
(1947) 12 AHC CK 0001

Allahabad High Court

Case No: None

Jagmal and Another

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: Dec. 2, 1947

Citation: AIR 1948 All 211 : (1948) 18 AWR 68

Hon'ble Judges: Sinha, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sinha, J.

Shyam Lal Kandhera, Har Swarup Barber and Jagmal Gujar were placed on their trial for the murder of a sweeper Ramdin on the night "between 25th and 26th October 1946. Shyamlal and Jagmal are residents of Mauza Boraki, whereas Har Swarup resides in Mauza Datauli, but all within the police station of Dadri, in the district of Bulandshahr.

2. The story for the prosecution is briefly this: Ramdin was induced to go to Shahdara for the purchase of a buffalo. He was accompanied by Jagmal. They missed the train at Chhauri and returned to their houses. Both of them again went to Shahdara and stayed there the whole day. After sunset, at about 8 P.M., they returned on a bus to the village. They actually alighted at Dadri and took a foot path. They met Tula of Kathera near the culvert of Mauza Palla. As they reached the bank of a canal, Shyamlal Kandhera and Har Swarup Barber both met them. There was some talk between them. Ramdin was ahead of them. Shyam Lal and Har Swarup, who were in hiding and were armed with gandasa, seized upon the deceased. Then follow certain other details of the manner in which the deceased was done to death.

3. The incident was discovered at about 4 A.M.; in the morning and a report was made at the police station within two hours at about 6 A.M. Khacheru, son of Gallar, was the man, who under the directions of the Mukhia, went to the police station to lodge the first information report. It was mentioned that the deceased was Ramdin. It was also

mentioned that he had with him Rs. 500, as he was going to Shahdara for the purchase of a she-buffalo. It was further mentioned that he was accompanied by Jagmal but beyond this, the first information report did not go.

4. On the person of the deceased were discovered seven safety razor blades, a motor ticket and a half anna bit of small size.

5. The houses of all the three accused were searched on 26-10-1946, but nothing incriminating was found. A gandasa, however, was recovered and the case for the prosecution was that it belonged to Jagmal and this was the gandasa which was used by him against the deceased with fatal results.

6. Two of the accused, Jagmal and Har Swarup, made confessions before a Magistrate, Mr. Ram Narain Singh, on 31-10-1946. These confessions they subsequently retracted.

7. The prosecution examined a number of witnesses in support of their theory that Jagmal, Har Swamp and Shyam Lal had killed" the deceased. They also produced a number of witnesses to establish that the gandasa belonged to Jagmal. The learned Sessions Judge was conscious of the infirmities in the case for the prosecution and has very fairly put and discussed them in his judgment, but he ultimately came to the, conclusion that the two retracted confessions, demolished the defence. He found Har Swarup and Jagmal guilty and sentenced them to the extreme penalty of the law. He acquitted Shyam Lal. The two accused are before us in appeal. There is the usual recommendation by the learned Sessions Judge for the confirmation of sentences of death.

8. We might, at the outset, notice an error in the judgment of the learned Sessions Judge. He was under the impression that the assessors had returned a finding in favour of Shyam Lal and adverse to Har Swarup and Jagmal. It is not so. All the three assessors found Jagmal not guilty, but the other two accused guilty.

9. From what we have said above, it is obvious that the case stands or falls by the two retracted confessions. They are to be found at pages 18 and 19 of the Paper-Book. Before dealing with them we might address ourselves to the question of law.

10. The learned Counsel for the defence has strenuously contended that the failure of the learned Magistrate to comply with the requirements of Section 164, Cr.P.C. is fatal to these confessions. They cannot be received in evidence and, at all events, they lose their evidentiary value.

11. Clause (3) of Section 164 enjoins upon a Magistrate the duty of appending a note in a prescribed form. This was not done. In support of this contention reliance is placed by the learned Counsel on AIR 1936 253 (Privy Council) .

12. The learned Crown Counsel, however, argues that the defect is cured by Section 533, Cr.P.C. It is contended that the case in AIR 1936 253 (Privy Council) does not afford a parallel to the case before us. There, the statement was not recorded u/s 164 at all and Section 833, Cr.P.C., did not and could not come into play. Here, it is argued, the confessions were recorded u/s 164 and, if there was any lacuna in the recording of those confessions Section 533 steps in to remedy it.

13. In our opinion, even if we agree with the contention of the learned Crown Counsel and hold that it is admissible in evidence, we cannot attach any evidentiary value to such confessions. In *Emperor v. Radhe Halwai* 7 C.W.N. 220 a Bench of the Calcutta High Court held that

(1) A confession unless made in accordance with Section 164, Cr.P.C., cannot be admissible an evidence u/s 80, Evidence Act.

(2) Where a confession made before a Magistrate did not bear his certificate stating his belief that it was freely and voluntarily made as required by Sub-section 3 of Section 164, Cr.P.C., it was held "that it could not be admitted "under Section 80, Evidence Act, without proof of its having been made.

14. Apart from this authority, we might mention that whatever the interpretation placed upon the case in AIR 1936 253 (Privy Council) , there is no doubt that their Lordships attached very great weight to the provisions of Section 164 and enjoined strict compliance with them. We are, therefore, of opinion that the two confessions, on which alone practically rests the judgment of the learned Sessions Judge, cannot be taken into account or even if they can be, they cannot be the proper basis for conviction.

15. Both the accused, as already mentioned, subsequently stated that those confessions were the result of the beating that they received at the hands of the police. We cannot reject their version completely. But even if we do, we are of opinion that the internal evidence furnished by them negatives their genuineness.

16. To take up the case of Jagmal first, he has been described by the learned Sessions Judge as twenty years of age on the date of his judgment, which was 3rd June 1947. The confession was recorded on 31st October 1946, i.e., about eight months before. In the paper book he has been described as sixteen, eighteen, nineteen or twenty years of age. He is present in the court room. The minimum age sixteen has the closest relation to truth.

17. The very first sentence which Jagmal uttered before the learned Magistrate was "I killed Ramdin Chauprey." Then he goes into further detail. But the whole statement makes one thing clear that, beyond handing over the gandas to Shyam Lal, he ascribes no part to himself. It is difficult to conceive any reason why, if he had played no other part in the commission of the crime, he should have been anxious to blurt out as the very first sentence, that he was the author of the crime.

18. Har Swarup has gone a little further into detail but has invented a theory which has not stood the test of medical examination. He says that he had strangled the deceased with a dhoti. The medical examination found no marks of strangulation. It has been held by a Full Bench of this Court in [Balmakund Vs. Emperor](#), that the confession must be read as a whole and their Lordships of the Judicial Committee have in *Harold White v. The King* 32 AIR 1945 P.C. 181 also emphasised the necessity of putting it to a careful scrutiny; if it is wrong in such a material particular, it is difficult to hold that the rest of the confession is true.

19. It might also be mentioned that the learned Magistrate, Mr. Ram Narain Singh, conceded that he examined Jagmal only ten to fifteen minutes after he had been taken out of the police custody. Har Swarup was examined fifteen minutes later. We do not think any hard and fast rule can be laid down as regards the time, which must elapse before a man making the confession gets out of the custody of the police, but we do feel that, in the present case, where both the accused were young one of them was particularly young a longer time should have been allowed to elapse between the custody of the police and their examination before the Court.

20. We might mention that we are not quite satisfied with the theory of the prosecution that Rs. 180, which were found with Jagmal, or Rs. 70 which were found with Har Swarup, were really part of the Rs. 500 which Ramdin was alleged to have taken with himself to Shahdara for the purchase of a buffalo. Nor are we satisfied that the gandasa, which was alleged to have been used in killing the deceased, really belonged to Jagmal.

21. We might also mention that the learned Sessions Judge was not right in holding that the accused were arrested on 28th October. Babu Jamuna Sahai who was an honorary Assistant Recruiting Officer during the war and is now a Welfare Officer, is clear and emphatic that both of them were arrested in his presence on 26-10-1946. He had reasons to be definite, because both Jagmal and Har Swarup lived within his area. We do not see any reason why the learned Sessions Judge did not accept his statement, which if accepted, as indeed it must be accepted, greatly impairs the story for the prosecution. The accused, according to him, were arrested on the 26th. The confessions were not recorded till the 31st. They remained in the custody of the police till the 30th, when they were taken to the jail, and although the confessions were recorded on the 31st, it is abundantly clear that they remained in the custody of the police for a fairly long time. This long interval during which they remained in such custody will by itself be an important factor, but the insistence of the prosecution that they came into the custody of the police, not on the 26th but on the 28th adds a great deal to its significance.

22. The prosecution examined Alia in support of their case that the gandasa belonged to Jagmal. He is a blacksmith and he says that he had sharpened the gandasa a year earlier. Gandasa must be a common instrument in the village and it is difficult to accept this man's statement when he says that he remembers that this was the precise gandasa which he had repaired a year before. We might also mention that, when it was identified,

it was not mixed up with other gandasas of the kind. It is true Alia said that it was mixed up with two other gandasas but Sulla, son of Ismail, at p. 38, has contradicted him. He says that it was only one gandasa, which was shown to Alia at the time of the identification. We have it from the evidence of Khacheru that Sulla was present at the time when Alia identified it. There is, at all events, a discrepancy between the two versions -the one given by Alia and the other by Sulla.

23. The learned Sessions Judge, in summarising the evidence, had to concede that, while the prosecution succeeded in proving that Jagmal took Ramdin with him on the night between the 24th and 25-10-1946, and he also tried to take him on the previous night, it had failed to establish the further link in the chain-the precise part played by the accused in the death of Ramdin. He was aware of this gap but was of opinion that it was for the defence, and not for the prosecution, to explain it. In his own words:

I am inclined to believe Simru and Mt. Bhim Kuer in this respect and think that it was for Jagmal to explain his conduct. I do not find his denial a bond, fide one.

24. This, in our opinion, was not a correct process of reasoning. The law, so far as this Court is now concerned, is settled that the burden of proof never shifts and it is always for the prosecution to prove every link in the chain which constitutes the evidence : [Krishna Dayal Vs. Emperor](#), .

25. We have come to the conclusion that the prosecution has failed to establish that the confessions of Jagmal and Har Swarup were true confessions and are of opinion that it will not be safe to base the convictions on them.

26. We, therefore, allow the appeal, set aside the sentences passed upon the appellants and direct that they be forthwith released, unless required in connection with any other case.