

(2005) 09 GAU CK 0042

Gauhati High Court (Kohima Bench)

Case No: None

Badal Debnath and
Another

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision: Sept. 16, 2005**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Evidence Act, 1872 - Section 80
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2006) 3 GLR 683 : (2006) GLT 48 Supp**Hon'ble Judges:** B.P. Katakey, J; B.K. Sharma, J**Bench:** Division Bench**Final Decision:** Allowed

Judgement

B.P. Katakey, J.

This appeal is directed against the judgment of conviction dated d 25.6.2002 passed by the learned Additional Deputy Commissioner (Judicial) Dimapur, Nagaland in G.R. Case No. 244/98 convicting the appellants u/s 3Q2/34 IPC and sentencing them to undergo imprisonment for life.

2. The prosecution case in brief is that on 19.4.1998, the appellants, Japu and Shyam killed Dhiren Singh whose dead body was found floating in a pond. The First Information Report was lodged by Shri Babu Singh on 21.4.1998 in East Police Station Dimapur alleging that the appellants along with 2 others killed Dhiren Singh on 19th April, 1998. The Police on receipt of the said information registration East Police, Dimapur Case No. 113/98 u/s 302 IPC and took up the investigation. Upon completion of the investigation, the charge sheet was filed against Japu @ Raju Sarkar. Badal Debnath as well as Bhaiti @ Depak Dheka. The learned trial court thereafter framed charge against the present appellants, viz., Badal Debnath and Depak Dheka u/s 302/34 I PC on 9.2.2000. When the

said charge sheet was read over and explained to the accused, they pleaded not guilty and demanded trial. Shri Raju @ Japu being the absconder, no charge was framed against him, however, the learned trial court convicted the said Japu @ Raju u/s 302/34 I PC and sentenced each of them to undergo imprisonment for life. Hence the present appeal by the appellants, viz. Badal Debnath and Depak Dheka against the said Judgment of conviction.

3. We have heard Mr. Apok Pongener, the learned Counsel for the appellants and Ms. Lucy, the learned Public Prosecutor.

4. The prosecution in order to bring how the charges levelled against the appellants examined 6 (six) witnesses which includes the first informant and also the Investigating Officer who investigated the offence P.W.1 Papulal Singh who lodged the first Information Report has stated in his deposition that he has not seen the occurrence but he was informed by the other people that the dead body of Dhiren Singh is lying in the Fishery Pond. This witness has stated that he suspects the present appellants and Japu Raju Sarkar has perpetrated the crime P.W.2 in his deposition has stated that the deceased was his nephew and he does not know the reason as to how Dhiren Singh died and he only came to know about the death of Dhire- Singh when he was informed by others. P.W.3 who is the Gaon Bura of United North Block Sector-A. Khatkati Road has also stated in his evidence that he has not seen the occurrence and he was only informed by the Police that Badal killed one person and on being asked by the Police personnel he went to the place where dead body of Dhiren Singh was kept. P.W.4. Shri Y. Lotha who is the council Secretary has stated in his evidence that he has also not seen the occurrence and even has not seen the dead body. He has further stated that the Investigating Officer came to their colony and informed about the murder of a person belonging to the said Colony and that is how he came to know about the death of Dhiren Singh. P.W.5 Syam Mokul has stated that on 19.4.1998 he went to Burma Camp at about 8.30 P.M. where he met Dhiren Singh and Japu Raju and offered there with half bottle of Rum which they drank together. He has further stated that he also met Badal and Bhaiti Depak, appellants herein at that place and they also drank together with him. After some-time Japu @ Raju dropped him in the Hill Gate and went back. He has further deposed that thereafter he did not know what had happened. This witness has further stated that while drinking Bhaiti and Dhiren (deceased) had a quarrel; but he pacified them. During cross-examination this witness has stated that while in custody they were severely beaten by the Police and out of the fear of the police beating they gave the earlier statement before the court. The P.W.8 (P.W.7) was the Investigating Officer who conducted the investigation. From the discussion of the evidences of the prosecution witnesses it is, therefore, abundantly clear that there was no witness to the occurrence and even there is no evidence on record to suggest that the appellant herein were even remotely connected with the offence alleged against them. It is also not the case of the prosecution that the deceased and the appellants were last seen together as the prosecution has failed to prove when the death occurred to Dhiren Singh.

5. The records of the G.R. case reveals the existence of 2 (two) confessional statements made by the present appellants Badal Debnath and Deepak Dheka. The said confessional statements were recorded by the learned Magistrate on 8.5.1998. It appears from the said confessional statement that the learned Magistrate has not recorded the statement of the appellants In verbatim and also not recorded In the form prescribed by the High Court. The order sheets reflects that the appellants were produced before the learned Magistrate on 8.5.1998 on which date the statements were recorded by the learned Magistrate. The record also does not reveal that, any time for reflection was given to the appellants before making such statements and also "whether the Police personnel were present while recording such statements. The record also does not reveal whether the learned Magistrate has given the warning to the appellants that in case of making confessional statement, the same will be used against them and they are not bound to make such confessional statement before the learned Magistrate. It has also not been warned by the learned Magistrate that in case the appellants do not make such confessional statement, they would not be sent back to tin Police custody. Tile learned Magistrate simply has recorded some statement in his own language without recording the statement of the persons in verbatim.

6. Let us now consider whether the confessional statement of the appellants can be treated as genuine and the conviction can be based on such confessional statement even though the learned Magistrate who recorded the confessional statement has not been examined. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary and the same authorises the court to presume that any statement as to the circumstances under which It was taken are true and that such confession was truly taken in accordance with law. In the instant case, the learned Magistrate, as observed above, did not record the statement of the accused/appellants in accordance with law and even a certificate by the learned Magistrate has not been appended to the said statement to the effect that he was satisfied that the confession was voluntary and the same was read over to the person making it and admitted by them to be correct and it contains a full and true account of the statement made by him. The Apex Court in [Madi Ganga Vs. State of Orissa](#), has held that when the Magistrate record confession of the accused after putting him of necessary questions and appends a certificate with the confession and documents shows the voluntary nature of the confession, the confessional statement is admissible in evidence and the learned Magistrate need not further be examined as witness. The conviction can be based on such confessional statement if the general trend of confession is substantiated by other evidence.

7. In the instant case, there is no other evidence supporting the version recorded by the learned Magistrate as the confessional statement of the appellants and as observed above, the same was not recorded as required under the law and even the certificate has not been appended.

8. The Apex Court in [Shivappa Vs. State of Karnataka](#), has held that a confessional statement made by an accused can be treated as voluntary and the conviction can be

based on such confessional statement if such statement is recorded by the learned Magistrate in accordance with law and after giving necessary warning as required under the law. It has been held that the learned Magistrate is also required to ascertain the voluntary character of the confession. Unless such conditions are fulfilled, such confessional statement recorded u/s 164 Cr.P.C. cannot be treated as voluntary.

9. In the instant case, the so-called confessional statement of the appellants were recorded in a very perfunctory manner by the learned Magistrate. The learned trial court has convicted the appellants solely on the basis of such confessional statements. Since such statement of the appellants have not been recorded as required under the law, the conviction cannot be based on such confessional statement as the same cannot be treated as voluntary. Moreover the appellants during their examination u/s 313 of the Criminal Procedure Code have retracted such confessional statements by saying that those were made as compelled by the police and there were four police personnel including the Investigating Officer inside the room of the learned Magistrate, while such statements were recorded.

10. In view of the above, we have no alternative but to set aside the judgment of conviction passed by the learned court below in so far as the appellants are concerned, which we accordingly do. The appellants are set at liberty, if they are not wanted in any other case.

The appeal, is accordingly, allowed.