

State of Assam Vs. Sahabuddin and ors.

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Court : Guwahati

Decided On : Apr-10-2001

Reported in : 2001CriLJ3499

Judge : H.K. Sema, C.J. (Actg.) and ;Ranjan Gogoi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164, 313, 319, 378 and 378(1);; [Evidence Act, 1872](#) - Sections 24, 25, 26 and 27;; [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302

Appeal No. : Government Criminal Appeal No. 9 of 1995

Appellant : State of Assam

Respondent : Sahabuddin and ors.

Advocate for Def. : Mr. F.H. Lasker, ;Mr. T.N. Srinivasan and ;Mr. Z. Kumar, Advs.

Advocate for Pet/Ap. : Mr. K. Deka, PP

Disposition : Appeal dismissed

Judgement :

Ranjan Gogoi, J.

1. This is an appeal filed by the State under the provisions of Section 378 of the Code of Criminal Procedure and is directed against the judgment and order dated 30.8.1994 passed by the learned Additional Sessions Judge, Sonitpur at Tezpur in Sessions Case No. 36(S)/90 acquitting the accuseds-respondents from the charge under Section 302/34 of the Indian Penal Code.

2. On 25.7.1985 at about 5 A.M. P.W. 13 Sri D.D. Bhakta, a practicing advocate of Tezpur town lodged a verbal information at the Tezpur Police Station to the effect that one Abdul Wahed, another practising advocate of Tezpur was murdered in his residence at Ex-Police Line, Tezpur by some miscreants. On the basis of the said information, General Diary Entry No. 816 dated 25.7.1985 of Tezpur Police Station was recorded and police started investigation. At the place of occurrence, the accused No.3 Meherun Nigar Begum, wife of the deceased Abdul Wahed, lodged the written ejahar (Ext.70). It is the further case of the prosecution that at the time of occurrence, the deceased Abdul Wahed was sleeping in his room. The window to the room of the deceased's wife was used as entry point to the house and that the accused Sahabuddin had illicit relationship with the wife of the deceased. The accused Kuddus Ali is the younger brother of the accused Sahabuddin. On the very day of occurrence, one handmade pistol and blood stained clothes were seized from the place of occurrence and on the same day, some documents and other articles were seized from the house of the accused Sahabuddin. It is the further case of the prosecution that as a consequence of the information received from the accuseds, 12 nos. of love letters written by Meherun Nigar Begum to the accused Sahabuddin; blood stained clothes worn by accused Sahabuddin and Kuddus and one dagger were recovered by the investigating officer. The police held inquest of the dead body and sent the same for post-mortem examination. The love letters written by the accused No. 1 to Meherun Nigar Begum; the blood stained clothes and the dagger were sent for examination by expert. On completion of investigation, police submitted charge sheet against the two accuseds Sahabuddin and Kuddus Ali under Section 302 of the Indian Penal Code read with Section 27 of the arms Act. It is the further case of the prosecution that at the stage of committal proceeding, the 3rd accused Meherun Nigar Begum was arrayed as an accused in the case under the provisions of Section 319 of the Code of Criminal Procedure, 1973.

3. In the Court of Sessions, charge under section 302 read with Section 34 of the Indian Penal Code was framed against the all three accuseds-respondents. The prosecution examined as many as 16 (sixteen) witnesses and exhibited a large number of documents and the allegedly incriminating materials recovered consequent to the information furnished by the accuseds. The accused persons were examined under Section 313 of the Code of Criminal Procedure. The defence case is one of total denial. At the conclusion of the trial, the learned Sessions Judge by the impugned judgment and order dated 30.8.1994 was pleased to acquit all the accused persons of the charge brought against them. Aggrieved, the State has come in appeal before us.

4. Before we proceed to examine the legality and correctness of the impugned judgment and order dated 30.8.1994 passed by the learned trial Court, it may be appropriate to consider the contours of the power of this Court in an appeal presented under the provisions of Section 378(1) of the Code of Criminal Procedure, 1973. The question regarding the scope and ambit of the said power is no longer *res integra*, the position having been that the power of the High Court in an appeal against an order of acquittal is as wide as the power available in an appeal against an order of conviction. The power of the High Court extends to examination and scrutiny of the entire evidence and materials on record and it is open to the High Court in exercise of the power to embark upon a complete review of the evidence on record. However, in the event the High Court finds itself unable to accept the reasoning of the trial Court, it is expected that the reasons for such disagreement would be recorded in the light of the evidence and materials on record. The High Court is not expected to substitute its own views in the matter unless on a scrutiny of the materials on record the High Court finds that the trial Court has either proceeded on a wrong assumption of law or has totally misread the evidence and materials on record. In other words, if the two views are possible on the evidence and materials on record, so long as the view taken by the trial Court is a possible view the High Court would not interfere with the impugned judgment of acquittal. The aforesaid principles can be called out from the judgment of the Apex Court in the case of *Prem Dass v. Income Tax Officer* reported in (1999) 5 SCC 241 and *Madan Lal v. State of Jammu and Kashmir* reported in (1997) 7 SC 677.

5. Against the above backdrop, we now proceed to consider the evidence of the prosecution witnesses examined in the case and the correctness of the findings of the trial Court as regards the culpability of the accused in the light of the said evidence and other materials on record.

6. PW-1 Md. Hussain Ali was an employee of Mobarak Bakery where accused Sahabuddin had also previously worked for about three years. PW-1 has deposed that the accused Sahabuddin had Spent one night with him at his house and on the said day while they were preparing to go to sleep, the accused Sahabuddin had confessed to him that he had murdered an advocate of Tezpur as he had an affair with the advocate's wife. This witness had also deposed that the accused Sahabuddin had stated that he was coaxed by the deceased's wife to commit the offence and in turn, she had agreed to open a bakery for him. This witness has also deposed that on the day of occurrence the accused Sahabuddin along with brother Kuddus had entered the advocate's room and were waiting for him. After some time, the advocate had come and gone to bed whereafter the accused Sahabuddin had fired a shot at the advocate's head with a pistol which, however, missed the target. Thereafter, the accused Kuddus had climbed on the advocate's chest and sawed his throat with a knife and that the accused Sahabuddin had gagged the advocate with a pillow. This witness has also deposed that the accused Sahabuddin and Kuddus had left the pistol and a pair of chappals in the room and that they had thrown out the knife through the window and that after coming out of the house of the deceased, the accused Sahabuddin went to his own house and had thrown the blood stained clothes he was wearing in the 'aram' (bush) at the back of the house. This witness, however, also stated that he did not report the incident to anybody until he was interrogated by the police about a week later. The statement of PW-1 was recorded by the Magistrate under Section 164 of the Code of Criminal Procedure. In cross examination, this witness has deposed that he had purchased a moped from the accused Sahabuddin at the cost of Rs. 2,500 but as the moped was found to be defective, he returned the moped to the accused Sahabuddin took the money back. This -witness has also stated that their mutual visits had stopped because of the incident of sale and purchase of the moped. This witness has also denied in cross examination that he had stated before the police that accused Sahabuddin had confessed to him that the

deceased's wife had coaxed the accused to kill the deceased and further that after the offence was committed, the deceased's wife would be married to him and she would open a bakery for him.

7. PW-2 Rezia Sultana had worked as maid in the house of the deceased at the relevant point of time. PW-3 Sakina Khatoon also worked in the deceased's house. She had also worked in the house of the accused Sahabuddin. Both P.W. 2 and PW. 3 have been examined by the prosecution to support the case of illicit relationship between the deceased's wife and the accused Sahabuddin.

8. PW. 4 Shri D.K. Mahanta, Judicial Magistrate, recorded the statement of P.W. 1 Md. Hussian Ali under Section 164 of the Code of Criminal Procedure. P.W. 5 is a witness to the seizure of a pair of Hawai chappal from the house of the deceased, whereas P.W. 6 Siddique Hussain is a witness to the recovery of clothes worn by the accused Kuddus and Sahabuddin which recovery is stated to have been made on the basis of the statement of the accused persons. This witness has further deposed that police recovered some old clothes having mud stain.

9. P.W. 7 Smt. Ambiya Khatoon was a tenant of the deceased and has been examined by the prosecution in support of the illicit relationship between the deceased's wife and the accused Sahabuddin. P.W. 8 Akhtar Hussain is another tenant of the deceased Abdul Waned. Both PW. 7 and P.W. 8 have been declared hostile by the prosecution. P.W. 9 Md. Jeruruddin Ahmed is the brother-in-law of the deceased. This witness has deposed that on the day of occurrence, he was in the house of the deceased as his guest. In the middle of the night at about 2/2.30 A.M., he heard some noise coming from the room of the deceased and that on going there he found the deceased screaming and his wife was shouting 'doctor' 'doctor'. This witness has categorically stated that though the deceased was saying he was being killed he did not name any person who had committed the assault. This witness has deposed that they tried their best to stop the flow of blood coming from the deceased's body and though water was offered to the deceased at his request, the deceased was unable to drink the water and shortly thereafter, the deceased breathed his last.

10. Dr. H.K. Bora who conducted postmortem examination on the dead body of Abdul Wahed was examined as P.W. 10 by the prosecution. This witness found a sharp cut injury over the anterior surface of the neck of the deceased as well as cut injury over the right side of the chest. A sharp cut injury measuring 1' x 1/2' in the thorax cavity was also found along with another cut injury over the distal phalanx of all the fingers of both the hands. The doctor has deposed that a cut injury over the abdomen just below cartilaginous part of the ribs and also that the cartilage part of 7th, 8th and 9th ribs was injured by sharp cut weapon and the right lung was found to be punctured at the side of injury over the chest. P.W. 11 Ismail Hussain has been examined as a witness to the seizure of the accused Sahabuddin's moped. This witness has not been examined by the prosecution as to the identity of the owner of the chappal which was stated to have been recovered from the room of the deceased though P.W. 15, one of the investigating officers of the case, has stated in his evidence that this witness Ismail Hussain along with another person Nazir Rashid had identified the seized pair of sandals as belonging to the accused Sahabuddin.

11. P.W. 12 Sri Subodh Chandra Pathak was ASI of Police who conducted investigation at the first instance. This witness has deposed as to the seizure of handmade pistol loaded with cartridge and some blood stained bed clothes from the room where the deceased was found. P.W. 13 Shri D.D. Bhakta is the person who verbally lodged the First Information Report regarding the incident.

12. P.W. 14 Md. Hazarat Ali, S.I. of Police was officer-in-Charge of Mahabhairab Outpost under Tezpur Police Station at the relevant time. He had deposed as to the arrest of the accused Sahabuddin on 2.8.1985 and also regarding the recovery of love letters from the house of the accused Sahabuddin as well as blood stained clothes worn by the accused Sahabuddin and Kuddus on the basis of the statement reportedly made by the accused persons. P.W. 14 also deposed about the recovery of a dagger from the Jungle on the basis of the statement made by the accused Kuddus. This witness has categorically deposed that the statements of the accused leading to discovery of the love letters, blood stained clothes and the dagger as recorded in Ext. 16(1) to 16(5) were not in the language used by the accused persons. P.W. 14 has also deposed that the dagger was recovered only

on the second day of the search and that the same could not be recovered on the first day. P.W. 14 in cross examination has denied any statement stated to have been made by P.W. 1 Md. Hussain Ali to the effect that the accused Sahabuddin in his confession had told the said P.W. 1 that he was being continuously coaxed by the deceased's wife to commit the crime. P.W. 15, Shri Mahendra Saikia is another S.I. of Police who conducted the investigation and he has deposed about the seizure of a pair of Hawai chappals from the house of the deceased. According to this witness, two persons namely, Ismail Hussain and Nazir Rashid who were working at the bakery had identified the pair of chappals belonging to the accused Sahabuddin. However, while Nazir Rashid was not examined by the prosecution. Ismail Hussain who was examined as P.W. 11 did not depose on the said aspect of the prosecution case. This witness has also deposed about the statement made by various persons interrogated in the course of investigation on the point of existence of illicit relationship between the deceased's wife and the accused Sahabuddin. P.W. 16 Sri Phanidhar Saikia is another police officer who proved the General Diary Entry No. 816 dated 25.7.1985 namely, the entry relating to the first verbal information about the occurrence lodged by Shri D.D. Bhakta, P.W. 13.

13. A careful scrutiny of the evidence of the prosecution witnesses narrated hereinabove would go to show that admittedly there is no eye-witness to the occurrence. The prosecution, therefore, has sought to make out a case against the accused persons on the basis of circumstantial evidence. An analysis of the evidence recorded in the course of the trial and the documents and the materials exhibited show that there are three circumstances which appear against the accused persons. Firstly, the extra-judicial confession made by the accused Sahabuddin to P.W. 1 Md. Hussain Ali. Secondly, the statement of the accused persons leading to discovery of allegedly blood stained clothes worn by the accused at the time of occurrence on 8.8.1985 and the recovery of the dagger on 9.8.1985. The third incriminating circumstance against the accused persons is the recovery of love letters from the house of the accused No. 1 on 5.8.1985. The law relating to circumstantial evidence is well settled. It may be appropriate to quote hereunder the following passage from the judgment of the Apex Court in the case of S.D. Soni v. State of Gujarat reported in AIR 1991 SC 917:-

'... Needless to say that in a case in which the evidence is of a circumstantial nature the facts and circumstances from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and circumstances so established should not only be consistent with the guilt of the appellant but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence.....'

14. The prosecution seeks to bring home the charge of the murder on the basis of an extra-judicial confession allegedly made by the accused Sahabuddin to P.W. 1 Md. Hussain Ali. It is not an inflexible rule of law that an extra-judicial confession in all cases requires corroboration by other independent evidence. In other words, it would not be correct on the part of the Court to proceed on the assumption that extra-judicial confession is a weak type of evidence necessarily requiring corroboration. In *Para Singh and others v. State of Punjab* reported in AIR 1977 SC 2274, the Apex Court has held that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. However, in the aforesaid case, the Apex Court found it safe to uphold the conviction on the basis of extra-judicial confession when such confession was proved by an independent witness who was a responsible officer and who bore no animus against the appellant. Necessity of corroboration, therefore, would depend on the facts of each case and it is for the Court to determine, for its satisfaction, the requirement of corroboration. In the instant case, the extra-Judicial confession has been proved by P.W. 1 who in his evidence has stated that he had differences with the accused Sahabuddin over the issue relating to sale and purchase of the moped belonging to the accused Sahabuddin and that because of the incident, their mutual visits had stopped. That apart, this P.W. 1 has deposed that for about a week after the accused Sahabuddin had confessed to him about the incident, he had chosen to remain mum and the matter was reported to the police only after the police arrested P.W. 1. The motive for making the extra-judicial confession is also not clear. The evidence does not disclose as to whether the alleged extra-judicial confession was made by way of attornment or in confidence. In the above circumstances, we feel that some amount of corroboration by other evidence is necessary and it would be unsafe to hold the accused person culpable solely on

the basis of uncorroborated extra-judicial confession proved by PW. 1 Md. Hussain Ali.

15. We next proceed to examine as to whether the alleged statement of the accused persons leading to discovery of blood stained clothes, dagger and love letters is admissible in evidence under section 27 of the Evidence Act and if so, to what extent, the said evidence brings home the charge against the accused persons either as evidence by itself or as evidence in corroboration of the extra-judicial confession proved by PW. 1 Md. Hussain Ali. Section 27 of the Evidence Act is reproduced hereinbelow:-

'27. How much of information received from accused may be proved.- Provided that when any fact is discovered as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

16. The Supreme Court in Jaffar Hussain Dastagir v. State of Maharashtra reported in (1969) 2 SCC 872 while interpreting Section 27 of the Evidence Act has laid down and that while Section 27 of the Evidence Act carves out an exception to the general law embodied in Section 25 of the Evidence Act, Section 27 itself operates as a proviso to Section 26 of the Evidence Act. The Apex Court has held that by virtue of Section 27 of the Evidence Act so much of the statement of the accused which led to the discovery of the fact deposed to by him and connected with the crime is admissible in the evidence against the accused. It has been further held that to attract Section 27 of the Evidence Act, information must be given by the accused which had led to discovery of a fact and such discovery must be a direct outcome of the information parted with. Only that portion of the information given which is distinctly connected with the said recovery is admissible in evidence. The discovery of the fact must relate to the commission of some offence. Only if the aforesaid pre-conditions are satisfied, Section 27 of the Evidence Act will operate to lift the embargo imposed by Section 25 of the Evidence Act on the statement made by an accused before the police.

17. Again, the Supreme Court in the case of Mohd. Inayatullah v. State of Maharashtra reported in AIR 1976 SC 483 has considered the scope and ambit of Section 27 of the Evidence Act and it will be useful to extract herein para-11 of the said judgment.

'The expression 'provided that' together with the phrase 'whether it amounts to confession not' shows that the section is in the nature of an exception to the proceeding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Sec.24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, in consequence or the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly' relates 'to the fact thereby discovered' (sic) (and?) is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

18. In the case in hand, Ext. 16(1) to 16(5), which are the record of the statements made by the accused persons leading to discovery are the General Diary Entries of the jurisdictional police station and not a recorded statement of the accused bearing their signatures. The basic requirement of attracting Section 27 of the Evidence Act namely, the statement of the accused must be proved is, therefore, not satisfied in the instant case. Even otherwise, the statements attributed to the

accuseds, at best, show that the accuseds had kept a dagger, blood stained clothes and love letters which were subsequently recovered on the basis of statements made by the accuseds. But, the said statements, even if accepted in evidence, do not reasonably connect the accused with the crime. It was the bounded duty of the prosecution to prove and establish how the dagger and blood stained clothes are connected with the offence alleged. Such proof has not been forthcoming in the instant case. We are, therefore, unable to hold that the evidence in the form of the statements of the accuseds is admissible under Section 27 of the Evidence Act so as to constitute any direct or corroborative evidence of the involvement of the accused with the crime.

19. To satisfy ourselves about the correctness of the findings recorded by the learned trial Court, we have scrutinised the judgment and order dated 30.8.1994 under challenge in the present appeal. The learned Sessions Judge has narrated the entire evidence on record in the impugned judgment and on the basis thereof has come to the conclusion that the charge against the accused persons must fail. In our opinion, the conclusion arrived at by the learned Sessions Judge and the grounds and basis thereof as recorded are correct. We are of the further opinion that the evidence and other materials on record do not admit any possibility of having any other view in the matter. In such a situation also, we would have to seriously consider as to whether the view adopted by the trial court is a possible view. However, in the instant case, we need not go into the said question as the only view that is possible on the evidence and materials on record is that the prosecution has failed to prove its case against the accused persons.

20. Before parting with the record, we would like to deal with one submission made by the learned counsel appearing for the accused No. 3 Meherun Nigar Begum. The learned counsel has contended that the said accused Meherun Nigar Begum has been arrayed as an accused by invoking Section 319 of the Code of Criminal Procedure at the stage of committal proceeding itself. The said impleadment of the accused at the stage of committal proceeding is argued as *ex facie*/illegal as the committal proceeding is neither an inquiry nor a bail. In support, the learned counsel relies on the judgment of the Apex Court in *Raj Kishore Prasad v. State of Bihar* and another reported in AIR 1996 SC 1931 and in

Abdul Khader v. State of Karnataka reported in 1999 Cri LJ 1801. In the above two cases, the order impleading as accused by invoking Section 319 of the Code of Criminal Procedure, 1973 was under challenge at a stage when the evidence had not been recorded. Such impleadment during the course of committal proceeding was held to be bad in the said circumstances. In the instant case, the accused No. 3 did not challenge her order of impleadment as an accused and instead, waited for the evidence to be brought on record. As we have considered the entire evidence tendered in the course of the trial, we are disinclined to separately go into the correctness of the order passed under Section 319 of the Code of Criminal Procedure so far as accused Meherun Nigar Begum is concerned.

21. For the reasons aforesaid, the judgment and order of acquittal dated 30.8.1994 is affirmed and the appeal stands dismissed.

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