Nika Ram Vs. State

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SooperKanoon Citation : sooperkanoon.com/889055

Court : Himachal Pradesh

Decided On : Sep-16-1971

Reported in : 1972CriLJ204

Judge : M.H. Beg, C.J. and; Chet Ram Thakur, J.

Appellant : Nika Ram

Respondent : State

Judgement :

M.H. Beg, C.J.

1. There is before vis an appeal against the conviction, of Nika Ram under Section 302 I. P. C. and the sentence of death awarded to him as well as a reference by the Sessions Judge of Mahasu for the confirmation of the sentence of death.

2. The prosecution case was : The appellant came to the house of the Naib Tehsildar, Magistrate II Class, Kothkhal, S.K. Mahajan (P. W. 15), at 10.30 p. m., on 16-9-1969, and knocked at his door. The appellant appeared nervous, and, as soon as the Magistrate had opened the door, the appellant stated that he had murdered his wife. Thereupon, the Magistrate asked him to sit down and be calm and then made enquiries about the matter. The appellant unburdened his mind by stating that his wife was a woman of loose character, and his relations with her were bad and that she had given birth to an illegitimate child. The appellant was clad in a kutchha (underwear) and a coat which appeared to : be wet. The

appellant explained that he had attempted to commit suicide by jumping, into water, but was unsuccessful. The Magistrate asked him to think over the matter as he was going to record his statement. As the appellant had no objection and indicated his willingness to make a statement voluntarily, the Magistrate recorded that statement in the words of the appellant (Ex. PH/I). This statement is admitted by the appellant to have been signed by him. The Magistrate had read out the statement to the appellant who had admitted it to be correct before he signed it. This statement was the basis of the prosecution case. It is the only piece of evidence, apart from the circumstances said to be corroborative, on which the conviction of the appellant rests.

3. This statement was to the effect Shmti Churl, the murdered woman, who was married to the appellant in 1958, gave birth to an illegitimate son in 1964, and. she had been, for that reason, living' with her parents along with the child since 1964. The appellant had tried to call her back, but she had not returned. At the time of Shivaratri, about eight months before the occurrence, the deceased came back. But, as she was 'corrupt', she used to go back to the house of her parents. At about 9.30 p. m., on 16-9-1969, when the appellant and the deceased were going to bed. the appellant enquired whose child the deceased had borne. She not only did not disclose the name of the father, but started abusing the appellant. After that, she went to sleep. The appellant started thinking over the matter and got worried up by the idea that the child was illegitimate and his wife was corrupt so that she deserved to be put to death. At that time, a lamp was lit. The appellant got up from the bed and took a 'Khokhri' lying in the room and struck three blows on the neck of Shmti Churi, and, thereby, killed her. The statement also revealed that a white shirt, which was torn at the arms and was blood stained, and a 'Khokhri'. were thrown in the room before the appellant left the dead body on the bed after shutting the door of the room. It ended by saying 'punish me'. The appellant, who was said to have been a compounder for some time up to 5 or 6 years before the occurrence, had signed the statement in English. Below his signature appeared the signature of the Magistrate and the date 16-9-1969 and the time 11 p. m.

4. The Tehsildar Magistrate had deposed that immediately after the appellant had made the statement, at about 10.45 p. m., he called his Peon, Mangat Ram (PW

10) and sent him to Police Post to call the S. L Incharge after informing him that a murderer had come to the residence of the Magistrate. Then, a Head Constable and a Foot Constable had arrived from the Police Post with handcuffs and the appellant was handed over to them with the statement endorsed by the Magistrate for investigating the case. The appellant was arrested and searched in the presence of the Magistrate, but nothing incriminating was said to have been found on his person.

5. Bhag Singh (PW. 13), Head Constable, posted at Kotkhai, Police Station; had fully corroborated the Tehsildar Magistrate's statement. He said that information was brought by Mangat Ram. (PW. 10), the Peon of the Tehsildar Magistrate, on 16-9-1969 at 10.50 PM. that a person said to be a murderer had appeared before the Magistrate. According to the Roznamcha entry No. 13, the Head Constable. along with Mangat Ram, and constable Gulaba Ram, left at 10.52 PM. for the residence of the Magistrate. The Magistrate handed over the appellant together with his statement to the Head Constable, who arrested the appellant and prepared a search memo but found nothing incriminating on his person. He also found that the appellant was wearing an old woollen coat and a 'Kutchha' which were wet, but he did not take these into his possession. He found the appellant shivering and nervous. The appellant was taken to the Police Post where the F. I. R. was written out at 11.15 PM. incorporating the contents of the statement (Ex. PH) made by the appellant to the Tehsildar Magistrate, The Head Constable then went into the village Shillru, at about midnight, awakened Mani Ram (PW. 8). the uncle of the appellant, Bhagat Ram (PW. 16), a school teacher, and Poshu (PW. 7). All these persons went to the appellant's house and found the door of the verandah bolted from inside. Poshu had to jump in from a side and open it. The door of the residential room was merely shut. It was opened and the light of a torch was thrown inside. The body of Shmti Churi, lying in a pool of blood at an angle from the bed, was revealed,. It was covered with a quilt up to the chest. A blood-stained Khokhri and its scabbard, and a shirt stained with blood, were lying nearby. The woman was dead as a result of gashing wounds in her neck.

6. Mangat Ram (PW. 10) also corroborated this version. He even stated that the appellant had admitted, in his presence, to the Tehsildar. that he had murdered his

wife. He also deposed that the statement had been written by the Tehsildar before the arrival of the Head Constable, He had evidently left his master at about 8 p. m. and gone into the lower storey of the house. It is possible that he may have heard something even before he was called as his curiosity may have been excited by hearing something of what was going on In the room of the Tehsildar in the upper storey. This witness was. however, not cross-examined as to when and in What circumstances he had heard the appellant admit the murder to the Tehsildar. It was argued that this statement could not be true as the Tehsildar had stated that he called him only after writing down the statement. As this witness was staying in the lower storey of that very house, he could, as already indicated, have overheard something. In any case, it has not been shown, by the cross-examination of either the Tehsildar Magistrate or the Peon, that their statements could not be true. Nor has any conceivable ground for them to de-Pose falsely against the appellant even been suggested. Similarly, there is no suggestion, that the Head Constable, Bhag Singh, could have any conceivable motive for deposing falsely against the appellant.

7. Three witnesses, namely, Mani Ram (PW. 8). the uncle of the appellant, Poshu (PW. 7), and Bhagat Ram (PW. 16), have also deposed about the manner in which the body of the deceased was discovered by Bhag Singh (PW. 19), as a result of the information given by the accused. This information had also led to the discovery of the fact that the Khokhri and a scabbard and the shirt, which was said to be of the appellant, were lying inside as the appellant had stated. These witnesses, including Mani Ram, the uncle of the appellant, were also shown, to have no motive whatsoever to depose falsely against the appellant. Indeed, no such motive was even suggested to them.

8. In fact, Mani Ram (PW. 8) had not identified the shirt (Ex. P3) found in the house and stated that he did. not know to whom it belonged. He had also deposed that, when the appellant was brought by the police next morning, he was wearing the same shirt as he was wearing on the previous day, thereby suggesting that the appellant was not clad in the way in which the Head Constable had said he was. The statement of Mani Ram. however, related to the attire of the appellant next morning when Devi Singh Thakur (PW. 17) the S. I. Incharge of Police Station,

Theog, had gone there and prepared a site plan and a recovery memo. Devi Singh, Investigating Officer, had stated that the appellant was taken to the spot in the same dress in which he had seen him at the Police Post and that this consisted of at coat, a shirt, and a kutchha. It was stated by him that the coat and kutchha were not taken into possession by the police. The slight discrepancy between the statements of Mani Ram and Bhag Singh and the Investigating Officer on the question of the actual attire of the appellant when he was taken to his house next morning, is immaterial. It could very well be due to lapse of time or some attempt on the part of Mani Ram to help the appellant. The appellant himself admitted that he was taken next morning to his house by the Investigating Officer although he was not permitted to go inside.

9. It is, however, true that, although a shirt was found as stated by the appellant to the Tehsildar, in the room in which the murder was committed, that shirf was not proved to be the shirt of the appellant. So far as the Khokhri (Ex. P. 1) was concerned, evidence was given by Girju (PW. 1), the brother of the murdered woman, that this was the very khokhri which he had seen earlier at the house of the appellant. The scabbard of the 'Khokhri' (Ex. P2) is certainly somewhat unusual inasmuch as it has two mini-pockets attached to it on one side with a small knife in one of these. No doubt, under cross-examination, P. W. I has stated that the khokhri appeared to be similar to the one he had seen earlier at the house of the accused and that there was no special mark of identification on it. We have, however, examined the khokhri, which is of a size and shape which could be easily remembered by a person who had seen it in the house. Even under cross examination, Girju had stated that he had seen the khokhri (meaning thereby the particular khokhri recovered) previously in the house of the accused in the scabbard. He was not asked whether the scabbard, which was also examined by us. had any special feature about it as it had. We think that this evidence is sufficient to prove the previous existence of this very khokhri in the house of the appellant. Thus, the appellant had, in his confession to the Tehsildar Magistrate mentioned that he had committed the murder with a khokhri which was lying in the house, and such a blood stained khokhri was actually found as revealed by the appellant, when the police went to the house.

10. The post-mortem report given by Dr. G. C. Gupta (PW. 3), after examining the body at 6 p. m. on 17-9-69, showed two punctured wounds by the side of the neck. 2' in diameter x 2' x 11/2' and an incised wound' 6' x 1' x 1' on the left side of the neck. These were the three principal wounds on the neck which had caused the death. The Doctor had deposed that, out of the 10 injuries on the body all except a scratch on the right hand, could have been caused by the khokhri produced. The other injuries were : (i) incised wound 2' x 1/2' x 1/2' above left eyebrow; (ii) incised wound 1'x 1/2'x 1/2' on the left fore-arm; (iii) incised wound 2'x 1/2' x 1/2' on the left fore-arm outer side in middle : (iv) incised wound 1'x 1/2'x1/2' between small finger and right finger on the left hand; (v) incised wound 1' x 4' x 4' on right hand between thumb and index finger, (vi) scratch 1' x 3/4 x 3/4' on the right hand behind and (vii) incised wound in the right arm.

11. The argument that the medical, evidence does not fit in but conflicts with the confession of the appellant does not impress us. The appellant had stated, in his confession, that he had attacked his wife after she had gene to sleep and that he had struck three blows on her neck in order to put her to death. He had also stated that the deceased had abused him before she went to sleep. It is true he had not stated that she had got up and tried to resist or protect herself when he took the khokhri and went towards the woman to strike her. The wounds in the hands could very well have been caused even after a single blow to the neck. The woman could have tried to get up and raise her hands involuntarily. Even if she had got up from sleep at all and lifted her hands suddenly to protect herself, the blows to the neck could be so sudden as to prevent her from crying out. The photographs of the corpse show that the hands were raised as though she was trying to ward off blows on her neck, when struck. There were only three wounds on the neck, and, therefore, the medical evidence, in our opinion, corroborates rather than contradicts the veracity of the confession. The doctor had stated that the tear of the trachea would prevent the victim from crying out and that the injuries did not indicate whether she struggled before her death or not. The fact that no neighbour heard cries was thus explicable-

12. An aspect of the matter, which has led to some argument on the question whether the confession was admissible in evidence at all, was that the Magistrate

had put down 11 PM under-neath his signature. He had admitted that the house of the A. S. I. was across the road, only 15 ft. away. It was suggested that the Police Post was also there, though it could only be proved that it was very near. Assuming, however, that the Police post was very near and information had been given there at 10.50 PM. so that the Head Constable had Started from there at 10-52. it was likely that he would reach the Tehsildar Magistrate before 11 PM. The Tehsildar Magistrate was, however, not asked when he actually signed and put down the time on the confession. Nor do we know whether there was any difference between the watch or the clock seen by the Tehsildar before putting down the time and that seen by Bhag Singh at the Police Post Learned Counsel for the State has, however, rightly contended that even if the Magistrate had signed and put down the time and given the confession to the Head Constable after the arrival of the Head Constable at his residence, it would not affect the admissibility of the confession which was. according to all the witnesses on this question, written out and signed by the appellant before the Head Constable reached the residence of the Tehsildar.

13. Another feature of the confession was that the Tehsildar had inserted, in pencil, at the end of one line. that a lamp was lit there, and, after writing this but in pencil, he had used a pen to cover this bit of writing also with ink. The Tehsildar had admitted that he had done so in order to fit in the extra information given by the appellant when the confession was read out to him. He had also admitted that, after making the insertion in pencil, he had written over it in ink. It is true that this could give rise to some suspicion whether the appellant had said anything about the lamp, particularly as the lamp, which was said to have been found by the Investigating Officer, when he went to the house next morning, was not taken into his possession by the Investigating Officer. The insertion could not be the result of any-thing the Head Constable or the Investigating Officer suggested because, in that case, a lamp or taper could have been shown to have been taken into possession.

14. It was suggested that the whole confession was written afterwards in order to make it fit in with what was found on the spot. The appellant had stated that he was compelled to sign a paper at the Police Post after he had been given a

beating. But. he had not mentioned any such maltreatment when he was taken to his house next morning when his uncle Mani Ram and other co-villagers were present. It is true that he was kept apart from the witnesses and was not allowed to go inside the house, but the fact remains that he did not complain to them that he was maltreated or tortured, or that he had been made to sign a statement although innocent.

15. The defence of the appellant was that he had gone to see a documentary film at village Kotkhai which had finished at about 9.30 P.M. and that one Gaddu Ram was with him at the show. Kotkhai was only a couple of furlongs away from his house. He stated, in the committing Magistrate's court that at 9.30 PM. two constables took him from the show to the Police Station and started beating him and then made him sign a paper. If there was any truth in this assertion, the appellant could have produced some witness to prove where he was arrested, He could have told witnesses next morning, who were his co-villagers, including his uncle, that he had been at the cinema. Again, he could have complained to the Magistrate before whom he was produced, on 18-9-1969, to be remanded into, custody. The appellant had not even complained about this to the Magistrate 1st Class. Theog to whom he was taken on 29-9-1969 for the purpose of recording. his confession. The appellant was produced again before the same Magistrate on 13th October, 1969. but did not complain of any beating, or taking of his signature by force on any paper. He made such an allegation orally on 18-10-69 when he was taken for the third time before the Magistrate Ist Class Theog, who had, for reasons which are not sufficient, not recorded the statement of the appellant on two earlier occasions.

16. The learned Sessions Judge who tried the case, had relied for corroboration of the first confession, among other facts and circumstances, on the statement of the Magistrate 1st Class of Theog, that the appellant clearly told him on the first occasion on which he was brought before him. that he wanted to make a confession of guilt. The contentions before us on behalf of the appellant were : firstly that the confession before the Tehsildar Magistrate was wrongly admitted in evidence; secondly, that even if that confession was admissible, it was not sufficiently corroborated by other facts; thirdly, that the main evidence wrongly

treated as corroborative of the first confession was struck by the provisions of Section 164 Criminal Procedure Code and ought to have been excluded; and, fourthly, that there were suspicious facts and circumstances in the case which should enable the appellant to get the benefit of a reasonable doubt. We will deal with each of these contentions seriatim.

17. In support of the first contention, the main case relied upon on behalf of the appellant was Nazir Ahmad v. King Emperor AIR 1936 P.C. 253, where a confession was made during the course of investigation, but it was neither reduced to writing by the Magistrate concerned, in the words of the maker of the confession, nor was it accompanied by the precautions found in Section 364 Cr. P. C. It was held to be inadmissible on the ground that where the law lays down a particular mode of performing the magisterial duty, other methods of its performance are necessarily forbidden. In the case before the Privy Council, the Magistrate concerned had, no doubt prepared a memorandum afterwards. But, that could not be held to be even a purported compliance with the provisions of Section 164 read with Section 364 , Cr. P. C. Therefore, in that case, no irregularities committed in the course of a purported compliance could have been cured in the manner laid down by Section 533 Cr. P. C. The contention was rejected there that a Magistrate duly empowered could give oral evidence to prove the confession, just as any ordinary person could do. by reason of Sections 17, 21, 24 or 26 of the Evidence Act, which permitted evidence of extra-judicial admissions and confessions shown to be voluntary.

18. The ratio decidendi of Nazir Ahmad's case was that, where a particular mode of performing an official duty is meticulously prescribed, it could not be deemed to have been performed in any other way. That was not a case of a mere omission or irregularity in the performance of a duty, curable under either Section 533 Criminal Procedure Code or 537 Criminal Procedure Code, but a case where a mode of proving a confession not sanctioned by law was adopted. The mode of recording confessions, prescribed by Sections 164 and 364 Criminal Procedure Code, is confined to cases in which the investigation has begun and the magistrate; who has to perform his duty, is duly authorised. In the case before us. the Tehsildar Magistrate II Class was neither shown to be especially empowered to record

confessions under Section 164 Criminal Procedure Code, nor had any investigation started when he recorded the appellant's confession. We therefore think that Nazir Ahmad's case (supra) would not apply to the case before us.

19. An authority cited, in support of the proposition that, even if a confessional statement is made to a Magistrate by an accused before he is treated as an accused and an investigation starts, the statement is excluded, was Rishi v. State of Bihar : AIR1955 Pat425 . Here, the statements made to a Sub-Divisional Magistrate by two cart-men found driving their carts who had admitted to the Magistrate that each cart contained 4 bags of rice each weighing about 2 maunds, were excluded because no investigation of an offence by the police had started, and because a Magistrate, in the opinion of the learned Judge could only record a confessional statement during the course of an investigation, and, that too, in accordance with the procedure laid down in Sections 164 and 364 Criminal Procedure Code. In other words, the principle laid down by the Privy Council, in Nazir Ahmad's case AIR 1936 PC 253 (2) (supra), that a Magistrate could not purport to follow another procedure for introducing a confession made to him. was extended further into a . prohibition against a Magistrate giving any evidence at all of even a confession to which Sections 164 and 364 Criminal Procedure Code could not possibly be applied. The prohibition against the performance of a duty in a prescribed mode was converted into a disability of a Magistrate attaching to his office. This meant that, although any person who is not a Magistrate could give evidence of. confessional statements made to him. yet a Magistrate could not do so even if there was no investigation into a case, or even if the Magistrate was not empowered to record confessions under Section 164 Cr. P. C. We find nothing in the language of Section 164 Cr. P. C. to enable us to go to the extent of converting a mode of performance of duty of certain Magistrates during a certain period into a disability of all those who may hold Magisterial office to give evidence of confessional statements even other than those, covered by Section 164 Cr. P. C. With great respect, therefore, we are unable to hold that this case lays down the law correctly.

20. We find that there are a number of cases in which a contrary proposition has been laid down. The latest of these cases cited before us was R. N. Murthy. : AIR

1966 AP131 , where several other earlier decisions, which were followed, were also mentioned. In this case, just as in the case before us, the accused person had gone to a Magistrate II Class voluntarily and expressed his desire to make a statement, which was recorded by the Magistrate concerned, read over to the maker of the confession and signed by him, and, then handed over to the Police by the Magistrate concerned. It was held there:

Where the statement is made by an accused person to a judicial officer before any investigation has at all commenced, or is totally outside the scope of any such investigation we are not clear that such a statement is liable to be excluded, unless the provisions of Section 164 Criminal Procedure Code had also been complied with. We would further observe that the position that : the statements recorded under Section 164 Criminal Procedure Code themselves are inadmissible unless the formalities of that Section are strictly adhered to, would not appear to be the latest and the current view of the law.

Reliance was placed there on the views adopted in Arunachala Reddi v. Emperor AIR 1932 Mad 500 and In Re. Natesan AIR 1960 Madras 443.

21. The rule in Nazir Ahmad's case AIR 1936 PC 253 (2) (supra), relied upon on behalf of the appellant, is only a specific application of the general and wider rule expressed in the maxim 'ex-pressio unis est exclusio alterius'. This principle is found stated and explained in Sutherlands Statutory Construction (Art. 4915 at p. 414). In Craies, on 'Statute Law' (at p. 240), we find the following quotation from Blackburn v. Flavelle (1881) about this rule:

If there be any one rule of law clearer than another; it is this, that, where the Legislature have expressly prescribed one or more particular modes of dealing with property, such expression always excludes any other mode, except as specifically authorised.

In Crawford's Statutory Construction, (Art. 195 at pp. 334-33S) it is thus stated:

As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing. It, therefore, logically follows that if a statute

enumerates the things upon which it is to operate, everything else ,must necessarily and by implication, be excluded from its operation and effect. For instance, if , the statute in question enumerates the matters over which a Court has jurisdiction, no other matters may be included. Similarly, where a statute forbids the performance of certain things, only those things expressly mentioned are forbidden. So also, if the Statute directs that certain acts shall be done in a specified manlier, or by certain person, their performance in any other manner than that specified, or by any other person than one of those named is impliedly prohibited.

22. In our opinion, the correct application of this rule of construction will really exclude confessions other than those specifically covered by Section 164 Criminal Procedure Code from the purview of Section 164 Cr. P. C, itself. In Colquohoun v. Brooks (1888) 21 Q.B.D. 52 at p. 62., Wills. J., whose opinion was finally affirmed by the House of Lords, said : 'I may observe that the method of construction summarised in the maxim expressio unis exclusio alterius is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits.' The learned Judge also said about this maxim:

It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents.

A prohibition, in order to be implied from the terms of a statute must be unavoidable, or else it would open the door to what is really legislation by presuming implications which are neither necessary nor intended.

23. It was next contended before us that even if the confession before the Tehsildar Magistrate was admissible, it was no better than an extra-judicial confession which must be held to be a very weak type of evidence. We think that no such general proposition can be laid down. The value of the evidence of a confession depends largely upon the credibility of the witness or witnesses through whom it is proved and other facts and circumstances surrounding it.

24. In Re Ramchandran AIR 1960 Mad 191, it was observed about a confession in that case:

Whereas in this case it was spontaneously made by an accused to a Magistrate, who was not even aware of the identity of the person appearing before him. or of the fact that any murder had occurred the confession is certainly entitled to very great weight, unless there are any reasons for accepting the suggestion in defence, or even considering it probable that the police had tutored the appellant to go and make a confession.

In the last mentioned case, after indicating the circumstances in which confession was made, it was observed:

In a certain sense an extra-judicial confession of this character is even more likely to have been voluntarily made, than a judicial confession for the simple reason that, whatever the formalities complied with, a judicial confession is almost invariably recorded only after the accused comes under the influence of the police, subsequent to his arrest. Any general impression that prevails that extra-judicial confessions, upon the whole, are necessarily inferior in weight and probative value would, therefore not be correct. Everything would depend upon the surrounding facts and circumstances of the case.

25. We have very anxiously and minutely scrutinised every circumstance surrounding the making of the confession. It was urged that the very details mentioned in the confession should arouse our suspicion and show that it was probably made before a Magistrate who was acting hand in glove with the police because it mentioned certain facts which could only be the result of the workings of the mind of a police officer, investigating the case, including the mention of a lamp which was inserted afterwards. The exact number of wounds on the neck, the khokhri with which the murder was committed, and the motive for the murder, are all mentioned in the way and the order in which a prosecutor would like to have them. Finally, the time 11 P.M. mentioned at the end by the Magistrate, it was urged, made it possible that the Head Constable might have arrived at the residence of the Magistrate when the Magistrate signed and put down the time on the confession.

26. In considering whether the confession could really have been the result of some attempt by the police and the Tehsildar Magistrate acting in concert, to implicate the appellant, we have been impressed by the fact that no motive whatsover could even be suggested for such a conspiracy to falsely implicate the appellant. Witnesses do not ordinarily give false evidence without any reason whatsoever to do so. Indeed, there is almost a superstitious horror of .giving false evidence which may hang a man-Only some strong enough counter-acting motive could overcome this feeling, such as the conviction that the accused is guilty, or the desire to take revenge, or art attempt to project the actual offender. No such conceivable reason could be suggested here.

27. Furthermore, we carefully examined the time chart to find out whether there was any possibility of discovering the dead body, coming to the conclusion, that the accused was guilty, and then, planning to extort a confession from him. We find that the time chart, beginning with the arrival of the appellant at the house of the Tehsildar Magistrate, recording of the confession, the arrest of the accused, the visit by the Head Constable to the house where the dead body and the weapon with which the murder was committed and a blood-stained shirt were found, at about mid-night, followed by the sending of the report to Police Station, Theog. about 20 miles away, where, the FIR, containing a reproduction of the confession, was registered at about noon on 17-9-1969. and the production of the accused before a Magistrate on 18-9-1969, leaves no room for such an attempt to have been reasonably possible.

28. Again, neither the recording of the. confession nor the details given in it nor the recoveries made next day by the investigating officer are so perfect as to fit in : with the theory that there was some plan or design to implicate the appellant. There was the omission to mention the lamp, which was said to have been corrected at the time of the reading out of the confession to the accused, the putting down of 11 PM. probably at the time when the Magistrate signed, coupled with the failure to take the lamp, said to have been found in the house into possession. These lapses would have been avoided if there was a plan to implicate the accused.

29. The Magistrate did not mention in the confession what the accused had said about an attempt to commit suicide before he came to the residence of the Magistrate- The police had not attempted to take the wet coat and the kachha of the accused in possession as evidence. These omissions are of a kind which are not inexplicable or uncommon. Hence, we have rejected the mere theory that the confession itself was artificial showing that it was fabricated for the purpose of foisting an offence upon an individual who had made no confession at all.

30. The confession was, of course, retracted by the appellant. Our attention was, therefore, invited to the extra caution which courts must observe in dealing with retracted confessions- Reliance was placed upon Bharat v. State of U.P. 1970 Cri. App. R. 205 (SC) where their Lordships of the Supreme Court said:

The law as to confessions is perhaps too widely stated. Confessions can be acted upon if the Court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it, Indeed a confession if it is voluntary and true and not made under any inducement or threat or promise, is the most potent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A Court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the Court if the general facts proved in the case and the tenor of the confession as made, and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused.

Their Lordships then referred to their earlier decision in Subramania v. The State of Madras : 1958 CriLJ238 where it was observed:

Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice, and, therefore it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue.

Hence, in Bharat's case (supra), their Lordships of the Supreme Court, following the earlier decision, held that the 'retracted confession requires the general assurance that the retraction was an after-thought and that the earlier statement was true.'

31. It was contended before us that there was no evidence that the retraction was an after-thought. The learned Counsel for the State mentioned that there was some evidence of a kind which had not been led relating to the manner in which a warder, who was the relation of the appellant, had acted, but, as, this was a suggestion of matters entirely outside the record of the case, of which no evidence had been led, it could not be properly even mentioned to us. There is also no evidence as to when the appellant obtained legal advice. There is, however, evidence on record as to how, when the applicant came to the Court of the Ist Class Magistrate. Theog, on 29-9-1969, and the contents of the application made by the police were read over and explained to him, after all the police officers had withdrawn and the handcuffs had been removed from the accused he was warned that such evidence was likely to be used against him. The learned Magistrate had also recorded that he had asked the accused why he wanted to confess and he had replied that he did not want to let other people be bothered by the Police and wanted to face the consequences himself. But, the Magistrate had sent the appellant away after asking him to 'consider over the matter and weigh fully in his mind all the consequences flowing out of the confession'. The Magistrate had again sent him away on 10-10-1969 as there was no time left to record the

confession. On 18-10-1969. when the appellant appeared before the Magistrate, Ist Class. Theog, the appellant had stated that he did not want to make any statement and complained that the police at Kotkhai had threatened and beaten him. He had also stated that he was no longer under the influence of the police, so that he had decided not to make 'any statement'. This shows that the appellant was given a fairly long time. In fact, more than necessary amount of time and warning was given by the Magistrate concerned. The appellant may, therefore, well have decided after further consideration, consultation and possible conversations with others, to retract and not to affirm the previous confession made.

32. In considering the psychology behind the initial confession and the not uncommon retraction after that, one could usefully bear in mind the pertinent observations of Horwill, J., in In Re Boya Chinna Papanna AIR 1942 Mad 49. The learned Judge said:

It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. I do not believe this to be the case. A man who has committed a grave crime- unless he is a hardened, offender- has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction, fear of them will act in restraint of his natural impulse to confess.

33. Again, in Ghulam Muhammad Wall Muhammad v. Emperor AIR 1943 Sind 114 it was observed:

The fact that on reflection, when time had passed, the appellant refused in the evening to make a confession before the Magistrate is not we think, of importance. A man labouring under great emotion may confess. When time has passed, especially in a case such as this, where the appellant had already been once convicted of murder and feelings have cooled, discretion may cause him not to confess. But, that is no reason for rejecting the confession made at another time and under different circumstances.

34. The history of the law relating to the use of confessions in Anglo-Saxon Jurisprudence, is thus summarised in Wigmore on Evidence (Vol. III, para 817, p. 291).

There may be noted four distinct stages in the history of the law's use of confessions. In the earliest stage (going for present purposes no further back than the times of the Tudors and the Stuarts) there is no restriction at all upon their reception. In the next stage, comprising the second half of the 1700s, the matter begins to be considered, and it is recognized that some confessions should be rejected as untrustworthy. In the third stage, comprising the 1800s. the principle of exclusion is developed, under certain influences, to an abnormal extent, and exclusion becomes the rule, admission the exception. In the last phase constitutional considerations become predominant.

35. The constitutional considerations to which Wigmore referred are found embodied in Article 20 (3) of our Constitution which says : 'No person accused of any offence shall be compelled to be a witness against himself.' This principle of procedural justice, which finds a place in our Constitution, has behind it a history of torture resorted to by unscrupulous and despotic investigating authorities, trying to extort confessions from innocent persons who may prefer to confess rather than be subjected to inhuman modes of collecting evidence. It is this background, as well as the suspicion that investigating authorities may use all kinds of methods for inducing false confessions by threats or allurements, in order to succeed in imagined detection of crimes, which led to the enactment of Sections 24. 25, 26 and 27 of our Evidence Act. If a confession is not struck by these provisions of the Evidence Act, and falls also outside the scope of Section 164, Criminal Procedure Code, it would not only be admissible in evidence, but. it could, in our opinion, be good enough, if believed, to sustain a conviction on any charge. In Thimma v. State of Mysore : 1971 CriLJ1314 . the Supreme Court held that an unambiguous voluntary confession, which is admissible in evidence and 'free from suspicion of falsity, is a valuable piece of evidence possessing high probative value'.

36. Keeping in mind the principles discussed above and having carefully examined every fact and circumstance, which may have a bearing on the question whether

the appellant had confessed to the Tehsildar Magistrate as a result of some possible inducement, pressure, or threat, we have come to the conclusion that his confession to the Tehsildar Magistrate cannot be excluded and was the genuine and voluntary action of an individual anxious to unburden his mind and give vent to his feelings of repentance, after having been overwhelmed with a passion or desire to take revenge or punish an innocent woman for imagined wrongs. We think that the woman was both morally and legally, innocent, because there is no evidence before us at all that she had done anything immoral, or illegal, or that the child she had given birth to was illegitimate. No name of a possible paramour has even been suggested. At the trial, the appellant stated : 'I had cordial relations with my wife for the last 14 years. I claim the son to be my own. He is not illegitimate.' He denied the suggestion that he considered his wife to be 'corrupt'. If this was a correct reflection of his state of mind at the trial, it is not unnatural that he should, soon after committing the crime, be so overwhelmed with remorse at having done what sprang from mere suspicion about the fidelity of his wife that he should state the truth.

37. The evidence given by Girju (PW. 1), the brother of the murdered woman, and by her mother, Smt. Nagzu (PW. 2) shows us that, three months after the birth of the child. Smt, Churi had gone back to her parents. When Girju and others enquired why she had come away with such a young child, she complained that the appellant had neglected her and maltreated her and used to beat her. It was also stated that she stayed with her parents for four years and the appellant did not care to visit their house. When Smt. Churi was finally sent, along with her mother and the child, back to the house of her son-in-law the appellant was said to have beaten her again so that she had returned to the house of her own parents next day with her mother and the child. The accused again had nothing to do with her for two years until he had taken her back without the child on the Shivratri day a few months preceding the occurrence. And, on this occasion, the child was said to have been left with the maternal grand-mother at the request of the appellant. The mother of the murdered woman had deposed that Smt Churi was sent back again because the appellant had threatened to take her forcibly by beating her. It is true that neither the brother nor the mother of the murdered woman had stated that the appellant had suspected the child to be illegitimate and had only stated

that the child was more attached to the maternal grand-mother. But, if the evidence given by Birju (P. W. 1) and Smt. Nagzu (P. W. 2) was true (and we see no reason to disbelieve it merely because they were near relations of the deceased), the actions of the appellant spoke louder than words. We, therefore, believe the motive set out in his confession by the appellant to the Tehsildar Magistrate, which is corroborated by the proved conduct of the appellant towards his murdered wife-

38. Learned Counsel for the appellant contended that the prosecution case hinges round the alleged motive which had not been proved at all by the prosecution evidence, apart from what is found in the confession which we have held to be voluntary and truthful. We hold that the contents of the confession relating to motive are sufficiently corroborated by the evidence of Girju (P. W. 1) and Smt. Nagzu (P. W. 2) about the conduct of the appellant towards the deceased, for a long period, after the birth of the child suspected by him, upon grounds not mentioned anywhere, to be illegitimate. The mere fact that the grounds of suspicion of the appellant, which were within the knowledge of the appellant himself could not be established, did not mean that the suspicion did not exist, or that the motive was not proved.

39. Learned Counsel for the State submitted, quite rightly in our opinion, that the search for motive is not always fruitful. He relied for this submission upon State v. Durgacharan : AIR1963 Ori33 where a young barber, aged 22 years, was gripped by a desire to cut the throat of a boy who was being shaved by an assistant of the accused, In that case, the boy had made some allegation that somebody intimately known to the barber had stolen some shoes. The accused had then started to shave the boy himself after asking his assistant to shave, another customer. He held the hair of the deceased and then inflicted a long gashing injury on the right side of the neck of the deceased, who had struggled and managed to release himself and escape to an adjacent shop. The accused had pursued the deceased and catching hold of his hair again, had inflicted two more gashing wounds on the neck, sat on the chest of the deceased, and pulled out the vocal cords by thrusting his fingers into the neck, in front of a number of persons, in broad-day light, in the heart of the town of Puri in front of Jagannath temple. The

plea of insanity was taken in that case, but, the accused even if he had been overcome by a fit of anger, was held to be guilty and sentenced to death. The learned Judges had repelled the defence of the accused, under Section 84 I. P. C., on the ground that the insanity, which could give rise to an adequate defence, was one which came within the well known MacNaghten rules.

40. In the case before us, there is no plea of insanity or insane impulse. It is true that there is no evidence of any threats by the appellant to do anything more than to beat the deceased if she did not return to his house. There is. however, enough evidence to show that the appellant was a man of violent temper, and that he looked upon his wife as nothing more than a piece of chattel to be treated in any manner he desired. This, in our opinion, is sufficient indication of motive to kill a woman, who according to the confession of the appellant was believed by him to be immoral, and, who had abused him a. short while before the murder.

41. A piece of evidence which the learned Judge had used as corroboration of the extra-judicial confession of the appellant, made on 16-9-1969. was the presumed conduct of the appellant in going before the Magistrate I Class, Theog, and stating that he wanted to make a confession of his guilt, after the police had been asked to withdraw. We are unable to accept the contention of the learned Counsel for the State that this evidence can be admitted either as an admission which was short of a confession or, as conduct of the appellant after the commission of the offence. We are unable to see how the fact that the accused was brought by the police to the Magistrate could constitute merely his conduct. It was. more correctly, the conduct of the police with regard to the appellant. Moreover, Explanation I of Section 8 of the Evidence Act, specifically enacts that the word 'conduct' does not 'include statements unless those statements, accompany and explain acts other than statements.' The statement attributed to the appellant and proved by the evidence of Shri R. K. Sharma Magistrate I Class, Theog (P. W. 6) and by his order dated 29-9-1969 (Ex. PO) was that the appellant wanted to make a confessional statement. It is true, that the confession, with all the details found in the earlier statement before the Tehsildar Magistrate, was not recorded as the Magistrate warned him and asked him to go back and think over the matter. The later statement could perhaps explain the conduct of the police which had brought

the appellant but not, properly speaking, the conduct of the appellant. Such a statement is directly hit by the specific provisions of Section 164 Criminal Procedure Code, if we interpret it as a confession of guilt, as it could be, even without a detailed confession. We have, however, as already indicated above, taken into account the fact that the appellant did not complain of any beating or pressure by the police until 18-10-1969 when the appellant was taken for the third time before the First Class Magistrate of Theog.

42. The fact that he was produced for making a confessional statement to the Magistrate was put to him at the trial., He had admitted that he was so produced, but said that he wanted to make a statement which was not a confession. The appellant also stated that he did not know what the Magistrate had recorded. He also admitted that he was produced for the third time before the Magistrate 1st Class. Theog on 18-10-69. He went on to explain : 'I had told the Magistrate that I do not know anything about the occurrence. I had been tortured by the Police at Kotkhai.' The statement which the accused alleged having made before the Magistrate on 18-10-1969, that he did not know anything about the occurrence, is not found mentioned in the : Magistrate's order of 18-10-1969. Nor was it suggested to Shri R. K. Sharma, the Magistrate concerned, that the accused had made such a statement to him. The Magistrate went on to state, in examination-in-chief, that, when the accused was produced before him on 18-10-1969, he put in an application saying that he was suffering from some mental ailment and that he did not want to make a confessional statement. This application was not produced before us to show that the appellant had stated in it also that he knew nothing about the occurrence or that he had been tortured by the police. We may also mention that it is unsatisfactory that accused persons are not examined in this State by a Doctor before entry into the jail, so that allegations of the beating by the police could be corroborated or contradicted. The fact, however. remains that there is nothing before us to corroborate the bald and unbelievable assertions of the accused at the trial.

43. A rather subtle argument advanced before us was that, although the statements of the appellant before Magistrate, Ist Class, Theog, may not amount to any confession, yet, they could be admitted as admissions, falling short of a

confession. We are not able to accept this argument because such admissions cannot be clearly distinguished from confessions,

44. We may here quote the following observations made by Lord Reid in. Commr. of Customs and Excise v. Harz (1967) 2 WLR 297 and pp. 303-304:

Then, it was argued that there is a difference between confessions and admissions which falls short of full confession. A difference of that kind appears to be recognised in some other countries. In India and Ceylon legislative enactments severely limit the admissibility of confessions, and the courts have construed these enactments as not preventing the admission in evidence of other incriminating statements obtained by fair means though not in the manner required for confessions. And for some reason not made clear in argument some such distinction appears to be recognised at least in some States in the United States.... I can see no justification in principle for the distinction.

We may also point out that, even in America, where, as Lord Reid pointed out, there were some cases recognizing this distinction, it. had been held that such distinctions between confessions and admissions are 'subtle and questionable'. (People v. Chessman 52 Cal 2d 467, 341 p. 2d 679).

45. A confession is nothing more than an admission of a completed offence. An admission of guilt, such as the one the appellant was alleged to have made before the Magistrate, Ist Class, Theog, was, therefore, only a compressed confession, bereft of, the details found in the earlier confession recorded by the Tehsildar Magistrate. The learned Sessions Judge had relied on all the facts deposed by the learned Magistrate Ist Class Theog, and, practically led in a second confession which in our opinion was in-admissible and should have been excluded, because of the provisions of Section 164 Criminal Procedure Code, as interpreted in Nazir Ahmad's case (supra). It is true that no objection was taken at the time when such evidence of a confession of guilt before the Magistrate Ist Class Theog was erroneously admitted. Nevertheless, as that evidence was clearly inadmissible and struck by the provisions of Section 164 Criminal Procedure Code, we have excluded it from consideration. We have, however come to the conclusion that, even without that evidence, there is ample corroborative evidence placed before

the learned Sessions Judge to enable him to reach the conclusion, which we have also reached, that the confession before the Tehsildar Magistrate was voluntary and true and is sufficiently corroborated by other facts proved so as to leave no shadow of doubt that the appellant had committed the murder of his wife in the manner he had disclosed before the Tehsildar Magistrate.

46. The truthfulness of the con-tents of the confession before the Tehsildar Magistrate is established beyond doubt by the following satisfactorily established corroborative facts and circumstances:

(i) The Police could not have gone to the house of the accused at night, unless he had not himself given the information, as disclosed in his confession, soon after the murder, to the Tehsildar Magistrate.

(ii) The time, at which the murder was proved to have been committed from the post-mortem report and other facts mentioned above, was such that the appellant would be expected to be in his own house with his wife at that time.

(iii) No facts and circumstances had been brought to our notice to indicate that the murder could have been committed by anybody else, or in circumstances other than those disclosed by the appellant's confession.

(iv) The appellant had failed hopelessly to substantiate the version that he was suddenly arrested from the show to which he had gone, as he alleged, and, if this allegation was true he could have produced some evidence to substantiate it.

(v) The evidence of the appellant's co-villagers, including his uncle, who went to the spot with the police at midnight, as a result of the information given by the accused, found the corpse and a khokhri and a shirt, lust as the accused had disclosed in his confession.

(vi) Although, the shirt found had not been specifically proved to belong to the accused, yet, the khokhri was proved to be the one of the same kind, if not the very khokhri, which had been seen by Girju (P. W. .1) in the house of the appellant

(vii) There was no time for fabricating, a confession of the appellant, or, any motive proved for any one to attempt to do so.

(viii) The motive mentioned in the confession was sufficiently corroborated by the evidence given by Girju and Smt. Nagzu.

(ix) The evidence of the Tehsildar Magistrate had been corroborated also by the evidence of his Peon, Mangat Ram (PW. 10), that he had also heard the appellant confessing the guilt.

(x) No suggestion was put forward to the prosecution witnesses, including the Tehsildar Magistrate (P. W. 15), his Peon (PW. 10) Bhag Singh, Head Constable (PW. 13), that there was any reason for them to depose falsely.

47. We think that the above-mentioned corroborative facts are enough to show that the confession of the appellant was voluntary and true. We can safely come to this conclusion, even after completely excluding the alleged confession of the accused before Magistrate 1st Class, Theog, which had to be duly recorded to be admissible or even his conduct in not complaining to the Magistrate, earlier than he did, that the police had maltreated him. The suspicions sought to be generated by the subsequent correction of the confession by the Tehsildar Magistrate, when he read it out to the appellant, the failure of the police to take the lamp, said to have been found in the house, in its possession, or the fact that it was not explained why the coat and the kachha were not taken into possession by the police, or that the shirt found in the house was not technically proved to be of the appellant, could not cast a reasonable doubt upon the veracity of the prosecution version. Suspicion, as it has been well said, is a sea without a shore. The prosecution case, which is otherwise fully established, cannot be said to be thrown into the region of reasonable doubt merely because there are a few suspicious but explicable features.

48. For the reasons given above, we reject the appeal before us and eon-firm the sentence of death passed upon the appellant. It is not for this Court, in the circumstances mentioned above, to consider a lesser sentence than that of death to be appropriate as we find no mitigating circumstances.