(2006) 2 ILR (Cal) 51

Calcutta High Court

Case No: Criminal Appeal 66 of 2000

Rabi Sarkar		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: July 29, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 164(2)
- Evidence Act, 1872 - Section 26, 27
- Penal Code, 1860 (IPC) - Section 201, 302, 364, 376

Citation: (2006) 2 ILR (Cal) 51

Hon'ble Judges: Debi Prasad Sengupta, J; Arun Kumar Bhattacharya, J

Bench: Division Bench

Advocate: Biplab Mitra and Amajit Dey, for the Appellant;Kazi Safiullah and Ranjit Kumar Ghosal, for the Respondent

Final Decision: Dismissed

Judgement

Debi Prasad Sengupta, J.
This appeal has been preferred against the judgment and order of conviction and sentence dated 19.1.2000 passed by the learned Additional Sessions Judge, Dakshin Dinajpurat Balurghat in Sessions Trial No. 18 of 1999 (Sessions Case No. 82 of 1999) thereby convicting the accused Appellant under Sections 376/302/201 of the Indian Penal Code and sentencing him to suffer imprisonment for life.

2. The prosecution case, in short, is that on the basis of a complaint lodged by one Madan Karmakar a case was registered with Gangarampur Police Station on 11.1.99 u/s 364 of the Indian Penal Code against accused Rabi Sarkar @Dilip @ Chika. In the FIR, it was alleged that when victim Laxmi Singh aged about 6 years daughter of Late Nikhil Singh on 10.1.99 at about at about 6 P.M. was gossiping in the house of one Sagari Karmakar (P.W. 7) by wrapping her body with an old saree, the accused Rabi Sarkar

came there and snatched away that saree from Laxmi Singh and ran away, victim Laxmi followed the accused on crying and demanding that saree from him. Since then victim laxmi was missing. This incident was noticed by Sagari Karmakar (P.W. 7), Anita Karmakar (P.W. 2) and one Babun Karmakar. Victim did not return to her house on that night and accused Rabi Sarkar was also found absent his house.

3. On the following morning at about 6 A.M. Bhuni Karmakar, mother of the informant found the accused Rabi Sarkar in the house of one Rabi Karmakar and asked him about victim Laxmi. But the accused replied that Laxmi had returned to her house. The informant along with his mother and the accused Rabi Sarkar went to the house of one Shibu Saha and thereafter to the house of one Sushil Karmakar. When victim Laxmi could not be traced out, they all returned to their house. The wife of the informant at that time noticed one blood stain on the sweater of accused Rabi Sarkar and when she asked about that mark of blood on the sweater, the accused could not give any reply and left that place. When the incident was narrated to one Krishna Karmakar (P.W. 8) and Govinda Karmarkar (P.W. 6) the accused fled away from village Samarapalli.

4. The informant thereafter went to Gangarampur Police Stateion and lodged FIR against accused Rabi Sarkar u/s 364 of the Indian Penal Code.

5. The investigation was taken up by P. W. 19. On the same date, i.e. on 11.1.99 at about 11.15 A.M. accused Rabi Sarkar surrendered before the Officer-in-charge, Gangarampur P.S. (P.W. 18) and stated to him that on 10.1.99 in the evening he had taken th victim Laxmi to an open field, raped her and after killing her threw her dead body into a nearby pond. At the time of raping her he received injuries on his male organ. He further stated that he would show the places where he committed rape on the victim and had thrown her dead body. Such admission of guilt was diarised in the G.D. Entry No. 456 dated 11.1.99. P. W. 18 arrested accused Rabi Sarkar and seized his blood stained sweater.

6. P.W. 18 along with force proceeded towards the place of occurrence to pursue the statement of accused and he found P.W. 19 S.I. Rasaraj Dhar already present there. Accused Rabi Sarkar pointed out the place where the dead body of the victim was thrown and then the deadbody of the victim was lifted from the pond with the help of a "Dome" (P.W. 9). Inquest of the dead body was held in presence of P. Ws. 1,3, 4, 5 and 6 as also the accused Rabi Sarkar.

7. On completion of investigation chargesheet was submitted by the police under Sections 364/376/302/201 of the Indian Penal Code. The learned trial Judge considering the materials placed before him framed charges under the aforesaid sections.

8. To prove its case prosecution examined as many as 19 witnesses including the doctors and police personnel. None was examined on behalf of the defene. Defence plea was of innocence andlatse implication.

9. The confessional statement'' of accused was recorded by the learned Magistrate (P.W. 16) u/s 164 of the Code of Criminal Procedure.

10. It may be mentioned here that the conviction is mainly based on -

1. Statement of the accused recorded u/s 164 of the Code of Criminal Procedure.

2. Recovery of the dead body u/s 27 of the Evidence Act pursuant to the confessional statement of the accused before the police ;

3. FSL report regarding the mark of blood stain in the sweater of the accused ;

and 4. The fact that the accused and the victim was last seen together by numbr of witnesses.

11. The sequence of events in the present case is the incident of causing the victim girl aged about 6 years to follow the accused by way of snatching away her saree by the accused on 10.1.99 at 6 P.M., the incident of rape and murder of the victim Laxmi, the incident of making confessional statement by the accused and showing the place of crime to the police and othr witnesses and finally recovery of the dead body of the victim from the pond pursuant to the confessional statement of the accused.

12. The first part of the incident took place in the house of Smt. Sagari Dutta (P.W. &) She stated in her evidence that when victim Laxmi was gossiping in her house, the accused all of a sudden appeared there and snatched away one saree from her. Victim demanded that saree from the accused and followed him. This witness is corroborated by P. Ws. 1 and 2. P. W. 1 is the resident of a house adjacent to that of P. W. 7 and everything was visible from his house. He also deposed that on the date and time of incident accused appared in the house of P. W. 7, where the victim was playing with Anita @Dhepsi and snatched away one saree from the victim. Victim started crying and followed the accused to get back the saree. Victim Laxmi threafter did not return to her house on that night. P. W. 2 also corroborated the statement of P. Ws. 1 and 7. P. W. 4 Babulal Karmarkar stated in his evidence that he saw the accused Rabi Sarkar to take away *he victim Laxmi playfully along with her saree. Laxmi thereafter did not return to her house on the said night. Next comes the incident of showing the places of crime to P. Ws. 18, 19 as also other withnesses and also the incident of recovery of the deadbady pursuant to the confessional statement made by the accused and in this respect, P. Ws. 3, 4, 5, 6, 9, 18, and 19 are the witnesses, who have direct knowledge about this incident. P. W. 18 the Officer-in-charge of the P.S. stated in his evidence that on 11.1.99 at about 11.15 A.M. accused Rabi Srkar came to the police station, made a confessional statement and he also stated that he would show the places of crime if he was taken to the said places. This confessional statement was recorded by P. W. 18 in the G.D. Entry No. 456 dated 11.1.99 Exhibit-11). Accused Rabi Sarkar was thereafter arrested and his blood stained sweater was also seized by the police in presence of witnesses. P. W. 18 thereafter proceeded towards the place of occurrence with the accused and on being

pointed out by the accused the deadbody of the victim was recovered from the pond. The recovery of the dead body of the victim was made in presence of P. Ws. 1, 3, 4, 5, 6, 9 as also P.W. 19, the investigating officer to this case, who was already present at the place of occurrence as it is evinced from the evidence of the said witnesses.

13. P. W. 13 Dr. Rampada Tadu on 11.1.99 at about 2.30 P. M. examined accused Rabi Sarkar and found the following injuries:

1. A Linear superficial cut injuries along the prefuce (inner''Aspect) measuring 1/12" x 14" which remain retracted.

2. Prepucial injury is 1/2" distal to the corona glandies and parallel to it.

3. A small pin prick like injury over the inerdigital (middle and wring finger) on the dorsal aspect of the right hand.

According to P. W. 13 these types of injuries are usually caused at the time of sexual intercourse. The injury report is marked as Exhibit-6. P. W. 17 Dr. Sandip Majumdar held P. M. examination of the dead body and he found the following injuries:

1. 2 Cm. x 1 Cm. abrasion over the right cheek lateral to the angle of mouth.

2. Lacerated fourehette.

3. Rupture & lacerated hymen.

4. Prolapsed fallopion tube on ovary.

In the opinion of P. W. 17 death of the victim was due to shock and haemorrhage as a result of sexual assault which was antemortem in nature. He was also of the opinion that death of a minor girl aged about 6 years may be caused by the said injuries at the time of sexual assault.

14. P. W. 16 is the Judicial magistrate, Gangarampur, who recorded the staement of the accused u/s 164 of the Code of Criminal Procedure.

15. P. Ws. 11 and 12 are the witnesses to the seizure of blood stained sweater on being produced by the accused before P. W. 18 at the police station. P. W. 14 is the photographer, who took photographs of the dead body of the victim at the place of recovery.

16. Mr. Biplab Mitra, learned Advocate for the Appellant referring to Section 27 of the Evidence Act submits that there are three requirements of Section 27 of the Evidence Act - (a) there must be discovery of a relevant fact in pursuance of an information received from a person in police custody ; (b) discovery of such fact must be deposed to, and (c) at the time of giving information the accused must be in police custody. If all such

requrements are fulfilled then the effect is that so much of the information as relates to the fact thereby discovered is admissible. Mr. Mitra submis that it becomes clear from the evidence on record that while making the confessional statement before the police the accused person was not in custody of the police. From the evidence of P. W. 18, the Officer-in-charge of the P. S. it appears that on 11.1.99 at 11.15 A.M, accused Rabi Sarkar came to P. S. and made a confessional statement before him and such statement was diarised in G.D.E. No. 456 dated 11.1.99. The blood stained sweater of the accused was seized by the police and thereafter accused Rabi Sarkar was arrested, i.e.. he was taken into custody. So, according to Mr. Mitra, Learned Counsel, the accused was not in custody when he made the confessional statement before the police and as such the recovery of the dead body can never be said to be a recovery u/s 27 of the Evidence Act. But we are unable to accept such contention. There is no doubt that the first requirement of Section 27 of the Evidence Act is that the statement must come from a person in custody. But we are of the view that when an accused person directly gives police officer by word of mouth an information which may be used as evidence against him the said person should be deemed to have submitted himself to the custody of the police within the meaning of Section 27 of the Evidence Act. The word "custody" in Section 26 or Section 27 of the Evidence Act does not mean formal custody, but it includes such state of affairs in which the accused can be said to have come in th hands of the police or can be said to have been under some sort of surveillance or restriction. Thus, in our considered view, when an accused gives an information to police and is formally arrested later on - the accused must be deemed to be in custody. "Custody" does not necessarily mean detention or confinment. Submission to custody by any action or by words is sufficement. In this regard, we find support from a Division Bench judgment of this Court reported in Mihir Adhikary Vs. The State,

17. Next argument advanced by Mr. Mitra, learned Advocate of the Appellant, is that recording of confessional statement of the acused by P. W. 16 suffers from serious infirmity as before recording such statement u/s 164 Code of Criminal Procedure. the learned Magistrate (P.W. 16) did not tell him that he would not be sent to further police custody even if he did not give any statement. This, according to Mr. Mitra, is a statutory reguirment and non compliance of the same renders such confession inadmissible in evidence. In support of his contention. Mr. Mitra relies upon a Division Bench judgment of this cour reported in State v. Prasenjit Tapadar 1991 Cal Cri. L.R. (Cal) 121 We have gone through the said Judgment, which, in our considered view, does not have any manner of application in the facts and circumstances of the present case. It appears from a reading of the said judgment that on the very first date when the accused was forwarded to the court of learned Magistrate on 5.3. 87 after his arrest, a prayer was made by the investigating officer for taking the accused in police custody for a period of fortnight. The learned Magistrate allowed the prayer and permitted the investigating officer to keep the accused in police custody till 16.3.87. The I. O. thereafter produced the accused before the magistrate on 12.3.87 with a prayer that his confession might be recorded as he was willing to confess. The learned Magistrate after cautioning him

adequately sent him to jail custody with a direction that he should be kept in segregation. On the next date, i.e. on 13.3.87 the accused was produced and his confession was recorded on the said date. It is clear that this was done on the date when period of police custody was yet to expire as the accuse was remanded to police custody till 16.3.87. There was every possibility of sending the accused to police custody after recording of confessional statement and as such it was held by their Lordships in the said judgment that in such circumstances, it was incumbent on the learned Magistrate to tell the accused that he would not be sent to police custody even if he declined to make any statement. In the present case such question of police custody after recording of con fession did not arise as the accused was all along in jail custody before recording his confessional statement. It also appears from the evidence of P. W. 16 that at the time of recording no allegation was made by th accused regarding torture or assault by the police.

18. From a plain language of Section 164 Code of Criminal Procedure, it is manifest that such provision emphasises an enquiry to be made by the magistrate to ascertain the voluntary nature of the confession. This enquiry appears to be most significant and an important part of the duty of the magistrate recording the confessional statement of the accused u/s 164 Code of Criminal Procedure.

19. The provision of Section 164 (2) Code of Criminal Procedure renders it incumbent upon the magistrate to explain to the person, who is to make a confession, that a) he is not bound to make a confession at all ; b) if he does so, the same may be used as evidence against him; and further c) the magistrate should record such confession only if upon examination of the accused he has reason to believe that it is voluntary. From a perusal of the statement recorded u/s 164 Code of Criminal Procedure. in the present case we find that the provision of Section 164 (2) Code of Criminal Procedure. has been sufficiently compied with. The learned Magistrate before recording confessional statement cautioned the accused by saying that he was a judicial Magistrate, that he was not bond to make any statement and that whatever the accused would say might be used as evidence against him. This, in our view, is sufficient compliance of Section 164 (2) Code of Criminal Procedure. After perusing the statement recorded u/s 164 Code of Criminal Procedure. we find that the same was recorded by the learned Magistrate on being fully satisfied regarding the voluntary nature of the statement.

20. Mr. Mitra next argues that although the prosecution case was that the death of the victim was caused by throwing, the autopsy surgeon stated in his cross-examination that it was not a case of throuling and that the blood stained sweater of the victim was sent for chemical examination, but the report did not confirm that such blood found in the sweater was that of the victim. But such arguments do not appeal to us. It is clear from the evidence of the autopsy surgeon that, in his opinion, the death of the victim minor girl aged about 6 yers was due to shock and haemorrhage as a result of sexual assault which was antemortem in nature. From the Forensic Laboratory Report, It appears that the blood found on the sweater of the accused was human blood.

21. Mr. Safiullah, learned Public Prosecutor, submits that there being no eyewitness to prove the charges, levelled against the accused Appellant the prosecution has relied upon the confessional statement made by the accused before the police as also before the learned magistrate, recovery of the dead body of the victim pursuant to the confessional statement of the accused and some other circumstantial evidence. If the chain of events and circumstances including the conduct of the accused are connected together it will be proved beyond reasonable doubt that the accused Rabi Sarkar took the victim Laxmi Singh to an open field on 10.1.99 at about 6 P.M. by tricks, reped her there, caused death by sexual violence and thereafter caused disappearance of the evidence by throwing the dead body into a nearby pond. Mr. Safiullah submits that the evidence of P.W. 18 regarding the information of the accused leading to the recovery of the dead body of the victim is very much admissible in evidence u/s 27 of the Evidence Act. The accused was in custody when he made the confessional statement before police and pursuant to such statement dead body of the victim was recovered. According to Mr. Safiullah, there is no infirmity in recording of the confessional statement of the accused by the learned magistrate (P.W. 16). The learned Magistrate after complying with all formalities and requirements provided u/s 164 (2) Code of Criminal Procedure and on being fully satisfied about the desire of voluntary disclosure of guilt of the accused, had recorded such confessional statement of the accused on 15.1.99 There is nothing on record to show that such recording of confessional statement by the learned Magistrate suffers from any infirmity. Mr. Safiullah further submits that the learned trial Judge was justified in acting upon such confessional statement of the accused Rabi Sarkar recorded by the learned Magistrate u/s 164 Code of Criminal Procedure and conviction could be given by the learned trial Judge on such confessional statement alone.

22. We have heard the learned Advocates of the respective partes. We have also scrutinised the entire evidence on record. As we have discussed above, the accused Appellant after committing the offence surrendered before P.W. 18 the Officer-in-charge of Gangarampur P. S. and made a confesional statement, which was diarised by P. W. 18 in G.D Entry No. 456 dated 11.1.99. Pursuant to such statement, P.W. 18 along with force and the accused proceeded to the place of occurrence and on being pointed out by the accused the deadbody of the victim was recovered from a pond. The dead body of the victim was recovered and was lifted from the pond in presence of witnesses. The argument advanced by the learned Advocate of the Appellant that since the accused was not in the custody of the police the statement of the accused leading to the discovery of the dead body of victim is not admissible in evidence u/s 27 of the Evidence Act, does not appeal to us for the reasons as we have already discussed above.

23. So far as the recording of confessional statement by the learned Magistrate u/s 164 Code of Criminal Procedure. is concerned, we do not find any infirmity or illegality in the said recording. We have already discussed above that after giving all statutory warning as required u/s 164 Code of Criminal Procedure. to the accused and after being satisfied about the voluntary disclosure of guilt of the accused, the confessional statement was

recorded by the learned Magistrate (P.W. 16). Confession of the accused, in our view, was voluntary, trustworthy and free from any influence.

24. This is a case of murder of a victim girl aged about 6 years after committing rape on her. Accused Appellant took the victim girl aged about 6 years to a field by tricks, committed rape upon her and acused her death by sexual violence and thereafter accused disappearance of evidence by throwing the dead body of the victim in a nearby pond. The confessional statement of the accused finds full corroboration in the oral testimonies of P. ws. 1, 2, 4, 7, 13, 17, 18 and 19.

25. After reappreciating the evidence on record, we entirely agree with the conclusion arrived at by the learned trial Judge. We do not find any illegality in the judgment of the court below and consequently we affirm the same. The appeal accordingly fails and the same is dismissed.

26. The accused Appellant, who is not in Jail, shall serve out the remaining period of sentence.

A copy of this judgment along with the LCR may be sent down to the court below immediately.

Arun Kumar Bhattacharya, J.

27. I agree.