

Khiro Mondal Vs Emperor

Court: Calcutta High Court

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

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 Khoro is concerned the only evidence against

him, is his retracted confession (the confession Ex. 4 read).

8. Khoro 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.