

(1997) 02 MP CK 0009

Madhya Pradesh High Court**Case No:** Criminal Appeal No. 430 of 1987

Nanhibai

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision: Feb. 25, 1997**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 164(2), 164(4), 281

Citation: (1997) JLJ 97 : (1997) 2 MPLJ 426**Hon'ble Judges:** Usha Shukla, J; D.M. Dharmadhikari, J**Bench:** Division Bench**Advocate:** S.C. Datt and Vasant Danial, for the Appellant; Alok Aradhe, Government Advocate, for the Respondent**Final Decision:** Allowed

Judgement

D.M. Dharmadhikari, J.

The facts of this case tell a very tragic tale. It is a sad commentary on the pathetic condition of women in Indian Village community.

The conviction of the present appellant Nanhi Bai Gond who has appealed to this Court from Jail is based on her alleged confessional statement made by her u/s 164, Criminal Procedure Code to Judicial Magistrate First Class, Sehore. She is charged u/s 309, Indian Penal Code for attempt to commit suicide and u/s 302, Indian Penal Code for causing death of her children Ku. Laxmi Bai 3 years, Ku. Ganga Bai 10 years, Ku. Ayodhyabai 6 years and Chatursingh 8 years. She is also charged for offence u/s 436, Indian Penal Code for putting fire to the house of her husband.

The woeful tale that she is alleged to have voluntarily told in her confessional statement (Ex.P. 30) to Judicial Magistrate is as under :-

She was married to Harisingh (P.W.2) who used to ill-treat her. She and her children were beaten by him. On the previous night there was a minor mishap. The domestic

cattle had gone astray. The members of her family quarrelled with her and abused her filthily. She reported the matter to her husband Harisingh who instead of supporting her gave her or beating. The incident led her to utter desperation. She thought that there was no point in leading such a miserable life and it was better for her to die. At about 4.00 in the early morning her husband had left for the field. She then went out of the house alone to commit suicide. When she had gone about 5 to 10 paces, a thought crossed her mind as to who would look after her children after her death. She then returned and took all the three children along with her and the youngest one in her lap. She then went to the well near the forest and pushed all her three children in the well. She herself jumped into the well along with her youngest child in her lap. The water in the well was not deep enough. She was not drowned, although all the four children were drowned. There was a pole lying in the well and with the help of it she came out of the well. She returned to her house with wet clothes and started warming herself near the fire. At the dawn her husband came and questioned her about the children. She then started weeping and when the husband started beating her again, she gave a false story that during his absence two thieves had entered the house and threw all four children in the well. Her husband then called P.W. 4 Khusilal and Kalluram and a village teacher. The matter was also reported to P.W. 3 Ramchandra. The villagers to whom the matter was reported then went to the well. According to appellant when she returned to her house and found the beds of children empty, she felt disgusted with her life and thought "what was the use of her house and all the grains stored there". She, therefore, out of sheer desperation put fire to all the belongings and thus engulfed the whole house to fire. When her husband returned she was sitting outside the house which was on fire. When the Judicial Magistrate put a question to her as to why she has done such an act, her reply was that her Devar Ramsingh had an evil eye on her and in fact had made overtures towards her. She said that all her members of the family and relations were continuously tormenting her and her children. They were beaten and not even given sufficient food. She, therefore, decided to commit suicide and as there would have been nobody to look after her children she jumped into the well along with her children.

At this stage it may be mentioned that P.W. 2 Harisingh (her husband) did not support the prosecution case and was declared hostile but in his cross examination nothing material has been elicited against the appellant. The other witnesses P.W. 3 Ramchandra, P.W. 4 Khusilal, P.W. 5 Kashiprasad and P.W. 6 Ramsingh all have been declared hostile and were cross examined with no positive help to the prosecution case. The post mortem report and the medical evidence of Dr. G. T Khemchandani confirmed the fact that all the four children died of asphyxia and may be due to drowning.

The Judicial Magistrate Shri Anil Pare was also examined by the prosecution as P.W. 10 to prove the recording of confessional statement Ex. P. 30. He stated that provisions of Section 164, Criminal Procedure Code were in letter and spirit

followed.

Shri Vasant Danial learned counsel volunteered to extend free legal aid to the appellant prisoner.

We have also heard Shri Alok Aradhe, G.A. for the State.

The tragic story revealed from the alleged judicial confession made by the accused is pathetic. The provisions of Section 309, Indian Penal Code, only because of such cases was held by the Supreme Court to be ultra vires and violative of Article 21 of the Constitution. The judgment is [P. Rathinam/Nagbhusan Patnaik Vs. Union of India and another](#), . The aforesaid decision of the two Judges of the Supreme Court was, however, overruled by the larger bench of the Supreme Court in [Smt. Gian Kaur Vs. State of Punjab](#), .

The discussion on the law and morality in the aforesaid decisions of the Supreme Court, however, has some relevance in deciding the question of quantum of punishment. It is commented that such offenders deserve compassion and reformation than punishment.

On our request Shri S. C. Datt, Senior Advocate, also appeared and addressed the Court as amicus curiae. We express our gratitude for the free legal aid that he extended in this case assisted by learned counsel Shri Vasant Danial.

On behalf of the prisoner it is argued that the alleged judicial confession recorded by the Magistrate Anil Pare (P.W.10) does not fully satisfy the requirements of Section 164, Criminal Procedure Code. It is argued that in order to ensure that the confession was made voluntarily, the learned Magistrate ought not to have put any questions to her so as to lead her to make statements. It is submitted that the contents of the Judicial statement (Ex.P.30) show as if the Judicial Magistrate had subjected her to an examination or cross examination as is done of a witness. The procedure adopted by the Judicial Magistrate is said to be contrary to the requirements of Section 164, Criminal Procedure Code. Strong reliance is placed on decision in Mysore Re Nadegowda AIR 1957 Mys 50 and Tilak v. State 1978 JMPJ 22.

On behalf of the G. A. reliance is placed on [Madi Ganga Vs. State of Orissa](#), [Bheru Singh Vs. State of Rajasthan](#), , Kartar Singh v. State of Punjab , Kripa Shankar Rai v. State of U. P. It is urged that the confessional statement was recorded in accordance with the provisions of Section 164, Criminal Procedure Code although it was subsequently retracted by the accused in her examination u/s 313, Criminal Procedure Code. Yet such retracted confession can be relied upon for basing the conviction.

The only question that arises for decision in this appeal is whether the conviction is sustainable on the basis of the evidence of the alleged judicial confession made by the accused u/s 164, Criminal Procedure Code. The first requirement of Section 164, Criminal Procedure Code is that the Judicial Magistrate must upon questioning the

person making the confession "be satisfied on reasons leading him to believe that it was made voluntarily". The confession under Sub-section (4) of Section 164 could be recorded in the manner provided in Section 281 for recording the examination of an accused person but the procedure does not permit putting the person leading questions or cross examining him. The Courts insist on strict compliance of the provisions of Section 164(2) and 164(4), Criminal Procedure Code for the obvious reasons that in order to base conviction on confession, all possibility of exertion of any pressure, tutoring or threat should be ruled out. The Court trying the offence should have before it the exact version of the confession given by the accused concerned to decide whether the confession is voluntary and sincere.

It is also well settled that in order to sustain conviction on the basis of confessional statement there should be, at least general corroboration of the same by some other evidence. See [Subramania Goundan Vs. The State of Madras](#), which was followed in Madhi Ganga's case (supra) and contains the following passage :-

"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. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue."

In order to prove the confession it is in fact even not necessary to examine the Judicial Magistrate who recorded the confession and non-examination would not in any manner impinge upon the evidentiary value of such confession. But when the Judicial Magistrate who recorded the confession is examined his statement should be looked into for the purpose of finding out whether the provisions of Section 164, Criminal Procedure Code were in fact followed in letter and spirit.

In the above legal background, we have examined the evidential value of the alleged judicial confession made by the accused. Investigating Officer P.W. 8 R. S. Sharma admitted that the appellant was arrested by the police on 22-2-1985. On that day itself an application was made to the Judicial Magistrate by the police for recording the confessional statement of the appellant. The appellant was produced before the Judicial Magistrate on 23-2-1985. According to the Judicial Magistrate Shri Anil Pare (P.W. 10) on that day she was explained that any confessional statement made by her might be used against her. She was given time to reflect and give Second thought to the same. She was then sent back to Sehore Sub-Jail and was reproduced on 25-2-1985 before the Judicial Magistrate. The following questions were put to her by the Magistrate and the answers given are as under :-

iz- D;k rqEgsa fdlh iqfyl vf/kdkjh us ;k vU; fdlh O;fDr us /kedh rks ugha nh fd vkt rqe xokgh nks\\

m♦kj& ugha] fdlh us /kedh ugha nhA

iz- D;k rqEgsa fdlh iqfyl vf/kdkjh ;k vU; O;f us vkt c;ku nsus ds fy, cpu rks ugha fn;k ;k fnyok;k ;k mRizsfjr rks ugha fd;k\\

m k & ugha] fdlh us Hkh u rks cpu fn;k vkSj u gh mRizsfjr fd;kA

It is surprising that the learned Magistrate who recorded the confession did not ascertain from the woman that she was of aboriginal tribe Gond. In paragraph 8 in his cross examination the Magistrate states that he did not know that she was an Adivasi woman. He, however, states that he found that she was fully understanding Hindi and was also talking in Hindi. Even if that be so, it is difficult to believe that she could understand the meaning of such highly literary words as (?) and (?). They are the words used by literate people when using chaste Hindi. The contents of the judicial confession show that she has given a version in a most methodical and coherent manner as is not expected from an aboriginal woman living in a village.

In the first part of the confession the Magistrate put her certain questions to elicit the background of the incident. Then he led her to speak more and more by every time putting a question (?) On such repeated questioning it appears that she had given in proper sequence a coherent version of the incident in all its stages and parts. In first of her versions she narrates how she was being ill treated and dominated by neighbours and relations. Her next version is that when the matter was reported to her husband he beat her. She then felt pensive throughout the night and was repenting on her life full of agony. According to her then she proceeded at 4.00 in the early morning. At every stage she was again questioned by the learned Magistrate to lead her to go on narrating the whole story. In the subsequent part of her version she stated how she left the house alone and later worried with the thought of her children took them along with her to commit suicide with all of them.

On further questioning then she narrated how she came out with the help of a pole in the well and when asked by her husband gave a false story of thieves having thrown the children in the well. The learned Magistrate then went on questioning her and thereafter she narrated how her husband reported the matter to the villagers who came on the scene. On further questioning she said that she had also put fire to all the belongings in the house. The learned Magistrate went on questioning her and asked her why she had done such an act. She then answered that her Devar Ramsingh had made vulgar advances towards her which she repelled. She also stated that she was subjected to beating and she herself and children were made to starve. The reason she gave for attempt to commit suicide with her children was that she was completely disgusted with her torturous life. The last question put to her was whether she had to state anything further and her answer was that she was still carrying in her womb five months child.

The Judicial Confession, as has been recorded, does not show that on authentic record of the version given by her in her own language was put down on the paper

by the learned Magistrate. The appellant was admittedly of the scheduled tribe Gond. She is illiterate as she has put her thumb mark on the confessional statement. It was not expected of her to have given such a coherent, clear and cogent version in proper sequence with full background and the details of the actual incident, to make out ingredients of all offences Under Sections 309, 302 and 436, Indian Penal Code levelled against her.

In case of AIR 1948 344 (Nagpur) (on which reliance was placed on behalf of the appellant) a judicial confession recorded in somewhat similar manner was not relied upon for conviction and it was commented as under :-

"The substance of the confession (Ex.P.24) of Bhukhin has been given in paragraph 5 of our judgment. The confession is full and detailed and the facts, have been stated in natural and proper sequence. The entire prosecution case has been set out therein. Everything necessary for the prosecution to establish a charge of murder has been admitted. In her confession she admitted that she had criminal intimacy with Malikram and that she used to meet him at the house of Bedmati. Bhukhin stated that there was a serious quarrel with her husband who beat her severely and threatened to kill her and Malikram, that all the four accused conspired to kill Gajraj and that in pursuance thereof poison was procured and mixed in food which was served on Sunday night when Gajraj took his meal. In our opinion it was impossible for her to make a coherent and a complete statement which she did unless she was tutored by someone familiar with the requirements of the law. The internal evidence furnished by the contents of the confession leave no room for doubt that it was not made voluntarily. As the confession was not voluntary it must be discarded."

The aforesaid decision of the Nagpur High Court (supra) has been relied by the Division Bench of this Court in Tilak v. State of M.P. (supra) and in rejecting similar judicial confession this is what the Division Bench observed on the requirements of Section 164, Criminal Procedure Code.

"The above law shows that it should be the entire initiative of the prisoner himself to state whatever he wants to depose. The confession should not only be voluntary but also should be uninfluenced by any other factor. It is not open to a Magistrate recording the confession to lead the accused as if he is examining a witness. The accused should be left to himself to state whatever he likes and it is not the business of the Magistrate to lead him or to examine him like a witness."

In the instant case firstly the learned Magistrate did not make sincere efforts to ascertain that she was not making statement under any threat, coercion or inducement. She was a Gond and illiterate woman. She was led to make a statement in sequence as if she was being examined as a witness. She was not left to herself to make a statement in a manner she liked. The statement shows lack of initiative on the part of the prisoner herself. She was produced in police custody. Later on she was sent for few days to Sub-Jail. The possibility of she being influenced by the

Police and coerced by her husband cannot be ruled out.

In her examination u/s 313, Criminal Procedure Code in reply to question Nos. 10 and 11, she categorically denied that she had given any confessional statement which was read over and explained to her. The confession has thus been retracted.

There is no quarrel with the proposition advanced on behalf of the State that even a retracted confession could be a basis of conviction, but as held by the Supreme Court in the case of *Madhi Ganga* (supra) and in [Shrishail Nageshi Pare Vs. State of Maharashtra](#), for basing conviction on retracted confession it is prudent for the Court to look for at least general corroboration from other independent source of evidence. In the present case, all the witnesses examined by the prosecution were declared hostile and in their cross examination nothing could be brought out against the accused. There is not even an iota of corroborative evidence. In our opinion it is, therefore, unsafe to base the conviction solely on the uncorroborated retracted judicial confession. The appellant deserves benefit of doubt.

Consequently, the appeal succeeds and is hereby allowed. The judgment of conviction and sentence dated 1-1-1987 is hereby set aside and the appellant is acquitted of all the charges framed against her. She be set forthwith at liberty if not otherwise required in any other case.