

**(1929) 06 CAL CK 0023**

**Calcutta High Court**

**Case No:** None

Khiro Mondal

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** June 12, 1929

**Acts Referred:**

- Evidence Act, 1872 - Section 24
- Penal Code, 1860 (IPC) - Section 395

**Citation:** AIR 1929 Cal 726

**Hon'ble Judges:** S.K. Ghose, J; Cuming, J

**Bench:** Full Bench

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### **Judgement**

Cuming, J.

This is an appeal by one Khiro against the order of the learned District Judge of Rajshahi convicting the appellant u/s 395, I.P.C., and sentencing him to three years" rigorous imprisonment. The appellant was tried jointly with another man Sabur Sheikh. Sabur Sheikh was acquitted. The dacoity with which we are concerned took place in the house of one Prosanna Chandra Mandal on 27th July 1927. The usual investigation followed but no clue was obtained.

2. Then later in connexion with the investigation of another dacoity the present accused Khiro made some statements to the police as the result of which he was taken before a Deputy Magistrate where he made a statement which forms the basis of the present case. Khiro and Sabur were committed to the Sessions with the result already noted. It will be seen and it is admitted that the only evidence against the present appellant is his own confession which was subsequently retracted.

3.The appellant has contended that for certain reasons the Judge should have held that the confession was not voluntary and so inadmissible in evidence and that being so the Judge should have told the jury that there being no evidence against the accused they should return a verdict of not guilty. Further that certain

formalities not having been complied with the confession for that reason was inadmissible. The admissibility of evidence is a question for the Judge.

4. Section 24, Evidence Act, provides that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, etc., in other words whether the confession is a voluntary one.

5. It is for the Judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false.

6. I do not think it is open to the Judge to ask the jury to determine whether it is voluntary or not even though that is a question of fact for the result would be that the jury would have had put before them evidence which was inadmissible in evidence and the difficulty of removing the effect of the inadmissible evidence from the jury's mind is obvious.

7. In dealing with this point the learned Judge charged the jury as follows : "So far as the accused Khiero is concerned the only evidence against him, is his retracted confession (the confession Ex. 4 read).

8. Khiero has alleged that the confession was not voluntarily made and he was tutored to make the statements. Confession which is not voluntary is not admissible in evidence. With regard to the confession two main points have to be considered:

(1) Whether it was voluntarily made.

(2) Whether it is true.

9. The Sub-Divisional Magistrate who recorded the confession has deposed to the effect that he gave warning to the confessing accused before recording the confession. He was satisfied that it was voluntarily made. I have therefore admitted the confession and provisionally answered the first question. It is for you to determine whether the confession is true or not. You will have to consider the circumstance in which it was made.

10. You will also have to consider the suggestion and allegation made by the ac-accused. You must remember that when an accused alleges he made a confession under inducement and threat from persons in authority, the onus is on him to prove the allegation. It is not of course possible to prove such allegations even if they were true."

11. The first difficulty is to determine what is the meaning of the word "provisionally." As far as I can see the learned Judge has not himself determined whether the confession was voluntary or not. He says the Magistrate has found it "so and so he admits it "provisionally."

12. Reading the whole of the paragraph beginning with:

I have therefore admitted the confession in evidence and have provisionally answered the first question. It is for you to determine whether the confession is true or not. You will have to consider the circumstances in which it was made. You will also have to consider the suggestions and allegations made by the accused. You must remember that when an accused alleges that he made a confession under inducement and threat from persons in authority the onus is upon him to prove the allegations. It is not of course possible to prove such allegations even if they were true,

the conclusion to which I have come is that the learned Judge left it to the jury to determine whether it was or was not voluntarily made and in other words was it admissible. This is the only way in which I can attach any meaning to the expression "provisionally." If that is so the Judge has been guilty of a serious error of law for it was for him and not for the jury to determine its admissibility. The Judge has committed a further error in directing the jury. He has told them that the accused must prove any threat or inducement but that it is impossible to prove such allegation even if true.

13. In other words, that the law places on the accused a burden which it is impossible for him to discharge. In other words that an accused person can never prove that a confession is not voluntary. The proposition requires only to be stated to be rejected.

14. It is not necessary for me in dealing with this point to decide whether the onus of proving that a confession is voluntary is on the accused or the prosecution. The point is not free from controversy.

15. Supposing, however, for the sake of argument that the burden was on the accused it was a clear misdirection to tell the jury that the accused could not possibly discharge this onus. It might no doubt be difficult, in some case very difficult but it is not always impossible and to tell the jury so is a grave misdirection. It has been suggested that in this case the accused never attempted to substantiate the allegation by evidence. Perhaps he did not but it would be still open to him to show that the circumstance under which it was made would justify the inference that it was obtained by threat or inducement.

16. It is to be remembered that the expression used in Section 24, Evidence Act, is not "proved" but "if it appears" which is not a strong expression as proved. Bearing in mind that this confession is the sole evidence against the accused I must hold that there has been such serious misdirection in dealing with it as would be fatal to the trial.

17. If the Judge had determined that it was not voluntary his duty was to tell the jury that there was no evidence against the accused and direct a verdict of not guilty.

18. We must therefore set aside the verdict of the jury and the order of the Judge. Whether the appellant should be retried we leave to the decision of the Local Authorities.

S.K. Ghose, J.

19. I agree.

20. Pending the decision of the Local Authorities as to whether the appellant will be retried or not he will continue on bail.