

Mohammad Hussaln Vs. the State

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Court : Jammu and Kashmir

Decided On : Feb-15-1990

Reported in : 1990CriLJ2351

Judge : R.P. Sethi, J.

Acts : Ranbir Penal Code (IPC) - Sections 201, 302, 304A and 403A; ;Code of Criminal Procedure (CrPC) - Sections 164, 174 and 364

Appeal No. : Criminal First Appeal No. 14 of 1975

Appellant : Mohammad Hussain

Respondent : The State

Advocate for Pet/Ap. : Avtar Singh and; M.S. Malik, Advs.

Disposition : Appeal allowed

Judgement :

R.P. Sethi, J.

1. The appellant was convicted under Section 304-A RPC and sentenced to 18 months rigorous imprisonment and a fine of Rs. 100/- and under Section 201 RPC to six months rigorous imprisonment mainly on the ground of his retracted judicial confession, which was stated to have been recorded by a Tehsildar, Executive

Magistrate 1st Class, Rajouri under Section 164 of the Cr. P.C.

2. According to the prosecution it was alleged that on the intervening night of 23/24th of Feb. 1974 three daughters of Zamal Ali had gone to attend a marriage in the house of his daughter and on the morning of 24-2-1974 his two daughters returned home but the youngest namely Rafiga Bi did not turn up. Upon enquiry it was revealed that the deceased had not gone to join the marriage on the night of occurrence. Upon search her dead body was traced at a distance of about one furlong from her house with hands missing and her chest torn as if some animal had attacked and killed her. Proceedings under Section 174 of the Cr. P.C. were initiated at the initial stage. However after the receipt of some clue the appellant was apprehended with the allegation of causing the death of the minor girl on account of rashly and negligently handling the gun in his possession. The police filed the final report against the appellant under Section 302 RPC and after trial convicted and sentenced him for the offences as stated hereinabove.

3. I have heard the learned counsel for the appellant and perused the record.

4. Section 164 of the Cr. P.C. provides the procedure for recording of confessions and statements by the Magistrate as under:

'164' 'Power to record statement and confessions : (1) (Any judicial Magistrate of the first class or any Judicial Magistrate of the second class specially empowered in this behalf by the High Court) may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter (or under any other law for the time being in force) or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in Section 364, and such statements of confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) 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 account of the statement made by him.

(Signed A. B.)

Magistrate')

Explanation:

It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

5. A perusal of the Section clearly shows that the power to record statements and confessions is conferred upon the Judicial Magistrate only and not the Executive Magistrate. The provision for recording of the statement by Judicial Magistrate was substituted vide Act No. XL of 1966. The object of empowering the judicial Magistrate to record confessional statement is obvious and is intended to minimize the apprehension of the Investigating Agency getting the statement recorded according to their choice and upon their asking. The provisions of Section 164 Cr. P.C. empowering the Judicial Magistrate only to record the confessional statements is mandatory having no exception. Confessional statement recorded by a Magistrate not empowered to do so under this section is not admissible in evidence. The Supreme Court held in Nika Ram v. State of Himachal Pradesh AIR 1972 SC 2077 : (1972 Cri LJ 1317) : that the confession recorded by a Magistrate

not empowered to record the same was inadmissible in evidence at the trial. It is settled law that when a statute confers a power on certain Judicial Officer and requires a particular thing to be done in a special manner, that power can be exercised only by those officers and in the manner prescribed by law. No Other officer can exercise that power. In the case before the Supreme Court the confessional statement recorded by a Second Class Magistrate was held inadmissible in evidence. In the instant case the conviction mainly based upon the confessional statement of the appellant recorded in contravention of the provisions of Section 164 of the Cr. P.C. cannot be upheld.

6. The Magistrate empowered to exercise the power of recording the statement under Section 164, Cr. P.C. is further required to ascertain the voluntary nature of the confessional statement, and while according the statement to bear in mind the principles as were enumerated in *Mazhar Ali v. State* : 1976 Kash LJ 179 : (1976 Cri LJ 1629):

7. The other circumstances relied by the trial court for convicting the accused and sentencing him for the commission of the aforesaid offences are the alleged disclosure statement and recovery of the gun and the knife. Assuming that such statement was made and recovery affected, the same cannot by itself connect the accused with the commission of the crime. Even if the confessional statement of the accused is presumed to have been recorded by a competent magistrate, it cannot be held that the offence under Section 304-A read with Section 201, RPC was proved against the appellant. The appellant in his alleged statement had stated that on the night of occurrence he was carrying a gun in his hand while passing through a jungle along with his son. His son was suffering and he had been told by some orthodox people that the suffering was because of some ghost. The appellant is stated to have seen some ghost like a figure in the jungle at about 10 PM which frightened him and the child. He fell on the ground where the gun struck with a stone as a result of which the fire got discharged and the same struck a ghost like object which later was found to be the deceased daughter of Zamal Ali. Zamal Ali has denied the involvement of the appellant in the commission of the crime and was declared hostile by the prosecution. No rashness or negligence can be attributed to the appellant in view of his so-called confessional statement. The

trial court, therefore, was not justified in convicting and sentencing the accused for the commission of the offence punishable under Section 403-A read with Section 201 of R.P.C. This appeal is accepted and the conviction and sentence of the appellant under Section 304-A read with Section 201, R.P.C. is set aside. The sureties shall stand discharged.

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