

Mst. Viran Wali Vs. State

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Court : Jammu and Kashmir

Decided On : Oct-20-1960

Reported in : 1961CriLJ258

Judge : Janki Nath Wazir, C.J. and; Syed Murtaza Fazl Ali, J.

Appellant : Mst. Viran Wali

Respondent : State

Advocate for Pet/Ap. : Mr. Sharma

Judgement :

Syed Murtaza Fazl Ali, J.

1. The appellant has been convicted under Section 302 R.P.C. and sentenced to imprisonment for life. A reference has also been made to us for confirmation of the sentence of life imprisonment.

2. The prosecution case was that the appellant was a nurse on probation and was on duty in the Male Eye Ward in the S.M.G.S. Hospital Jammu on the night intervening 20/21st January 1960. Some time in the midnight the appellant entered a hath room and gave birth to a child. Soon after that, she threw that child through an opening in the ventilator. Thereafter, she came and sat in the duty room and felt serious pain in her abdomen. She asked for some dettol from a nurse who

informed P.W. Krishna Sharma about the matter. Shortly thereafter the staff nurse Ishar Devi went to call Dr. Prabha Sharma to see the appellant. Dr. Prabha Sharma then came and saw the appellant who was sitting on a bench without her Shilwar and found her bleeding profusely from her private parts.

The lady doctor then sought the permission of the Matron for her examination and after her examination she discovered that she had given a birth to a child. After questioning the accused, the appellant gave out that she had just been delivered of a child which she had thrown out on the ground through the ventilator. The Lady Doctor thereupon sent P.W. No. 1 Asha Sweepers to bring the child. When the child was brought the doctor noticed serious injuries on her head and found her gasping for breath. She then revived the child but ultimately the child died the next day at 2 P.M. Dr. Sharma then sent a report to the Gynaecologist of S.M.G.S. Hospital Jammu mentioning the aforesaid facts.

This report was treated as first information report by the police which was drawn on 21-1-60 at 3-45 P.M. at the police station Jammu and a case was instituted against the appellant on the basis of this report. During the course of investigation it appeared that on the next day the appellant had sent a message through P.W. Jagdish Chander to Harsant Singh to inform him that she had given birth to a daughter. Dr. Surjit Singh performed the post mortem examination of the child and he found the following injuries on the new born baby:

1. A contusion 1 1/2' X 1' over the left ear on the scalp.
2. An ecchymosis mark on the left thumb.
3. An abrasion over the back of the right elbow.
4. An abrasion over the right foot.

3. In the opinion of the doctor the death of the child was due to her being thrown from a height of 21 ft. which caused the fracture of the parietal bones of the skull, resulting in coma.

4. The defence was that the appellant was falsely implicated due to enmity and she had not given any birth to any child.

5. In support of its case the prosecution examined 17 witnesses including the doctors but the defence did not adduce any evidence.

6. The central evidence in the case consists mainly of the confession of the appellant before Dr. Sharma and other nurses. This evidence is sought to be corroborated by the other circumstantial evidence with which I shall deal hereafter.

7. Mr. Sharma appearing for the petitioner assailed the oral confession made by the appellant before Dr. Sharma and others on various grounds. Mr. Sharma has also submitted that the examination of the appellant by Dr. Sharma having been conducted against her will should be completely disregarded as such an examination amounts to compelling the appellant to give evidence against her and is hit by Article 20(3) of the Constitution of India. It appears from the evidence of the Lady doctor as also the first information report that the appellant resisted her examination by Dr. Sharma but she had to yield after persistent requests. In this connection our attention was drawn particularly to the following passage appearing in the evidence of Dr. Sharma which was subsequently treated as first information report in this case:

On my forced enquiry she confessed amenor-rhoea of about 5 to 6 months, Then I requested the Matron to give me permission for vaginal examination as I believed she was unmarried. Matron permitted me to do so. Then I requested her for vaginal examination, which she refused strongly; but later on gave her consent reluctantly.

The doctor was of the opinion that after the internal examination of the appellant she was convinced that she had given birth to a child some time before, and this was undoubtedly an important circumstance against the appellant which was sought to be used by the prosecution.

8. Article 20(3) of the Constitution of India runs as follows;

No person accused of any offence shall be compelled to be a witness against himself.

A perusal of this Article clearly shows that two conditions are necessary to attract this article. In the first place the person who is compelled must be accused of an offence.

Secondly, that such accused must be compelled to give evidence against himself.

9. In the present case, we are fully satisfied that at the time when Dr. Sharma conducted the internal examination of the appellant, she was not accused of any offence as there was no formal accusation against her. It may be noted that at the time when she was examined she had not in her confession and therefore, the doctor was not aware of any of the facts which constituted an offence. This question came up for decision recently by the Supreme Court in case *Mohamed Dastagir v. State of Madras* reported in AIR 1960 SC 756, where their Lordships' observed as follows:

As to the second submission, Article 20(3) of the Constitution states : No person accused of any offence shall be compelled to be a witness against himself. Before this provision of the Constitution comes into play two facts have to be established (1) that the individual concerned was a person accused of an offence, and (2) that he was compelled to be a witness against himself. If only one of these facts and not the other is established, the requirement of Article 20(3) will not be fulfilled... In the present case, even on what was stated in *M.P. Sharma v. Satish Chandra* : 1978(2)ELT287(SC) there was no formal accusation against the appellant relating to the commission of an offence.

It is, therefore, clear from the decision of their Lordships that before Article 20(3) can come into play, there must be a very clear and formal accusation against the person concerned as to make him a person accused of any offence.

10. In the present case, as already indicated, there being no material to show that at the time when the appellant was examined by Dr. Sharma there was any accusation against her, the first essential condition for the application of this Article

is not fulfilled. We are, therefore, of the opinion that Article 20 cannot be successfully invoked in this case. The contention of Mr. Sharma, on this point, is therefore, overruled.

11. I shall now deal with the confession made by the appellant to Dr. Sharma and other witnesses. In this connection Mr. Sharma has placed before us the entire evidence and has submitted that as the prosecution evidence clearly shows that the confession was made under threat and inducement it is inadmissible under the provisions of Section 24 of the Evidence Act. It appears from the evidence of Dr. Sharma that at the time when the confession was made to her. Staff Nurse Isher Devi, Krishena Sharma Nurse, and Kuldeep Nurse were present. P.W. Krishena Sharma says at page 5 that the appellant was questioned for about half an hour and thereafter she made the confession. She further states towards the close of her statement that before the confession the Lady Doctor told her (the appellant) that she should tell the truth and that nothing will happen to her service if she tells the truth. The exact words used by the witness in her evidence are as follows:

(Here follows portion in Urdu script)

12. The other witnesses also admit that the appellant was questioned for full half an hour and it was only after persistent questions that She made the confession, Dr. Sharma, no doubt in her evidence does not say that she used any words to induce the appellant to make a confession, but the fact that some inducement was brought to bear upon the appellant has been proved by one of the P.Ws. who according to Dr. Sharma was present at the time when the confession was made.

I might indicate here that in Section 24 of the Evidence Act the words used are not 'proved' but 'appear' and it is well settled that even a well grounded conjecture on a strong possibility that the confession was a result of inducement or threat is sufficient to attract the provisions of that section. In this case, there is something more than a conjecture namely that there is the evidence of one of the P.Ws. who was admittedly present at the time when the appellant made the confession, to the Lady Doctor. Moreover, the fact that the appellant was questioned for half an hour and reluctantly confessed, the guilt clearly shows that she must have done so under some inducement.

Apart from this the evidence clearly shows Slat; at the time when the appellant made the confession, she was suffering from pain and was actually bleeding. Dr. Sharma also admits, in her cross examination that at that time the appellant looked mentally upset and excited. Under these circumstances, it was contended by Mr. Sharma, that the confession made by her (the appellant) was not voluntary and was also inadmissible under Section 24 of the Evidence Act. In our opinion, the contention seems to be well founded and must prevail.

13. The Advocate General on the other hand submitted two serious arguments to rule out the application of Section 24 of the Evidence Act. In the first place he contended that Dr. Sharma to whom the confession was made was not a person in authority as envisaged by Section 24 of the Evidence Act. In support of his contention he relied mainly on a Full Bench decision of the Patna High Court reported in AIR 1933 Pat 149, Santokhi Beldar v. Emperor where their Lordships of the Full Bench have made the following observations:

There is no statutory definition of the words 'person in authority' but it is well established that the words have reference to a person who has authority to interfere in the matter under inquiry.... The reported cases on the point show that, generally speaking, a 'person in authority

within the meaning of Section 24 is the one who is engaged in the apprehension, detention or prosecution of the accused or the one who is empowered to examine him. In my opinion, the question as to whether a person to whom a confession has been made is a person in authority would naturally depend on the circumstances of each case having regard to the status of the accused in relation to the person before whom the confession is made. The words 'person in authority must be liberally construed because the legislature seems to have broadened the ambit of the section. Contrasting Section 24 with Section 25, it appears that whereas Section 25 deals with confession to a police officer, Section 24 deals with confession made to police officers or other persons of influence.

The question as to who is person in authority does not seem to be free from difficulty. There is no doubt the view of the Patna High Court that a person in authority is one who is in charge of prosecuting, conducting, or defending cases.

There is on the other hand a number of authorities which seem to have taken a more liberal view of the matter. In *Bhagabatcharan v. Emperor* AIR 1933 Cal 644, which is a Full Bench decision, it has been laid down, that even a superior officer of an accused is a person in authority. To the same effect is a later decision of the same court reported as *Gunga Prosad v. Emperor* AIR 1945 Cal 360. To the same effect is also the decision reported in AIR 1917 Sind 65, *Loung Rashid v. Emperor*. In *Emperor v. Attursing* AIR 1932 Sind 64, manager of the office where the accused was employed was held to be person in authority. Similar seems to be the view of the Lahore High Court in the case reported as *Mahomed v. Emperor*. AIR 1936 Lah 264. In *E.D. Smith v. Emperor* AIR 1918 Mad 111 it was held that the words 'person in authority' are wider in the meaning than the actual prosecutor. I, therefore, propose to construe the words 'person in authority' in the light of the decisions mentioned above.

14. In the present case it is not disputed that the appellant was merely a nurse on probation of one of the wards of the hospital. It is also not disputed that Dr. Sharma to whom the confession was made was the House Surgeon Gynae Maternity Ward S.M.G.S. Hospital Jammu, to which the appellant was attached. It is therefore, absolutely clear to us that Dr. Sharma did exercise a good deal of authority over the appellant, who merely being a probationer could have been confirmed only on the report of Dr. Sharma. In this case, therefore, there can be no difficulty in holding that Dr. Sharma was a superior officer so far as the appellant is concerned.

The consensus of judicial opinion as indicated above seems to be that under such circumstances a superior officer would be no doubt a 'person in authority'. The Advocate General has not been able to refer to any other case except the Patna case in which a contrary view has been taken. Moreover in this case, it appears that it was the report of the doctor herself which was treated as first information report in this case and she would therefore, become a person in authority even as laid down in AIR 1933 Pat 149 because then she would be engaged in the apprehension and prosecution of the accused. For the reasons given above, we hold that Dr. Sharma was a person in authority within the meaning of Section 24 of the Evidence Act, and the contention of the Advocate General on this score,

cannot be accepted.

15. The next ground taken by the Advocate General to exclude Section 24 was that before Section 24 can apply the person confessing must be accused of an offence at the time when the confession was made. The contention was that at the time when the confession was made there was no formal accusation against the appellant, therefore, she was not a person accused of an offence as mentioned in Section 24 of the Evidence Act, and therefore Section 24 is not attracted.

The Advocate General has relied on a case reported in 8 Bom LR 507, *Emperor v. Mahamad-buksh Karimbuksh*, and also on ILR 35 Mad 397 at 535, *Muthukumaiaswami Pillai v. Emperor*. As regards the case reported in 8 BLR 507 our attention has been drawn to a later Full Bench decision of the same court reported in AIR 1920 Bom 270, *Emperor v. Cunna* where the observations of their Lordships have greatly weakened the authority of the previous Bombay case, if not overruled it. Their Lordships have observed as follows:

It is quite enough that the confession is subject to the infirmities which are laid down in that section, and if it is made by an accused person, or before he came to be accused, or even at the time when he was under the benefit of the pardon, in my opinion, it could not be said that Section 24 on that ground would not apply. The observation in 8 Bom LR 507 must be read with reference to the context, and I do not think that the point was decided in that case in the sense in which the learned Government Pleader has contended before us.

In the latest decision of the Bombay High Court reported in AIR 1959 Bom 534, *State v. Memon Mohamad Husain* their Lordships while interpreting Section 25 have also referred to Section 24 and have made the following observations:

In Section 24 of the Evidence Act, words precisely similar to those used in Section 27 are used. It refers to a confession made by an accused person and if the contention that is now made is accepted, it might introduce a great deal of injustice to persons accused of an offence, because all confessions made by a person before he became an accused would be admissible even if they were obtained by inducement, threat or promise. Section 24 is considered in the case of 22 Bom LR

1247 : AIR 1920 Bom 270 (FB). Sir Lallubhai Shah at page 1261 (of Bom LR) : at page 273 of AIR says that section will be applicable to a confession made by a person, who becomes subsequently accused of an offence. The other judges in effect accept this, but they differed from the learned Chief Justice on the question of fact as to whether the confessions were made by inducement, threat or promise. The phrase has been used in both sections and it must be interpreted in the same manner in both sections. No possible reason can be suggested why it should have a different meaning.

The same view has been taken by a Division Bench of Allahabad High Court in a case *Amin v. State* : AIR1958 All293 . The Lahore High Court also seems to have taken the same view in a case reported as *Surjan Singh v. Emperor*, 48 Cri LJ 651. To the same effect is the decision of the Calcutta High Court in a case reported in *Jasoda Haldar v. Sailendra Nath* : AIR1957 Cal372 . It is true that one of the Judges of Madras High Court in a case reported as ILR 35 Mad 397 has taken a view that a person who makes the confession must be an accused person at the time when he makes the confession, but the current of authorities indicated above, seem to convey that the better view seems to be that Section 24 refers to a person who is not only an accused at the time when he made a confession, but also to one who becomes an accused subsequently.

In the Full Bench decision which was relied upon by the Advocate General on the first point namely the case reported in AIR 1933 Pat 149, their Lordships observed that the very fact that a person confesses his guilt makes him an accused so as to attract the operation of Section 24 of the Evidence Act. The Patna view, therefore, supports my view that Section 24 refers to the status of the person not at the time when he made the confession but when the confession is being considered by the court and when he is undoubtedly an accused person. On a consideration, therefore of the authorities mentioned above, we are clearly of the opinion, that Section 24 refers even to a person who becomes an accused subsequently and this interpretation seems to be in consonance with the language employed in Section 24 of the Evidence Act.

In this view of the matter, it is manifest that the present confession comes within the purview of Section 24 of the Evidence Act, and in view of our finding that the confession was a result of inducement on the part of lady doctor, it must be excluded from consideration as being inadmissible. Moreover, even apart from the provisions of Section 24 of the Evidence Act, it appears to us that when there is positive evidence that the confession has been made at a time when the accused was mentally upset and excited and after a great deal of inducement, it ceases to be voluntary. It is well settled that before a confession is accepted it must be voluntary. I am fortified In my view by a decision of Calcutta High Court reported in AIR 1936 Cal 316, Kalijiban Bhattacharjee v. Emperor, where their Lordships have made the following observations:

If a confession is not voluntary in the wider sense of the term *ex hypothesi* the person who made it did not do so from any desire to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances if facts are proved which suggest that an inducement of some kind, although outside the terms of Section 24 was in fact given the court may well refuse to accept the confession as true.

The confession having thus been excluded from consideration we have now to see whether the other evidence is sufficient to prove the charge against the appellant.

16. The other evidence consists of the follow ing facts:

1. The internal examination of the appellant by Dr. Sharma and her opinion that she had given birth to a child.
2. That a child was recovered in consequence of the confession made by the appellant.
3. The conduct on the part of the appellant to resist her examination by the doctor.
4. The evidence of Jagdish Chander that a message was sent to Harsant Singh by the appellant through him to the effect that she had given birth to a child.

17. In considering these circumstances, we have, however, to remember that if the confession is excluded then there is no legal evidence to show that the child which was found and which ultimately died was born of the appellant, The lady doctor in her evidence admits that the appellant did not give birth to the child in presence of anybody. No blood grouping test of the appellant and the child was conducted to fix the identity of the child. The Advocate General suggested that the fact that the child was recovered as a result of the confession made by the appellant should be conclusive on the subject.

We are, however, unable to agree with this contention. It is obvious that the recovery of a child from an open place which is accessible to the public and which does not seem to be within the exclusive knowledge of the appellant cannot afford any corroboration of the confessional statement made by the appellant particularly when the confession has not been held to be voluntary. In our opinion, the only and the only evidence in the case which could show that the child in question was born of the appellant was the confession of the appellant and once it is excluded from consideration, there is absolutely no evidence on this point.

The circumstantial evidence indicated above, if taken at its face value, does not in our opinion, prove the charge against the appellant. The Advocate General also conceded that if the confession is excluded, it will not be safe to infer that the child who had died in the hospital was really born of the appellant. Moreover, there is an important intrinsic circumstance to show that the child who was found and later on died, could not be born of the appellant. The prosecution case is that the child was a full term baby with cord placenta intact. The internal examination of the appellant by Dr. Sharma however, reveals that the size of the uterus was only of five and half months.

Moreover, the doctor further admits in her evidence and also in the first information report that the appellant told her that her menses had stopped 5/6 months before. Under these circumstances, it is not understandable how the appellant would give birth to a full term baby. The Advocate General has not been able to give any explanation for this important lacuna appearing in the case. It is true that Jagdish Chander says that he was asked by the appellant to inform Harsant Singh that she

had given birth to a child, but his evidence cannot, however, fix the identity of the child born to the appellant with the child that was found and who ultimately died at 2 P.M. on 21-1-1960.

18. In these circumstances, we are clearly of the opinion, that if the confession is excluded then there is no legal evidence to substantiate the charge of murder against the appellant.

19. For the reasons given above, the appeal is allowed, the appellant is acquitted of the charge framed against her, and she is directed to be set forth at liberty at once.

20. The reference is accordingly discharged.

Janki Nath Wazir, C.J.

21. I agree.