

Emperor Vs. Garib Hari

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Court : Kolkata

Decided On : Jan-29-1926

Reported in : AIR1926Cal742,94Ind.Cas.365

Judge : Chotzner and ;Mukerji, JJ.

Appellant : Emperor

Respondent : Garib Hari

Judgement :

1. This is a Reference by the Second Additional Sessions Judge of Burdwan under the provisions of Section 307, Cr. P.C. The accused Garib Hari was tried for an offence under Section 304, Indian Penal Code, for having caused the death of one Kiranbala Harini who is said to have been his mistress and to have been in his keeping for a number of years. The prosecution case is that on the day of the alleged occurrence there was a quarrel of some sort between the accused and the deceased and that on account of the provocation which the accused received in the course of the quarrel he struck her with a knife, the result of which was that she died. The Jury brought in a unanimous verdict of not guilty and the learned Judge being of opinion that that verdict should not be accepted but that the accused should be convicted under Section 335, Indian Penal Code, has made this Reference to us.

2. The learned Judge in his letter of reference has very clearly and carefully set out the different items of evidence upon which the prosecution relied for the purpose of showing that the accused was guilty of the offence. The first item of evidence relates to the confession which the accused is said to have made on the day shortly after his arrest. The accused was arrested about 4 or 4-30 in the afternoon of the 16th April 1925. He was thereafter taken to the Jorasanko thana and the Police Officer in charge of that thana took him to the residence of an Honorary Presidency Magistrate, Mr. B. N. Mitter, and at his house the confession was recorded. The evidence of the Police Officer is to the effect that at the time when he was so taken the accused was smelling of liquor but that he was not in a drunken state. The confession was not recorded in the form prescribed for recording confessions and it does not contain the questions which were put by the Magistrate to the accused; nor the answers which the accused gave to those questions but the whole confession was put down in a narrative form. The warnings, such as they are said to have been administered to the accused, also do not appear on the record of the confession. The Honorary Magistrate is a Bengali gentleman, and the accused spoke in Bengali and yet the confession was recorded in English. No explanation also appears to have been given as to why instead of waiting till the next day and producing the accused before a Magistrate who was sitting in Court, the accused was produced before the Honorary Magistrate that very night at his residence and the confession was recorded there. Under these circumstances it is necessary to scrutinise the evidence of the Magistrate with some degree of care in order to find out what he exactly did or whether he did really comply with those formalities which have been from time to time laid down for the guidance of Magistrates in the matter of recording confessions. The Magistrate in the course of his evidence stated that he remembered only the gist of the confession, and that the accused did not say for what time he had been in Police custody. The Magistrate also stated that he does not remember what the exact words were that were used by the accused; nor does he profess to remember the exact questions that were put to the accused or the order in which they were put. The only warning that he gave to the accused appears to have been this that he asked him whether the accused was willing to make a voluntary confession and that if he made a confession that might be used

against him. He does not appear to have even informed the accused that he was a Magistrate and he certainly did not put to the accused questions in order to find out whether the confession which the accused was about to make was a voluntary one or not. Under these circumstances it is difficult for us to hold that there was such enquiry as was necessary for the Magistrate to make in order to enable us to form an opinion as to whether the confession was voluntary or not. This is the view that I take of the confession apart from the provisions of Section 164, Cr. P.C. But, in my opinion, the learned Magistrate has failed in the present case to record the confession strictly in accordance with the provisions of that section. The accused was arrested in Calcutta in pursuance of a request made by the Police at Burdwan who evidently were holding the investigation with regard to this matter under the provisions of Ch. XIV of the Cr. P.C. The arrest of the accused by the officer of the Calcutta Police and his production by that officer before the Magistrate must be taken to have been an act done in the process of the investigation that was being held; and if that is so, the Magistrate was bound to comply with the provisions of Section 164, Cr. P.C., in the matter of the recording of the confession. Though he may have given the warnings required by the first part of Clause (3) of Section 164, Cr. P. C, he has done nothing which he is bound to do under the latter part of that clause which provides that 'no Magistrate shall record any such confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily.' It has been urged by the learned Deputy Legal Remembrancer that although there was an investigation which was being held by the Burdwan Police the arrest of the accused and his production before the Magistrate in Calcutta must be considered as something done not in the course of that investigation but apart and quite detached from the investigation that was being so held. I am unable to accept this contention as I think the proper view of the matter is that the officer of the Calcutta Police merely lent his services to the Burdwan Police who were holding the investigation. But assuming for a moment that that was so and that the Police Officer had authority to act in this matter apart from the investigation that was being held by the Police at Burdwan there was no reason whatsoever why the Magistrate who has got to record the confession made by the accused should not comply with those statutory rules which have been embodied in Section 164, Cr. P.C., and why he should not proceed on the lines indicated in

that section and in conformity with the Rules and Circular Orders issued by this Court.

3. On the whole, we are not satisfied that the record of the confession that is before us is one upon which we can act, nor is the record such as would enable us to say in disagreement with the verdict of the Jury that it was a confession made by the accused person voluntarily and that it should be acted upon.

4. The next item of evidence is the evidence of P. W. No. 2, Gobinda Hari, the son of the deceased. He is the only witness who speaks to the occurrence itself. He is a boy aged 12 and he professes to have been present at the time of the occurrence. He states that he was in the kitchen at the time when there was an altercation between his mother, the deceased, and the accused on the verandah adjoining the kitchen and that in that altercation the accused inflicted the injury upon his mother. In cross-examination, however, he stated that he did not see the actual stabbing and he did not notice how many times the accused struck his mother, and he stated also that it was quite dark at the time. The evidence of this witness is practically all the evidence that we have on the record as to the actual occurrence. Having regard to the statement made by this witness in his cross-examination to which I have referred I am not of opinion that the evidence is so very convincing that it should be right for us dealing with this case under the provisions of Section 307, Cr. P.C., to accept it as conclusive in view of the fact that the Jury evidently were of opinion that it was not sufficient to fix the guilt, upon the accused.

5. The third item of evidence referred to by the learned Judge relates to the evidence of certain witnesses who spoke to the fact that shortly after the occurrence P. W. No. 2, Gobinda told them that he was an eyewitness to the occurrence and that the accused had inflicted the injury upon his mother. Having regard to what I have said as to the value of the evidence of Gobinda himself I do not think that the third item of evidence even if it be accepted as true, carries the case very far.

6. The last item of evidence is that of the P. W. Nos. 6 and 11 who say that on the day of the alleged occurrence and shortly before it took place the accused was

seen in the village where the occurrence took place. This no doubt is a piece of circumstantial evidence but if we are not prepared to rely on the confession of the accused and if we are not satisfied with the evidence of Gobinda, it cannot be said that the mere fact that the accused was seen in the village where the occurrence took place shortly before the time of the occurrence is a fact upon which the conviction of the accused can possibly be founded.

7. There are certain other matters which present some difficulty to us, though perhaps if we were to deal with the case independently of the verdict of the Jury we might not regard them very seriously. Though the injury was inflicted on the verandah of the kitchen the deceased was found lying with the knife beside her at no less a distance than 130 feet from that place. It may be that she ran after the assault and was chased by her assailant who dropped the knife when she fell, or it may be that she ran with the knife sticking on to her and then she pulled out and threw the knife and herself fell. But these are mere theories, for there is no evidence on the point, and indeed we do not know whether it was possible for her to run this distance after the injury she had received. The learned Deputy Legal Remembrancer has argued on the presence of blood-in the verandah and the fact that there were blood spots on the cloth which the accused was wearing at the time of his arrest. So far as the presence of blood on the verandah is concerned that only goes to show, if that evidence is accepted, that the occurrence took place there, and as regards the presence of blood on the cloth which the accused was wearing at the time of his arrest the chemical examiner's report is to the effect that although blood spots were found on the cloth, the origin of the blood could not be determined.

8. The evidence on the record is not of a very convincing character and we are of opinion that in this case we should not be justified in interfering with the unanimous verdict of the Jury. The Reference is accordingly discharged, the verdict of the Jury upheld and the accused Garib Hari is acquitted and directed to be set at liberty.