

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE JOYMALYA BAGCHI
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

CRA 549 of 2015

Idrish Ansary

Versus.

The State of West Bengal

For the Appellant : Mr. Himanshu De, Sr. Adv.,
Ms. Monami Mukherjee, Adv.,
Mr. Musharraf Alam, Adv.

For the State : Mr. Partha Pratim Das, Adv.,
Ms. Eshita Dutta, Adv.

Last Heard on : **10.04.2023**

Judgment on : **19.04.2023**

PARTHA SARATHI SEN, J. :-

1. In this appeal the judgement and order of sentence dated July 30, 2015 as passed by Learned Additional Sessions Judge, 3rd Court, Purulia in Sessions Trial No. 22 of 2014 arising out of Sessions Case no.40 of 2014 has been assailed. By the impugned judgement and order of sentence learned

trial court found the present appellant guilty under Section 302 IPC and thus sentenced him to suffer imprisonment for life and to pay a fine of Rs.5000/- in default to suffer simple imprisonment for six months more. The convict felt aggrieved and thus preferred the instant appeal.

2. For effective disposal of the instant appeal the facts leading to initiation of the aforesaid trial is required to be dealt with in a nutshell.

3. One Sk. Manir, son of Idrish Ansary of Anara Bungalow Side Railway Quarter (Quarter no.E/124/A) lodged a written complaint dated 17.12.2001 with the O/C of Para Police Station stating, inter alia, that on the self same day i.e. on 17.12.2001 at about 9:30 p.m. he went to the quarter of one Zakir Hossain (a neighbour of the de facto complainant). It is his further version that at about 11p.m. he was called by his inmates and when he came out from the quarter of his said neighbour he noticed that his father Idrish Ansary, the appellant herein was standing there in a perplexed condition and at that time his father disclosed to him that he had murdered his daughter, Afsana Khatun by strangulating her by using a rope. It was his further version that immediately thereafter he rushed to his quarter and found his sister Afsana Khatun was lying dead on the cot and at that time blood was oozing from her mouth and the de facto complainant also noticed a rope around her neck. It is the further version of the de facto complainant that after taking information he came to learn that a nylon rope which was fixed on the backside of the verandah of their quarter for drying clothes was used as a weapon of offence. The de facto complainant further disclosed that on being asked his father, Idrish Ansary disclosed that his daughter Afsana used to go outside in the night in a suspicious manner and inspite of all his

efforts he failed to rectify his said daughter and thus he punished his said daughter by murdering her by way of strangulation by a rope. It was further averred by the de facto complainant in his said written complaint that thereafter his father disclosed to him that he would be going to Anara Police Station for surrendering himself.

4. On the basis of the said written complaint Para P.S case no.56 of 2001 dated 18.12.2001 under Section 302 was started. Investigation was taken up and on completion of the same charge sheet under Section 302 IPC was submitted.

5. After commitment and transfer the learned trial court duly considered the entire materials as placed before him and by his order dated August 05, 2015 framed charge under Section 302 IPC as against the accused. Since the accused pleaded his innocence and claimed to be tried the trial proceeded.

6. Trial court record reveals that in order to bring home the charge, the prosecution has examined seven witnesses in all and several documents have been exhibited on their behalf. On behalf of the accused no evidence was adduced. However, from the trend of cross-examination of the prosecution witnesses and the answers as given by the accused in course of his cross-examination under Section 313 Cr.P.C, it reveals that the defence case is based on clear denial and false implication.

7. In order to reach at a logical conclusion of the instant appeal we consider it necessary to discuss the evidence of the prosecution witnesses in a nutshell.

8. PW1 being the scribe of the written complaint became hostile and in course of his cross-examination by the prosecution he categorically denied that the said written complaint was written by him as per instruction of the de facto complainant, Sk. Munir (PW2). He however proved the written complaint as written by him and the same was marked as Exhibit 1.

9. PW2 being the de facto complainant of the aforesaid sessions case in his examination-in-chief though proved his signature on the written complaint but denied that he had asked PW1 to write the complaint. He had stated that he had no idea as to how the death of his sister occurred. He was also declared hostile by the prosecution but in course of his cross-examination by the prosecution nothing could be elicited from his mouth which may be helpful for the prosecution.

10. PW3 is the wife of the present appellant. In her examination-in-chief she stated that she had no idea as to how her daughter died. She was also declared hostile by the prosecution and in her cross-examination by the prosecution she denied all the suggestions as given to her by the learned Public Prosecutor-in-charge.

11. PW4 is an inquest witness. Neither in his examination-in-chief nor in his cross-examination he has stated anything which would be helpful either for the prosecution or for the defence.

12. PW5 is a neighbour of PW2 and is also an inquest witness. In his examination-in-chief he had also stated that he did not know the reason of death of Afsana. He was also declared hostile by the prosecution and like other prosecution witnesses he had not stated anything in such cross-examination which may be detrimental to the accused.

13. PW6 is the Recording Officer as well as the Investigating Officer of the said case. In his examination-in-chief he stated that after receipt of the written complaint from PW2 he started the aforementioned criminal case, he filled up the formal FIR and thereafter took up the investigation. It was his further version that in course of investigation he visited the P.O, prepared a rough sketch map with index, arrested the FIR named accused person and produced him before the court. In course of investigation he seized some articles under cover of seizure list. He also conducted inquest over the dead body of the victim and prepared an inquest report and thereafter sent the body for Post Mortem examination. He thereafter examined the available witnesses under Section 161 Cr.P.C and thereafter he collected the post mortem report of the deceased and on completion of the investigation he submitted the charge sheet. It is his further version that before starting Para P.S case no. 56 of 2001 the accused had given a confessional statement before a constable and in course of investigation he collected the same. In course of his cross-examination he stated that he could not say as to whether prior to lodging of FIR any earlier information was received in respect of the self same incident or not.

14. According to prosecution PW7 is a very vital witness. From his examination-in-chief it reveals that on the relevant day i.e. on 17.12.2008 he was posted at Anara outpost as police constable. It is his further version that on the said day the accused came before him and confessed that he had killed his daughter. He further testified that the accused had given a writing containing confessional statement to him which he proved before the learned trial court. It is his further version that O/C Para Police Station

collected the said confessional statement from him and made an endorsement on such confessional statement. According to him the accused had written such confession in his own hand writing voluntarily in his presence and thereafter the accused himself signed on it. In course of his cross-examination he stated that on the night of the incident the O/C had taken such confessional statement from him and made endorsement on it.

15. On perusal of the impugned judgement it reveals that learned trial court believed the testimony of PW7 as well as the contents of the confessional statement being Exhibit 6 and thus came to a finding that it is none but the present appellant who committed the murder of Afsana Khatun and accordingly passed the impugned judgement of conviction giving rise to the instant appeal.

16. Ms. Monami Mukherjee, learned advocate for the appellant at the very outset draws attention of this court to the evidence of PW7 vis-à-vis the alleged confessional statement of the present appellant which has been marked as Exhibit 6. Attention of this Court is also drawn to Sections 25, 26 and 27 of the Evidence Act. It is argued on behalf of the appellant that in view of the provision of Section 25 of the Evidence Act, learned trial court ought not to have rely upon the oral evidence of PW7 and at the same time learned trial court ought not to have admit the alleged confessional statement made by the appellant into evidence in view of clear bar of Section 25 of the Evidence Act. It is thus argued since in view of the provisions of Section 25 of the Evidence Act a confession made before a police officer is not admissible in the eye of law, learned trial court committed gross error of

law in placing reliance upon the oral evidence of PW7 vis-à-vis Exhibit 6 and thus the conviction of the present appellant may be set aside.

In support of her contention Ms. Mukherjee, learned advocate for the appellant placed reliance upon the following two reported decisions:-

i. Aghnoo Nagesia vs. State of Bihar reported in **AIR 1966 SC 119: 1966 Cri LJ 100;**

ii. Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh reported in **2022 SCC Online SC 1396.**

17. Per contra, Mr. Das, learned advocate for the State submits before this Court that learned trial court is very much justified in passing the impugned judgement and thus the present appeal is liable to be dismissed.

18. As discussed above since the learned trial court in its impugned judgement placed his reliance upon the oral testimony of PW7 as well as upon the contents of Exhibit 6 being the confessional statement of the present appellant we propose to look to the relevant provisions of law in this regard.

Section 25 of the Indian Evidence Act reads as under:-

"Confession to police officer not to be proved: No confession made to a police officer shall be proved as against a person accused of any offence."

Section 26 of the Indian Evidence Act reads as under:-

"Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate¹, shall be proved as against such person.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

Section 27 of the Indian Evidence Act reads as under:-

“How much of information received from accused may be proved.— Provided that, when any fact is deposed to 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.”

In this regard we also consider it necessary to look to the reported decision of **Aghnoo Nagesia (supra)** and the relevant portions of the same is reproduced hereunder in verbatim:-

“18. *If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27.*

19. *Our attention is not drawn to any decision of this Court or of the Privy Council on the question whether apart from Section 27, a confessional first information report given by an accused is receivable in evidence against him. Decisions of the High Courts on this point are hopelessly conflicting. They contain all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. In Harji v. Emperor [AIR 1918 Lah 69] and Noor Muhammad v. Emperor [(1925) 90 IC 148] the Lahore High Court held that the entire report formed a single connected story and no part of it had in Emperor v. Harman Kisha [(1935) ILR 59 Bom 120] the Bombay High Court held that the entire confessional report dealing with events on the night of the offence was hit by Section 25, and it could not be said that portions of it dealing with the motive and the opportunity were not parts of the confession. In King-Emperor v. Kommoju Brahman [(1940) ILR Patna, 301, 308, 314] the Patna High Court held that no part of the confessional first information report was receivable in evidence, the entire report formed a single connected story and no part of it had any meaning or significance except in relation to the whole, and it would be wrong to extract parts of the statement and treat them as relevant. This case was followed in Adi Moola Padayachi v. State [(1960) MWN 528] and the Court admitted only the portion of the confessional first information report*

which showed it was given by the accused and investigation had started thereon. In State of Rajasthan v. Shiv Singh [AIR 1952 Rajasthan, 3] the Court admitted in evidence the last part of the report dealing with the movements of the accused after the commission of the offence, but excluded the other parts of the statement including those relating to motive and opportunity. In Legal Remembrancer v. Lalit Mohan Singh Roy [(1922) ILR 49 Cal 167] the Calcutta High Court admitted in evidence the narrative of the events prior to the night of the occurrence disclosing the motive of the offence. This case was followed by the Nagpur Court in Bharosa Ramdayal v. Emperor [AIR 1941 Nag 86] . In Kartar Singh v. State [AIR (1952) Papsu 98] the Court admitted in evidence the introductory part and the portion narrating the motive and the opportunity. In Ram Singh v. State [(1952) ILR 2 Rajasthan 93] the Rajasthan High Court held that where it is possible to separate parts of the first information report by an accused from that in which he had made a confession, that part which can be so separated should be admitted in evidence, and on this view, admitted a part of the report relating to motive and subsequent conduct including the statement that the accused had left the deceased lying wounded and breathing in the tibari and there was no hope of her surviving and he had come having covered her with a cloth. In Lachhuman Munda v. State of Bihar [AIR 1964 Patna 210] the Patna High Court admitted in evidence portions of the first information report relating to the motive, the opportunity and the entire narrative of events before and after the crime. This case was followed in the judgment under appeal. Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. We think that the separability test is misleading, and the entire confessional statement is hit by Section 25 and save and except as provided by Section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.”

19. On conjoint perusal of the aforementioned legislative provisions and the proposition of law as enunciated in the reported decision of **Aghnoo Nagesia (supra)** it reveals to us that the legislature in its wisdom while enacting Sections 25, 26 and 27 of the Indian Evidence Act made it clear that a confession made to a police officer and/or whilst in the custody of the police officer shall not be proved as against a person accused of any offence. Admittedly Section 27 of the said Act is an exception to the provisions of Sections 26 and 27 where the ban of Section 25 and 26 has been lifted to a

certain extent namely; a confession by an accused leading to discovery whilst in the custody of the police officer may be proved against him in accordance with law.

20. Coming to the factual aspects of this case, it appears to us that it is undisputed that PW7 is a police official before whom the present appellant alleged to have made confession in writing on the relevant day i.e. on 17.12.2008. Since PW7 is a police official, such writing which according to the prosecution is a confession of the present appellant is not admissible in the eye of law and therefore the learned trial court while passing the impugned judgement ought to have discarded the oral testimony made by PW7 and in course of trial, the said trial court ought not to have admit the alleged written confessional statement of the present appellant into evidence by marking the same as Exhibit. It may be relevant to emphasize merely because the purported confession was in writing it would not escape the exclusion clause engrafted in Section 25 of the Evidence Act.

21. As discussed above since before the learned trial court apart from oral evidence of PW7 and Exhibit 7 no other material is available to sustain the charge under Section 302 of the Indian Penal Code as against the present appellant, we are constrained to hold that the learned trial court is not justified in passing the impugned judgement.

22. As a result the instant appeal succeeds.

23. Consequently the impugned judgement of conviction and order of sentence dated July 30, 2015 as passed by learned Additional Sessions Judge, 3rd Court, Purulia in Sessions Trial No. 22 of 2014 arising out of Sessions Case no.40 of 2014 is hereby set aside.

24. The appellant is thus acquitted of the charge under Section 302 of the Indian Penal Code in connection with Sessions Trial no.22 of 2014 as disposed of by the Learned Additional Sessions Judge, 3rd Court, Purulia and he be set at liberty at once, if not wanted in connection with any other case.

25. Department is directed to transmit the Lower Court Record along with a copy of this judgement forthwith .

26. Department is further directed to forward a copy of this judgment to the Secretary, District Legal Service Authority, Purulia who will in turn forward the said copy of the judgement to the Superintendent of the concerned Correctional Home where the present appellant is detained now so that release of the present appellant can be expedited.

27. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

I agree.

(Joymalya Bagchi, J.)

(Partha Sarathi Sen, J.)