntary and true.

71. On an anxious consideration of the facts and circumstances proved by the prosecution, together with the confession of the accused recorded by the learned Magistrate, we unhesitatingly arrive at the conclusion that the appellant is responsible for the murder of his wife Manwara Bibi.

72. The defence case that the appellant was not in the house on the night of occurrence and did not sleep with his wife on that night is unacceptable in view of the evidence of Haliman Bibi (P.W. 2) and Sujat (P.W. 9). Since the appellant took up the plea of alibi, the onus was upon him to prove that he spent the night at some other place but no attempt was made to discharge the onus. We are, therefore, left with no other option but to dismiss the defence case as false.

73. For the foregoing reasons, we are of the opinion that the appellant was rightly convicted for the murder of his wife and we see no reason for interference with the order of conviction and sentence passed against him.

74. In the result, we dismiss the appeal and affirm the order of conviction and sentence passed against the appellant by the lower court. The appellant will be entitled to set off under Section 428, Cri. P.C.

**J.N. Hore, J.**

75. I agree.

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