

A SHIVA KARAM PAYASWAMI TEWARI
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 117 of 2009)

B JANUARY 21, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY]

Penal Code, 1860: s.302 – Sudden quarrel between accused and deceased – Accused hit the deceased with a wooden log kept nearby – Deceased died of injuries sustained during assault – Conviction u/s. 302, upheld by High Court – Held: The background in which assault was made clearly show that s.302 was not applicable – Assault was made in the course of sudden quarrel without pre-meditation – Accused was not armed at the relevant point of time – Conviction altered to s.304 Part II – Custodial sentence of 8 years would meet the ends of justice.

Evidence: Extra-judicial confession – Evidentiary value of – Held: Extra judicial confession form basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused – Where there is material to show animosity, Court has to proceed cautiously – On facts, extra-judicial confession made not to a stranger but to a friend – Courts below rightly believed it.

Words and phrases: 'confession', 'statement' – Meaning of.

G Prosecution case was that the appellant-accused made an extra judicial confession that there was sudden quarrel between him and the deceased and that he hit the deceased with a wooden log kept nearby used for cutting vegetables. The deceased died of the injuries sustained during the assault. The trial court convicted accused u/

ss. 302, 321 and 201 IPC, which was upheld by High Court. Hence the present appeal. A

Partly allowing the appeal, the Court

HELD: 1.1. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied that confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous. [Para 4] [447-B-H; 448-A] B
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1.2. The expression 'confession' is not defined in the H

A Evidence Act. 'Confession' is a statement made by an
accused which must either admit in terms the offence, or
at any rate substantially all the facts which constitute the
offence. The dictionary meaning of the word 'statement'
is "act of stating; that which is stated; a formal account,
B declaration of facts etc." The word 'statement' includes
both oral and written statement. Communication to
another is not however an essential component to
constitute a 'statement'. An accused might have been
over-heard uttering to himself or saying to his wife or any
C other person in confidence. He might have also uttered
something in soliloquy. He might also keep a note in
writing. All the aforesaid nevertheless constitute a
statement. It such statement is an admission of guilt, it
would amount to a confession whether it is
D communicated to another or not. [Para 5] [448-A-D]

Sahoo v. State of Uttar Pradesh AIR (1966) SC 40, relied
on.

2. In the instant case the extra-judicial confession is
believable as rightly done by the Trial Court and the High
E Court. The same not was made to a stranger but to a
friend. Therefore, the Trial Court and the High Court have
rightly acted upon the extra-judicial confession. At the
same time the background in which the assault has been
made clearly shows that Section 302 IPC has no
F application. The assault was made in the course of
sudden quarrel without pre-meditation. The accused was
not armed at the relevant point of time. Even according
to prosecution he picked up the wooden log which was
lying there and made the assault. That being the position,
G the conviction is altered to Section 304 Part II IPC.
Custodial sentence of 8 years would meet the ends of
justice. [Paras 7 and 8] [449-D-G]

Case Law Reference:

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AIR 1966 SC 40

relied on

Para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 117 of 2009. A

From the Judgment and Order dated 25.8.2005 of the High Court of Judicature at Bombay in Criminal Appeal No. 217 of 2000. B

Nirmal Chopra for the Appellant.

Ravindra Keshavrao Adsure for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted. C

2. Challenge in this appeal is to the judgment of a Division Bench of the Bombay High Court upholding the conviction of the appellant for the offence punishable under Sections 302, 321 and 201 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of life, nine months and nine months respectively and fine with default stipulation. D

3. Background facts in a nutshell are as follows:

The accused Shiva Karam Payaswami Tewar was working in Hotel Premier run by the complainant Anthony Xavier at Dharavi, Mumbai-70. The accused was entrusted with the work of preparation of spices. Muttukumar (hereinafter referred to as the 'deceased') was working as a manager in the said hotel. Considering the nature of their work the accused as well as Muttukumar used to stay overnight in the hotel. E

On 31.8.1995 in the evening complainant Anthony Xavier went to the Hotel Premier and after usual supervision and talk with manager at night he returned. At that time the accused as well as Muttukumar were in the hotel. On the next day morning i.e. on 1.9.1995 one Murugan Shetiya working in the hotel went to Anthony (PW-1) and told him that the hotel is open and Muttukumar and accused are not present in the hotel. He also informed that cash drawer was open and tape recorder was F G H

A found missing. Naturally, complainant Anthony immediately went to the hotel. When he was making query, Arun Pujari, who was running Pan bidi shop near the hotel and taxi driver Suresh Kumar who often used to park his taxi near the hotel told him that accused met them at about 5.30 a.m., and made enquiry
B about the bus going to Bangalore. When complainant took survey of the hotel he found that cash box was open and tape recorder kept in the hotel was missing. There was no cash in the cash box. According to him on the previous night the manager i.e. deceased had informed him that on that day
C amount of Rs.3500/- was collected and the same was kept in the cash box. Report was lodged with the police and investigation was undertaken. Appellant was suspected to be the murderer.

After completion of investigation charge-sheet was filed.
D Since the accused pleaded innocence, trial was held. Though there was no direct evidence the Trial Court held that the circumstantial evidences adduced by the prosecution were sufficient. Particular reference was made to the extra-judicial confession made before PW-1. Accordingly, conviction was
E recorded by the Trial Court. Appellant filed appeal before the High Court which upheld the conviction.

Before the High Court the stand was that even if the extra judicial confession is accepted to be correct for the sake of
F argument, case under Section 302 IPC is not made out. The stand of the prosecution was that the extra-judicial confession clearly showed both the intention and the knowledge. Accordingly, the High Court dismissed the appeal. The stand taken before the High Court was reiterated by the parties. In
G addition, learned counsel for the appellant submitted that there was no pre-meditation and in the course of quarrel, a wooden log which was lying was picked up by the appellant in a heat of passion and assault was made. Only one blow was given and, therefore, Section 302 IPC, in any event, has no
H application. It was submitted that extra-judicial confession is a very weak piece of evidence and should not have been made

the basis for conviction.

4. We shall first deal with the question regarding claim of extra judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra judicial confession, Court has to satisfy itself that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may be many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied that confession was voluntary basing on such evidence, conviction can be founded. Such confession should

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A be clear, specific and unambiguous.

5. The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in *Sahoo v. State of Uttar Pradesh*, AIR 1966 SC 40: (1966 Cr1 U 68). After referring to some passages written by well known authors on the "Law of Evidence" Subba Rao, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". In paragraph 5 of the judgment, this Court held as follows:

...Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession. as the case may be.... If, as we have said, statement is the genus and confession is only a sub-species of that genus, we do not see any reason

why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt

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(Emphasis supplied)

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6. The extra-judicial confession purported to have been made before PW1 reads as follows:

"He was brought to the hotel in a taxi. In enquired with the accd. what he did to Muttukumar. The accd. disclosed that he and Muttukumar got up at about 4.30 a.m. and while he was preparing spices there was quarrel between them; and as a result of the quarrel he had hit Muttukumar with a wooden log used for cutting vegetables and Muttukumar had died of the injuries sustained during the assault."

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7. In the instant case the extra-judicial confession is believable as rightly done by the Trial Court and the High Court. The same not was made to a stranger but to a friend. Therefore, the Trial Court and the High Court have rightly acted upon the extra-judicial confession. At the same time the background in which the assault has been made clearly shows that Section 302 IPC has no application. The assault was made in the course of sudden quarrel without pre-meditation. The accused was not armed at the relevant point of time. Even according to prosecution he picked up the wooden log which was lying there and made the assault.

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8. That being the position, we alter the conviction to Section 304 Part II IPC. Custodial sentence of 8 years would meet the ends of justice. The appeal is allowed to the aforesaid extent.

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9. We record our appreciation for the able manner in which Mr. Nirmal Chopra, *Amicus Curiae*, assisted the Court.

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Appeal partly allowed.

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