Chhotelal Vs State of Madhya Pradesh

None

Court: Madhya Pradesh High Court

Date of Decision: March 16, 1978

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 213, 227, 435, 478#Evidence Act, 1872 â€" Section 133, 3, 30#Penal Code, 1860 (IPC) â€" Section 201, 302, 34

Citation: (1978) CriLJ 1559 : (1982) ILR (MP) 77 : (1978) JLJ 718 : (1978) 23 MPLJ 547

Hon'ble Judges: U.N. Bhachawat, J; N.C. Dwivedi, J

Bench: Division Bench

Judgement

U.N. Bhachawat, J

This is an appeal by the accused challenging his conviction u/s 302 of the Indian Penal Code and sentence of imprisonment for life, for having

committed the murder of Dojabai, his wife on the night intervening between 14-1-1972 and 15-1-1972 at Kymori hill, awarded by the First

Additional Sessions Judge, Jabalpur. vide his judgment dated 27th Nov. 1972, in Sessions Trial No. 75 of 1972.

The accused is the resident of village Majhagawan, police-station Katangi. At the relevant time he was residing at Moharghat of the river Hiran

which falls in the village Barpata, in a hut along with his wife, the deceased. The accused had no Issue. The in-laws of the accused belong to the

village Patan.

It was alleged by the prosecution that Chetsingh (P. W. 1) used to visit frequently the hut. He also used to visit the deceased at the hut during the

absence of the accused. He had developed illicit connection with the deceased. Two days before the fateful day when the accused returned from

the river Hiran to his hut, he found Chetsingh (P. W. 1) in his hut in the company of his wife. He was annoyed at this and warned Chetsingh (P. W.

1) not to visit his hut during his absence. On the midnight of 12-1-1972, as a result of conspiracy between the deceased and Chetsingh (P. W. 1),

the deceased with her bag and baggage left the hut. During the night, when the accused got up and did not find her at first he thought that she must

have gone to answer the nature''s call, but when she did not return till after the sun-rise, he started for her search. In the course of his search he

also met Chetsingh (P. W. 1); but Chetsingh (P. W. 1) who had kept the deceased concealed in his house, did not disclose anything about the

whereabouts of the deceased to the accused. On the contrary, stating his ignorance, he gave his cycle to the accused to facilitate his travel in

search of the deceased. On 14-1-1972, at about 8.00 p, m. in the course of his search when the accused; happened to meet the deceased

accompanied by Chetsingh (P. W. 1) at a nala near the village Barpata, he slapped her and took her away to leave her at her parents" place at

Patan and while leaving he had threatened Chetsingh (P. W. 1) that he would see him after his return from Patan. When the accused was so

proceeding towards Patan he took the deceased to the Kymori hill; dealt a severe lathi blow on her chest consequent to which she fell down

unconscious and then the accused throttled her to death. Thereafter, the accused with the intention of causing disappearance of evidence of the

offence, lifted the dead body; set fire to it on the cart way and ran away to his hut, where he put off his blood stained clothes, tore them to pieces

out of which some pieces he, concealed in the hut and rest were burnt.

On 15-1-1972, Lattu (P. W. 2) who happened to see the dead body of the deceased informed of it to his father Lallu Kotwar (P. W. 12) who in

his turn informed the police-station at Katangi which registered the Marg Report (Ex. P. 18).

After usual investigation, the police put up a challan against the accused and Chetsingh (P. W. 1) for the offences u/s 302 read with Section 34 of

the Indian Penal Code in the Court of Magistrate First Class, which Court committed accused-appellant to stand his trial for an offence u/s 302

and accused Chetsingh, now prosecution witness No. 1, u/s 302 read with Sections 34 and 201 of the Indian Penal Code to stand his trial in the

Court below.

As the order sheet dated 13-11-1972, in the original record of the trial Court indicates, on this date allowing the application of the Public

Prosecutor on behalf of the State u/s 561A and Section 435 of the Cr. P.C., 1898 (hereinafter referred to as "the old Code") praying that the

Court may either ignore the charge framed against accused Chetsingh (now P. W. 1) by the committing Court or make a reference to the High

Court in that behalf, the Court ordered to ignore the charge against accused Chetsingh (now P. W. 1) and directed the prosecution to produce him

as a witness in the case. The relevant excerpt of the order is set out below:

The Public Prosecutor makes an application under Sections 561A and 435 both of the Cr. P.C. for ignoring the charge framed against accused

Chetsingh (as so far) or to make a reference to the High Court in his behalf.

Having heard the parties, I am of the clear opinion that this is a fit case for exercising of inherent jurisdiction u/s 561-A of the Cr. P.C. Therefore, I

proceed to ignore the charge against Chetsingh accused under Sections 302 and 201 I.P.C.

However, he shall be produced tomorrow as a witness. A direction to this effect shall be given to the Superintendent, Central Jail, Jabalpur.

The accused Chetsingh. who was produced in custody was examined as a witness on behalf of the prosecution as Prosecution Witness No. 1 on

14th and 15th Nov., 1972; but was ordered to be produced every day till the trial was concluded and the impugned judgment was delivered on

27-11-1972. On this date Chetsingh was ordered to be released. The relevant extracts relating to Chetsingh from the order-sheets of the trial

Court are set out below:

14-11-1972 - Chetsingh is produced in custody as a witness. Properties produced by the Nazir of this Court. The Public Prosecutor opened the

case of prosecution and examined Chetsingh. His examination in-chief has not been concluded till 5 p.m. Therefore, Chetsingh is directed to be

produced as a witness tomorrow.

15-11-1972 - Chetsingh is also produced in custody. Property is produced by the Nazir of this Court.

The evidence of Chetsingh was concluded and after cross-examination, he was discharged.

However, at the request of the Public Prosecutor Chetsingh is directed to be produced tomorrow.

16-11-1972 - Witness Chetsingh is also produced in custody,

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At the request of the Public Prosecutor, the witness Chetsingh is directed to be produced tomorrow.

17-11-1972 - Chetsingh is also produced as a witness....

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The accused makes an application that the evidence of Chetsingh (P. W. 1) may not be considered in this trial. Having heard the parties and even

as conceded by the learned Counsel of the accused, this matter has been already dealt with by me at the earliest and before the trial commenced

here. (Please see Order Sheet dated 13-11-72). Therefore, this application must fail as infructuous.

18-11-72 - Chetsingh is also produced as a witness...

Witness Chetsingh is directed to be produced on this date as the trial is still not over.

22-11-72 - Witness Chetsingh is also produced...

Witness Chetsingh is directed to be produced tomorrow as the trial is still not over.

23-11-72 - Chetsingh is also produced in custody...

Chetsingh who is a witness is also remanded to jail custody as the trial is over. He be produced on 27-11-72.

27-11-72 - Witness Chetsingh is also produced. As the trial is over, he is ordered to be released, and set at liberty immediately.

We have set out the above relevant excerpts from the order-sheets of the trial Court for the purpose which would be indicated from the discussion

to follow.

At the outset it may be said that there is no ocular evidence, The trial Court has rested its judgment on the circumstantial evidence which has been

summed up, in para 28 of the impugned judgment, which is set out below:

28 .... To sum of up:

(i) The deceased Dojabai was last seen alive in the company of the accused.

(ii) The medical evidence clearly supports the instant version of prosecution of throttling in entirety.

(iii) Bloodstained clothes of the accused discovered by him and on search of his house, latter having the thumb impression of the accused,

predicating his presence at that time clearly incriminates the accused in the instant behalf.

(b) False explanation in these behalves is a further circumstance against the accused.

(iv) Disclaimer of the bloodstained articles by the accused is a further circumstance to indicate his guilty conscience and above all, his incrimination

in the instant behalf.

(b) The want of knowledge of the seizure of the clothes after the search which also indicates his presence at this time must show both these pieces

being indicated as shown little earlier, namely, that he has guilty conscience and is clearly implicated in the present behalf.

(v) Medical evidence showing that the clothes of the assailant may be bloodstained and this being found so here.

(vi) The absconding of the accused soon after the commission of this diabolical act by him.

(b) His false explanation in the instant behalf is a further circumstance against him.

(vii) Accused being annoyed by the intimacy of Chetsingh (P. W. 1) with his wife just before her flight from his house.

(viii) Accused threatening to cut the nose and ears of his wife soon after the flight and this being vouchsafed by his wife''s sister''s husband. Indeed,

the talk transpired at the time of his visit to his place which is accepted by the accused.

(ix) There is ample motive for this murder. It is usual green-eyed monster jealousy wherein a woman is involved.

(x) Then, we have the bloodstained clothes of the deceased.

It may be said here that the learned Counsel, Shri N. C. Beohar, for the appellant, did not assail the finding of the trial Court that Dojabai is dead

and has died a homicidal death - in our view rightly. In this view of the matter, it is not necessary to rewrite the evidence and reiterate the

reasonings of the trial Court for this finding.

Now the main point for consideration is whether the present appellant has been rightly held by the trial Court to be the perpetrator of the crime.

From amongst the circumstances relied upon by the prosecution and accepted by the trial Court, the most vital circumstance is that the deceased

Dojabai was last seen alive in the company of the accused. It is an agreed submission that this is the main link in the chain of circumstances and if

this link is held to be not proved it certainly knocks the bottom out of the prosecution case. It is undisputed that to establish this circumstance the

only evidence is the testimony of Chetsingh (P. W. 1) his evidence is the main stay of the prosecution.

Before dilating on the merits of his testimony we shall proceed to examine whether Chetsingh (P. W. 1) was a competent witness.

The commitment and trial in the instant case was under the old Code. The appeal was also filed when the old Code was in force. Therefore, the

old Code shall apply to the instant case. From the facts stated in the foregoing paras. 5 to 8 it is evident that Chetsingh (P. W. 1) was co-accused

and committed to stand his trial along with the accused-appellant; but the trial Court ignored the charge against him and did not try him. These facts

pose a serious question as to what was the position of Chetsingh when he was examined as a witness by the prosecution.

The procedure adopted by the trial Court, of ignoring the charge against Chetsingh; examining him as a witness against the other accused namely,

the appellant and then releasing after the judgment against the appellant was pronounced, its evolution is in utter disregard of the provisions of old

Code. We are unaware of judicial recognition of the use of expression. I proceed to ignore the charge"" and as such it passes our comprehension as

to what the learned Additional Sessions Judge of the trial Court meant thereby and what judicial meaning can be assigned to it. Taking the plain

meaning of the expression, it means the charge framed against Chetsingh by the Committing Magistrate remained; but the trial Court chose to

examine him as a witness against the other accused, namely, the appellant instead of holding a trial against him.

In view of Section 215 of the old Code which reads thus -

A commitment once made u/s 213 by a competent Magistrate or by a Civil or Revenue Court u/s 478, can be quashed by the High Court only,

and only on a point of law.

The trial Court was not competent to quash the order of committing the accused Chetsingh (now P. W. 1) for trial by it. Thus the ignoring of the

charge cannot be taken to be as quashing the commitment. We then have Section 226 of the old Code which reads thus - ""When any person is

committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the State,

may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of

charges."" According to this also, there is no provision for ignoring the charge or dropping the charge. Then there was Chap. XXIII in the old Code

instituted - ""of Trials Before High Courts and Courts of Session"" which was divided in two parts - "A- Preliminary. B - Commencement of

Proceedings. In this Chapter also there was no provision for ignoring the charge, or dropping the charge or for discharging the accused. At this

stage it would be pertinent to recall the fact that on 4-10-1972, the trial Court had ordered for the production of the accused persons on 13-11-

1972 and it was on that date when the accused persons were brought before it; that the trial Court ordered for ignoring the charge against

Chetsingh. Section 271(1) of the old Code which reads thus -

When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and

explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

provides for reading out, explaining of the charge to the accused and asking him whether he was guilty of the offence charged or claims to be tried.

It nowhere provided the course adopted by the trial Court. We would further like to impress here that if we take the order of ignoring the charge

to mean as discharging the accused as already said by us, the trial Court had no such power under the old Code. It is now that by virtue of Section

227 in Chap. XVIII intituled ""Trial before a Court of Session"" that the power of discharge or of framing charge which was hitherto exercised by

the committing Magistrate has been given to the Sessions Court. We do not find a corresponding Section in the old Code. Section 227 of the new

Code reads as under:

Discharge - If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the

accused and the prosecution in this behalf. the Judge considers that there is not sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing.

The upshot of the foregoing discussion is that the trial Court had neither the power to quash the commitment nor to drop the charge nor to

discharge the accused. In view of the aforesaid specific provisions in the old Code, the order of ignoring the charge cannot be interpreted to mean

quashing of charge or discharge of the accused and the only course left to the trial Court was either to refer the matter to this Court for quashing

the commitment against Chetsingh or to proceed with the trial. The trial Court was not competent to act in the manner it acted even u/s 561-A of

the old Code, in the purported exercise of inherent powers. Without going into the question whether the lower Courts are competent to act in

exercise of inherent power, for the simple reason that such power cannot be invoked on a point where the Code has made express provisions; we

hold that the trial Court was not competent to pass an order of ignoring the charge against Chetsingh (P. W. 1).

In the result we are of the opinion that the trial Court was not competent to order ignoring of the charge against Chetsingh (P. W. 1). It was thus

void. As a sequel to this finding, Chetsingh (P. W. 1) continued to be an accused. Hence the trial Court could examine him as a witness in the trial

only after tender of pardon as provided in Section 338 of the old Code. This Section reads as under:

338. At any time after commitment, but before judgment is passed, the Court to which the commitment i8 marie may, with the view of obtaining on

the trial the evidence of any person suoposed to have been directly or indirectly concerned -in, or privy to, any sirh offence, tender, or order the

committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

It is undisputed and as clearly borne out from the order sheet of the trial Court dated 13-11-72 reproduced hereinabove in para 7 of this

judgment, no pardon was tendered to fhetsingh (P. W. 1) before examining him as a witness. Chetsingh (P. W. 1) was not examined as an

approver. In this view of the matter Chetsingh (P. W. 1), a co-accused who was committed along with the accused-appellant was not a competent

witness in the trial. In this respect we can do no better than referring to the observations of their Lordships of the Supreme Court in Lt.

Commander Pascal Fernandes Vs. The State of Maharashtra and Others,

The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty or arraignment, or (c) to

offer no evidence and permit his acquittal, or (d) to enter a nolle prose-qui. In our criminal jurisdiction there is a tender of a pardon on condition of

full disclosure. Section 8(2) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a

witness in the same case against another accused.

(Emphasis supplied by us).

Further it is clearly borne out on reading Sections 342-A and 343 of the old Code also that an accused person is not a competent witness except

as provided under these sections. The material part of Section 342-A and S. S43 are set out below:

342-A - Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in

disproof of the charges made against him or any person charged together with him at the same trial:

Provided that -

(a) he shall not be called as a witness except on his own request or

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343 - Except as provided in Sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused

person to induce him to disclose or withhold any matter within his knowledge.

Admittedly in the instant case the conditions provided in the forequcted Sections did not exist. It is significant to note that neither there was a

prayer by Chetsingh to examine himself as a witness. It is also pertinent to note that u/s 342-A also the accused is a competent witness for the

defence and not for the prosecution. As already stated, there was no prayer at all for a pardon from any side; hence the question of tendering

pardon did not arise, nor it is submitted or shown to us that the trial Court had granted pardon nor there was material before the Court for

exercising the jurisdiction u/s 338 of the old Code.

We would further like to state here that as we have held herein-above, Chetsingh continued to be an accused in the case, he was not a competent

witness even as an accomplice u/s 133 of the Evidence Act.

Even postulating that the statement of Chetsingh was a statement of co-accused, it cannot be considered u/s 30 of the Evidence Act. Firstly he was

not tried jointly with the accused-appellant and secondly he did not make a statement Incriminating himself along with the accused-appellant.

Further the statement of co-accused u/s 30 of the Evidence Act is not an evidence. In this respect we shall like to refer the following observations

of the Supreme Court in Hari Charan Kurmi and Jogia Hajam Vs. State of Bihar,

Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30 the fact remains that it is not

evidence as defined by Section 3 of the Act. The result. therefore, is that in dealing with a case against an accused person, the Court cannot start

with the confession of co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with

regard to the quality and effect of the said evidence then it is permissible to turn to the confession in order to receive assurance to the conclusion of

guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in Section 30.

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As we have already indicated, it has been a recognised principle of the administration of criminal law in this country for over half a century that the

confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to

accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

In the light of the foregoing discussion, we are of the firm opinion that statement of witness is competent.

Now we shall consider the statement of Chetsingh on merit. Admittedly on his own showing he was having clandestine relations with the deceased

which the accused had resented. He, therefore, bore hostility against the accused. He has also deposed that the deceased had come to him leaving

the accused and he had not disclosed this fact to the accused when he (accused) had come in- search of her and inquired from him about her; that

he was going with the deceased towards Patan side being afraid of his brother and that lest he be suspected in the murder of the deceased he had

thrown the box of the deceased which was lying at his place in the river. Thus it can reasonably be suspected that in order to save his own skin

Chetsingh had involved the accused-appellant. This apart, from the evidence of this witness, it is also not borne out that he had seen the accused

and the deceased together near to the time and place of incident. Then we also get from his evidence that he had not disclosed the fact of his

having last seen the accused with the deceased to any one except Jawaharsingh, who is not examined. He has admitted that he is under police

surveillance. His evidence does not appear to be natural and consistent also. In this view of the matter, we do not find this witness to be

trustworthy,

As a result of the foregoing discussion the first circumstance of last seen together relied by the trial Court is repelled by us.

As mentioned hereinabove after having not accepted the first circumstances, nothing survives to uphold the conviction of the accused, and as such

it is not necessary to consider the other circumstances enumerated and accepted by the trial Court. However, we would like to observe that the

other circumstances relied upon by the trial Court are not only not established; but are preposterous. It is very difficult to believe that the accused

after the murder would burn some of the pieces of his bloodstained clothes and would preserve and concealed the rest. How the bloodstained

clothes of the deceased in absence of grouping could be a circumstance to connect the accused with the crime. Further when there is no evidence

at all to connect the accused, how the medical evidence would be a piece of corroboratory evidence against the accused and it can be said that the

explanation given by the accused was false warranting an inference against the accused.

In the result, the appeal merits to be allowed; is accordingly allowed; the impugned judgment is set aside; the conviction and sentence of the

accused-appellant u/s 302 of the Indian Penal Code are set aside and he is ordered to be released forthwith, unless he is required to be detained in

any other offence.