

Rasila and anr. Vs. State

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Court : Jammu and Kashmir

Decided On : Mar-13-1961

Reported in : 1961CriLJ229

Judge : S. Murtaza Fazl Ali and; K.V. Gopalakrishnan Nair, JJ.

Appellant : Rasila and anr.

Respondent : State

Advocate for Pet/Ap. : Mr. G. L. Gupta

Judgement :

K.V. Gopalakrishnan Nair, J.

1. Rasila and Kanshi were convicted by the Sessions Judge at Jammu under Section 302 of the Penal Code and sentenced to life imprisonment. The Sessions Judge has referred the case to this Court for confirmation of the sentence as required by Section 374 of the Cr. P.C. as it obtains in this State. And the accused persons have preferred the present appeal against their conviction and sentence.

2. The case for the prosecution is briefly as follows. On 15th July, 1960 Sunder deceased who was a cultivator left his house with the necessary cattle for ploughing his field which was in the neighbourhood of Dudar Nalla in village Hartarian, Tehsil Udhampur. As usual, he came home for his mid-day meal and

again went to the field to continue ploughing operations there. Ordinarily, he used to return home by sunset.

That day he did not turn up. What is more, one bullock which he had taken for ploughing returned home unled by anybody. This aroused some suspicion in the mind of his son Krishan, P.W. 1. He, therefore, set out in search of his father in the direction of the field where he had ploughed that day. A short distance from Dudar Nalla in the neighbourhood of his father's field he found a bundle of grass, a sickle, a stick and the cap of his father abandoned on the ground.

This caused apprehension in the son's mind that some evil had betaken his father. He raised an alarm as a result of which P.Ws, 7 and 12 and C.W. 1 arrived on the spot. Thereafter all of them proceeded towards the field of the deceased and after they went a short distance they found the pair of shoes worn by the deceased thrown on the ground. On going still further they found Sunder lying dead with a string Ex. P6 by his side. The neck of the dead body was badly swollen. As a result of the screams of these persons Dittan, the widow of the deceased, and some others arrived on the scene.

After leaving the corpse to be guarded by others. P.W. 1 the son of the deceased accompanied by the Numberdar and the Chowkidar of the village went to the Udhampur police station which was at a distance of six miles and made an oral report there at 9 A.M. the next day. The Circle Inspector of Police, Rasal Singh, P.W. 16 proceeded to the scene of occurrence that afternoon. He also noticed that the neck of the corpse was badly swollen and that the shoes, cap and stick, of the deceased were thrown about in the vicinity.

After the formal inquest the corpse was sent for post mortem to the Udhampur hospital. The autopsy was conducted by Dr. Nanak Chand, P.W. 14. The police made further investigation and recorded the statements of several persons. On 1-8-60, the second accused, Kanshi, also made a confession before the First Class Magistrate at Udhampur. After completion of the investigation the accused were sent up for trial which culminated in their conviction and sentence as already stated.

3. The defence of the accused persons, as can be gathered from their statements and also the evidence of the two defence witnesses, is that they are innocent and that the offence was falsely laid at their door by P.W. 1, the son of the deceased, and others with a view to get possession of the land regarding which there had been a long-standing dispute between the deceased and the two accused persons.

The suggestion is that death of the deceased for which the accused persons were in no manner responsible was exploited for the purpose of bringing the accused persons into trouble and with a view to baulking them of the land to which they had laid claim as against deceased Sunder and which was alleged to have been occupied by P.W. 1 after the death of his father. This attempt on the part of the accused did not succeed before the learned Sessions Judge who found them guilty and sentenced them to life imprisonment.

4. Mr. G. L. Gupta, counsel for the appellants did not make any effort worth mentioning to argue that the evidence on the side of the accused has to be accepted as true or that the accused will be entitled to an acquittal on the strength of the defence evidence. His main and only attack was that the prosecution has not successfully brought home the guilt to the appellants.

With a view to demonstrate this, he took us through the entire evidence on the side of the prosecution and criticised it with considerable skill and thoroughness. But we have not been impressed with the contention that the evidence on the side of the prosecution is insufficient to establish the guilt of the appellants. We shall now proceed to consider the evidence led by the prosecution.

5. This evidence consists of (1) the direct evidence furnished by the testimony of the two eye-witnesses, P. Ws. 5 and 10; (2) the circumstantial evidence furnished by the evidence of the other P.Ws. and (3) the confessional statement of Kanshi, the second accused. As the circumstantial evidence goes to furnish the background and the setting of the prosecution case, we shall begin with that. After discussion of evidence His Lordship proceeded.

6. Now we come to the confession of the second accused. We have the evidence of Sant Ram, Magistrate, First Class, P.W. 13 in respect of it. His evidence is that the confession was free and voluntary, and that all the formalities contemplated by Sub-section (3) of Section 164 of the Criminal P.C. were duly and scrupulously observed by him in the matter of recording the confession. But the appellants' learned Counsel has argued that the entire confessional statement should be rejected in view of the fact that a warning that the accused is not bound to make a confession and that the confession if made is likely to be used against him has not been recorded in the form of questions and answers at the commencement of the confession. It is profitable in this connection to read Sub-section (3) of Section 164 of the Criminal P.C. which runs;

A 'Magistrate shall before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect;

I have explained to name that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true accounts of the statement made by him

Signed A.B. Magistrate.

Nowhere does this provision require that the caution administered to the accused that he is not bound to make a confession and that if he does so it may be used as evidence against him, must be recorded in the form of questions and answers and that such record must be made at the commencement of the confessional statement. But it is urged that the latter part of Sub-section (2) of Section 164 requires that confession shall be recorded and signed in the manner provided by Section 364 of the Criminal P.C. and that therefore the Magistrate was bound to record the warning given by him to the accused under Sub-section (3) in the form

of questions and answers.

We do not think this contention ought to prevail. Section 364(1) of the Criminal P.C. comes into play only whenever the accused is examined. But the relevant expression used in Sub-section (3) of Section 164 is that the Magistrate shall explain. The words 'explain' and 'examine' have distinct and different meanings and connotation and cannot be treated as synonymous in scope and content. Besides, a Magistrate can easily explain to an accused person that he is not bound to make a confession etc. without addressing any question to him with the intention of eliciting an answer. The word 'explain' is obviously different from the word 'question'. This is emphasized by the circumstance that in the latter part of Sub-section (3) the word 'questioning' does occur. This makes it clear that when the legislature intended that the accused has to be questioned it employed that precise word to convey the intention, and when it considered that he has not to be questioned but that only something has to be explained to him, it significantly employed the word 'explain'.

7. The memorandum to be made at the foot of the record of confession is that the Magistrate explained to the person concerned that he is not bound to make a confession and that if he does so any confession he may make may be used as evidence against him. The language employed by the legislature in framing this memorandum is quite consistent with the view that a Magistrate recording a confession is not bound at the outset to record that he duly administered the prescribed caution to the accused, much less to record it in the form of questions and answers.

If the Magistrate is to record even at the commencement of the confessional statement that he duly explained to the accused person that he is not bound to make a confession, etc., the memorandum to be appended at the foot of the record of confession becomes a mere surplusage. We cannot reasonably expect that the legislature intended that the same fact should be placed on record at the beginning as well as at the end of a confessional statement. We are unable to see any real purpose for such duplication. We are, therefore, clearly of the opinion that the argument advanced on behalf of the appellants is not well-founded, and that

no infirmity attaches to the confessional statement on the ground of its non-compliance with the requirements of Section 164(3).

8. But the confession made by the accused was retracted by him. Being a retracted confession we can act upon it only if we are satisfied that it is voluntary and true. In fact, the learned Counsel for the appellants did not urge this aspect of the matter. All the same we are of opinion that we are bound to satisfy ourselves that the confession was voluntarily made and that what is stated therein is also true.

The second accused who went to the Magistrate for the purpose of making a confession was sent to the judicial lock-up by the Magistrate and was allowed to remain there for about two days before he was called up again. Then the Magistrate clearly explained to him that he was not bound to make the confession, that if he makes it is likely to be used in evidence against him. In spite of this clear caution the second accused offered to make the confession.

What is more, the Magistrate specifically asked him whether he was making the confession on account of any extraneous influence or pressure from or fear of the police. The second accused gave a categorical answer in the negative. The Magistrate apart from the memorandum signed by him at the foot of the record of confession has also given testimony on oath that he was fully satisfied on questioning the accused that the confession he made was free and voluntary.

The Magistrate was offered for cross-examination, but the defence counsel, could not however shake him in any manner in cross-examination. The second accused retracted the confession only a month after he made it. This delay-remains unexplained. The reason for his resiling from the confession is stated very vaguely and badly, and even this reason was improved upon from stage to stage. All that was stated before the committing Magistrate was that he made the confession on account of police influence.

He did not specify in what manner the police influenced him or which police officer influenced him or during what period of time such influence was exerted. In the Sessions Court he improved upon his statement before the committing Magistrate

by saying that he made the confession on account of police violence. In what manner was the alleged violence employed or when it was employed or where it was employed or by whom it was employed all remain undisclosed.

We are, therefore, not at all satisfied that the reason alleged by the second accused for retracting his confession is true and acceptable. The extreme baldness of this belated assertion of police pressure or violence betokens falsity. And the falsity of the reason alleged for retracting the confession points to the acceptability of the prosecution evidence relating to the confession. We unhesitatingly accept the testimony of the Magistrate that the confession made by the second accused was free and voluntary; this testimony quite well accords with the reasonable probabilities of the case.

9. A confession may be retracted by an accused person either because what is stated by way of confession is not true or because the confession is not free and voluntary in the sense that it flowed from hope or fear of a temporal nature or threat or inducement made directly or indirectly by a person in authority. A confession may also be retracted because the spiritual urge or the genuine and wholesome remorse from which it proceeded has worn off and vanished.

We have already held that the confession is voluntary. We have now to see whether it is true. With this end in view we have to examine the confession with reference to its intrinsic probability and also in the light of extrinsic evidence in the case, keeping in view the reasonable probabilities and the surrounding circumstances. The plethora of direct and circumstantial evidence already noticed by us indubitably goes to show that the confession of guilt made by the second accused was true. The probabilities of the case and also the surrounding circumstances comport with the guilt of the second accused who made the confession.

We are therefore, satisfied that the confession made by the second accused is true. The retraction of this confession could not have been because it was not true or voluntary, but because the spiritual urge or the wholesome remorse which had actuated it abated and vanished, leaving the criminal callous, hardened and dishonest. We are therefore clearly of the opinion that the confession made by the

second accused although retracted by him subsequently can properly be acted upon as evidence, provided it is sufficiently corroborated by other evidence in, the case.

10. The question then is what is the extent of corroboration necessary for acting upon the confession of the accused person? There appears to be some difference of opinion on this point. In *Puran v. State of Punjab* : AIR 1953 SC459 Mahajan, J. as he then was said:

It is a settled rule of evidence that unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone.

11. In *Arjuna Lal v. The State* : AIR 1953 SC411 Chandrasekhara Aiyar, J. observed:

We have before us a case where the conclusion of guilt rests solely on a retracted confession, not only uncorroborated in material particulars, but untrue in many parts. Such a conviction is opposed to law and cannot be allowed to stand.

12. But in *Balbir Singh v. State of Punjab*, (S) : 1957 CriLJ481 S. K. Das, J. said at p. 224:

Though a retracted confession, if believed to be true and voluntarily made, may form the basis of a conviction, the rule of practice and prudence requires that it should be corroborated. by independent evidence.

13. It will' be noticed that this passage does not say that a retracted confession must be corroborated in material particulars.

14. The next decision dealing with this aspect of the matter is *Subramania Goudan v. State of Madras* : 1958 CriLJ238 Govinda Menon, J. stated as follows:

But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated. One of the latest cases being (S) : 1957 CriLJ481 but it does not

necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession.

15. Again his Lordship contrasted a retracted confession with the evidence of an approver or an accomplice in the matter of the requirement of corroboration and observed at page 72

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.

This decision is clear enough authority for the proposition that in the case of a confession which is true and voluntary but which is retracted, all that a court need look for is 'general corroboration' and not 'corroboration in material particulars.' It is, however, not necessary in the instant case to labour this aspect further. Even if we adopt; the stricter standard that corroboration in material particulars is necessary before we act upon the retracted confession of the second accused, we have here ample corroboration of that kind.

In fact, even if we totally eschew the confession from consideration, we have ample evidence before us for holding that the second accused is guilty. This evidence does connect the accused with the crime. We can, therefore, unhesitatingly say that the confession of the second accused in the present case is well corroborated in material particulars, not to speak of mere general corroboration. This confession by itself is sufficient to convict the second accused.

As we already stated, there is acceptable evidence on the side of the prosecution to bring home the guilt to the first accused as well as the second accused, apart

from the confession of the second accused. Under Section 30 of the Evidence Act the confession made by the second accused can be considered against the first accused also. Thus, if we throw the confession of the second accused into the scale in assessing the evidence against the first accused which is considerable even otherwise, we are hardly left with any alternative except to pronounce that the first accused is guilty of the offence charged.

16. It follows from the foregoing that both the appellants are guilty of the offence under Section 302 of the Penal Code and have been rightly convicted by the learned Sessions Judge. The sentence of life imprisonment imposed upon the appellants by the court below is, if anything, lenient. We have, therefore, no hesitation in confirming the sentence also. The appeal is dismissed and the reference made by the learned Sessions Judge under Section 374 of the State Criminal P.C. is accepted.

S. Murtaza Fazl Ali, J.

17. I agree.