

(1966) 07 OHC CK 0005

Orissa High Court

Case No: Criminal Appeal No. 128 of 1965

Mingura Mallik and
Others

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: July 6, 1966

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 287, 288
- Evidence Act, 1872 - Section 45
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (1966) 32 CLT 1011

Hon'ble Judges: Barman, Acting C.J.; Misra, J

Bench: Division Bench

Advocate: R.K. Mohanty, for the Appellant; Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Misra, J.

The Appellants have been convicted u/s 302/34, Indian Penal Code and each of them has been sentenced to imprisonment for life. They are Kondhs. The deceased was a Pana. All the four belong to adjacent villages within a radius of half a mile. The deceased and the accused committed theft of gold and silver ornaments from the house of p.w.1. The deceased divulged this fact to p.w.1 alleging that the accused had kept the ornaments. P.w.1 lodged information with the police on 15-7-1964. In the morning of 16-7-1964, the accused invited the deceased from his house to take the meat of pig. He was led inside a forest at Kamdaguda and was killed there with an axe (MO. I). The head and the body were completely severed and were recovered from two different pits at some distance from the very forest. The defence is one of denial.

2. The learned Sessions Judge, on discussion of the evidence, held that the deceased was murdered by the accused and that the head and the trunk recovered belonged to the

deceased.

3. That the deceased was killed with his head and body completely severed is not disputed before us. The evidence of the doctor (p.w.11), who held the post-mortem examination, is that the head and the body belonged to the same person. There were a number of injuries. The neck injury, which severed the head from the trunk, was possible with the axe like (MO. I) by multiple strokes. On the materials An record it is established beyond reasonable doubt that death was homicidal.

4. The next question for consideration is whether the accused murdered the deceased. The conviction is based on the extra-judicial confessions made by the accused before p.w.17, the father of accused Mingura. His statement in Sessions Court as follows-

One evening in the season of transplantation of paddy in 1964 all those three accused persons came to the house of accused Mingura and all of them were drunk. It was present there. An the three told me "we are guilty; kill a pig; we shall take the meat and then we shall abscond". I could not kill any pig for them. The police came shortly after and took them to custody. I do not know anything more.

This statement in examination-in-chief does not show an extra-judicial confession of the offence of murder. In the committing Court, however, he had stated: "the accused persons informed me that they killed Jatinga ahead of a Dimbiri tree in Kam baguda jungle". The committing Court statement was tendered. P.w.17 was confronted with his statement in the committing Court u/s 45, Evidence Act. He admitted to have made the statement in the committing Court. Thus p.w.17 resiled from his statement in the committing Court.

Which of the two versions is to be accepted? Section 288, Code of Criminal Procedure lay down that the evidence of a witness may in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act. Thus the statement of p.w.17 in the committing Court can be treated as evidence in the Sessions Court subject to the witness being confronted with the statement u/s 145, Evidence Act, which lays down that the trial Court is to treat it as evidence in its discretion. The caution has been impeded for the obvious reason that when a witness gives different versions in two Courts, he stands self-condemned. It is, therefore, necessary for the trial Court to examine both the versions carefully and to see which is true. In the course of this investigation the Court is to search for corroboration.

There may be some cases where, even without extrinsic corroboration, a Judge may prefer one version to the other keeping in mind the intrinsic weakness of the two contradictory versions. But such cases are exceptional though not rare. In most of the cases corroboration is necessary to accept a particular version. (See [Shranappa Mutyappa Halke Vs. State of Maharashtra](#), .

In this case the version of p.w.17 in the committing Court appears to be true. The accused made the statement that they killed Jatinga ahead of a Dimbri tree in Kambaguda Jungle. Jatinga has been found murdered. The dead body was recovered nearabout a Dimbri tree in Kambaguda jungle. The existence of the Dimbri tree is spoken of by p. ws. 18 and 22. Corroboration is also necessary with regard to the complicity of the accused persons. In their statements before the committing Court, all the three accused persons admitted to have murdered the deceased. Each of the accused stated that they removed the cloth of the deceased from his waist. They gave recovery of the blood-stained cloth (M.O. II) of the deceased, the axe (M.O. I) stained with human blood with which they killed the deceased and the Jumbi in which they carried liquor. Thus the statement of p.w.17 before the committing Court is corroborated in material particulars by extrinsic evidence. This statement is true and is acceptable? The statement proves the extra-judicial confessions of all the accused persons before p.w.17. P.w.17 is the father of accused Mingura. He disclosed the truth before the committing Court and had a very strong motive to suppress the truth in the Sessions Court.

5. The extra-judicial confession before p.w.17 has been retracted. It is, therefore, necessary to see if it is voluntary and true. It is not disputed that it was voluntary. The accused are inter-related. It is not their case that they made the extra-judicial confession before p.w.17 by any threat, inducement or promise in circumstances coming within the Scope of Section 24 of the Evidence Act. We are satisfied that the extra-judicial confession was voluntary. The next question for consideration is whether it was true. For this corroboration is necessary not only with regard to the story of murder but with regard to the complicity of each individual accused. The following pieces of evidence are well established on the materials on record:

- (i) P.w.9 saw all the accused going together towards Kambaguda forest at about 10 a. m. The accused in their statement before the committing Court admitted that they went together to Kambaguda forest.
- (ii) P.w.8 saw them coming back from the jungle with an axe and a Jumbi (liquor pot).
- (iii) P. ws. 6, 7 and 12 saw the deceased going from his house in the company of accused Bidila since then the deceased was intercede. Bidila told p.w.15, who is his own brother-in-law, that the head and the body of the deceased were buried in Kambaguda jungle.
- (iv) Accused Mingura had produced the cloth stained with blood (M.O. II) which admittedly belonged to the deceased P.w.12, wife of the deceased, identified the same. The accused themselves admitted before the committing Court that MO. II was worry the deceased when he was killed and that they removed the cloth from his waist after he was murdered.

(v) The axe (M.O. I), found to be human blood on serological test, was accused Bidila from his house.

The aforesaid pieces of evidence fully corroborate the retracted extra-judicial confession, both with regard to the story of murder and the complicity of the accused. We have carefully examined the evidence of p. ws. 6, 7, 8, 9, 12 and 15. No criticism has been levelled against their evidence as to why they would make false statements. Some of them are related to the accused. We accept their evidences reliable.

6. The statements of all the three accused persons in the committing Court were tendered by the prosecution and were read as evidence u/s 287, Criminal Procedure Code. There is nothing in the other evidence adduced by the prosecution to prove any part of these statements as unreliable. These statements of the accused show that most part of the prosecution case was admitted. They admitted to have gone together to Kambaguda jungle and to have come back together with wet cloths carrying the axe (M.O. I), the cloth of the deceased (M.O. II) and the liquor pot. It was admitted that at first accused Batakara went to call the deceased. As the deceased refused to come on the invitation of Batakara, when the feast was being done in the house of Bidila, later on accused Bidila came to invite the deceased and in his company the deceased left for Bidila's house. They also admitted the recovery of the head and the body of the deceased from two different pits from inside Kambaguda jungle and the production of axe (M.O. I), cloth (M.O. II) and the Jumbi by them.

Thus the extra-judicial confession before p.w.17 is not only corroborated by other independent evidence but also by the statements made by the accused before the committing Court which constitute evidence -under Section 287, Criminal Procedure Code. The conviction is well founded on the retracted extrajudicial confessions.

7. There were judicial confessions before the Magistrate (P.w.10) by all the three accused persons. The learned Sessions Judge rejected the judicial confessions by making the following observations:

The accused persons have made judicial confessions before the Magistrate p. w. IV. But I do not attach, any importance to these confessions. Because p.w.10 remanded the accused persons to Belliguda Jail for cool reflection. P.w.10 states that Balliguda. Sub-Jail is guarded, by constables. So the accused persons virtually remained in police custody in that jail from where they were brought to the Court, and their confessional statements were recorded. So it is not proved that the mind of the accused persons was free from police influence when they made the .confessional statements before the Magistrate, p.w.10.

In this particular case, the judicial confessions are not being utilised for the conviction of the accused. It is, however, necessary to examine how far this general observation of the learned Sessions Judge is correct in law. It is well settled tat the confession would not be

treated as voluntary if there is any scope for police influence. Existence of actual influence is not essential. The likelihood of the accused being influenced is enough. If the police is in any way connected with the administration or guarding of the jail in such manner as to create an impression in the mind of an under-trial prisoner that he is under police control, the view of the learned Sessions Judge that in such cases the confessions should not be treated as voluntary, is correct. Where, however, the jail is merely guarded by the police and they have nothing to do with its administration or control, a general observation of the aforesaid character may not be acceptable. Law is clearly elucidated in [Aher Raja Khima Vs. The State of Saurashtra](#), -,see discussions from para 6 to para 11.

In the ex-Madras area the sub- jails and the Tahasildar"s Courts have been located in many places in one building. There is no independent jailor and the Tahasildar had been kept in charge of the jails. Police guards are posted to watch the Court I buildings. Necessarily they also guard and watch the sub-jail. Sometimes police constables remain at the jail gate to control the entry in and out of the under-trial prisoners. In such circumstances, the argument that the accused were not free from police influence inside the jail might not be rejected out of hand. In all such cases, judicial confessions are to be excluded on the simple ground that Government has made no provision for separate jail staff for jail administration. It is for the concerned authorities to take note of the gravity of the situation.

8. For reasons already stated, the appeal fails and is dismissed.

Barman, A.C.J.

9. I agree.