Kusal Toppa vs The State Of Jharkhand on 7 August, 2018

Equivalent citations: AIR 2018 SC (SUPP) 1077, 2019 (13) SCC 676, (2019) 195 ALLINDCAS 175 (SC), (2018) 10 SCALE 651, (2018) 72 OCR 410, (2019) 106 ALLCRIC 964, (2019) 195 ALLINDCAS 175, AIRONLINE 2018 SC 232

Author: N.V. Ramana

Bench: Mohan M. Shantanagoudar, N.V. Ramana

1

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1691-1692 OF 2010

KUSAL TOPPO AND ANOTHER …APPELLANTS

VERSUS

STATE OF JHARKHAND …RESPONDENT

ORDER

1. These appeals by special leave are directed against the judgment and order dated 12.1.2009 passed by the High Court of Judicature of Jharkhand at Ranchi in Criminal Appeal No. 240 of 2002 with Criminal Appeal No. 302 of 2002.

2. These appeals have been filed by Accused No.1 and Accused No.4 questioning the conviction and sentence passed by the trial Court on 17 and 18th May, 2002 wherein the accused were convicted for the offence under Section 392 and were sentenced to seven years' rigorous imprisonment and fine of Rs.1000/- each and in default of payment, to undergo rigorous imprisonment for one year each and also convicted for the offence under Section 302 and sentenced to undergo rigorous imprisonment for life and a fine of Rs.5000/- each and in default of payment to undergo rigorous imprisonment for a term of 2 years each.

3. The judgment passed by the trial Court was subsequently challenged before the High Court. The

High Court also confirmed the sentence and conviction passed by the trial Court.

4. In the present case there were as many as five accused. A-5 was acquitted by the trial Court itself. The other two accused A-2 and A-3 had filed Special leave Petition (Criminal) No(s). 2572-2573 of 2009 against the judgment and order of the High Court, which were dismissed by this Court at the time of admission itself. In criminal cases, it is well settled that a dismissal of a SLP in limine, would neither mean that the lower court judgment stands affirmed nor the principle res judicata would be applicable [refer Kunhayammed and Anr. v. State of Kerala, AIR 2000 SC 2587; State of Punjab v. Devinder Pal Singh Bhullar, AIR 2012 SC 364]. Therefore, the dismissal of the SLP of the co-accused will not have any effect accordingly.

5. In the instant special leave petitions filed by the accused A-1 and A-4, leave was granted by this Court on 30.8.2010.

6. We have heard learned counsel for the parties.

7. The prosecution story in brief is that on 3.12.1999, Truck No. BR-24-M-8171 had gone to Balrampur having loaded the lac of one Adit Sah of Latehar. The truck was returning from Balrampur after unloading the lac in question on 4.12.1999 and reached Ranchi at 4 P.M. The aforesaid truck had picked up its owner Sita Devi from Seva Sadan, Ranchi and proceeded for Latehar. When the truck did not reach Latehar till the morning of 5/12/1999, PW-2, Binod Agrawal (the joint owner of the truck and brother-in-law of Sita Devi, and the informant in this case) tried to search for the truck; in the course of his search he went to the Line Hotel, owned by PW-1, Bindeshwar Sah, situated at Ranchi Road, Kuru where the truck usually used to stop for refreshment for its staff. The informant learnt from the aforesaid hotel owner that his truck had stopped at the hotel on 4.12.1999 at about 6.45 p.m. The driver, Suresh Singh @ Bulet Singh, and the Khalasi (i.e., cleaner of the truck), Jitendra Thakur, had taken four cups of special tea, one for their employer Sita Devi, two for themselves and one for a third person in the truck, but the third person did not take tea and the same was returned. The driver was heard to say that A-2, Mahendra, the third person inside the truck, would not take tea. Thereafter, the truck proceeded for its destination, having taken the owner Sita Devi, the Khalasi Jitendra Thakur, and the third person, Mahendra (apart from the driver himself). The informant also came to know from the hotel owner that an unknown person aged about 25 years had also come to the hotel at 5.00 p.m. on 4.12.1999, who had enquired from the hotel owner whether Suresh Singh @ Bulet Singh, the driver, had come to the hotel with the truck. The hotel owner had replied to the unknown person that the truck had not reached yet. Subsequently, the informant gathered information from others at Kuru that the truck had crossed Kuru Chowk for its destination (i.e. Latehar), but it was hijacked by some criminals near Kuru P.S. and taken away towards the forest. He further came to know that the truck was lying abandoned in Aamjharia Valley with two dead bodies lying near the truck and one dead body of a woman lying inside the cabin of the truck. On such information, he went to Aamjharia Valley and found the truck, where he found the dead body of Sita Devi inside the truck, with her hands tied and neck slit, and the bodies of the driver and Khalasi thrown outside. The informant then went to Kuru P.S. to lodge an FIR, but the police of Kuru P.S. did not entertain his information. He then went to Lohardaga to approach the S.P., who was not available, but the reader of the S.P. told him that the FIR had to be

lodged in the Police Station in the jurisdiction of which the dead bodies had been recovered. Therefore, the informant lodged the FIR at Chandwa Police Station on 7.12.1999 at 10 A.M., which is the basis of the case.

8. Mr. Annam D.N. Rao, learned Amicus Curiae appearing on behalf of the accused mainly contended that the trial Court as well as the High Court had convicted the accused by relying upon the extra-judicial confessions made by Mahendra Prasad and Chanchal Bhaskar (A-2 and A-3). Mr. Rao contended that the accused could not be convicted merely on the basis of extra-judicial confessions, relying upon the settled proposition of law that an extra-judicial confession is a weak piece of evidence, and an accused cannot be convicted on such basis in the absence of other reliable evidence establishing guilt. He placed reliance on the decisions of this Court to this effect in Gopal Sah v. State of Bihar1 and Pancho v. State of Haryana.2

9. Learned counsel, while arguing, has taken us through the depositions of various witnesses. PW-1 is Bindeshwar Sah, the hotel owner, who according to PW-2, Binod Agrawal, first revealed the information to him that the truck party had come to his hotel on the date of the incident, and left the place after taking some tea. Based on the said information, PW-2 further inquired about the matter. PW-2 also deposed that PW-1 had told him that A-2 Mahendra was inside the truck, and that A- 2 had confessed to him (i.e. PW-1) that the accused had committed the murder of the three persons and further committed theft of a gold bangle and chain belonging to Sita Devi, an amount of Rs. 2 Lac and a demand draft for Rs. 32,000/-. PW-2 admitted so in his cross-examination as well as stated so before the police. At the time of trial, however, PW- 1, the owner of the Line Hotel, turned hostile. He denied saying anything to PW-2 as alleged.

10. Thus, according to PW-2, A-2 made a confession to PW-1. In addition, the confessions of A-2 and A-3 were also recorded by 1(2008) 17 SCC 128.

2(2011) 10 SCC 165.

the police. As per the testimony of PW-6, the investigating officer in the case, on the basis of the confession of A-3, a rope was recovered from the place of occurrence.

11. Learned counsel for the appellants contended that rope is a common material or thing which is available anywhere in the market and in every household.

12. Apart from this, learned counsel for the State is unable to show any other material indicating the guilt of the appellants.

13. Learned Counsel for the State argued in support of the impugned judgment.

14. The evidence relating to the extra-judicial confession made by the accused Mahendra is found in two places in the evidence of PW-2, i.e., in paragraphs 8 and 27. If we read both the paragraphs, it is clear that PW-2 got the information from PW- 1 (the owner of the Line Hotel, Bindeshwar Sah) about the factum of confession made by the accused Mahendra before PW-1. In other words, PW-2

has not deposed in so many words and clearly that the accused Mahendra made a confession before him. On the other hand, it is the specific deposition of PW-2 that the accused Mahendra confessed before PW-1, and in turn PW-1 told about the same fact to PW-2. This means that the information received by PW-2 from PW-1 about the extra-judicial confession is hearsay, inasmuch as there is no confession made by the accused Mahendra before PW-2 directly. Hence, such hearsay evidence of PW-2 relating to the so-called confession cannot be relied upon. Even otherwise, PW-1, who had allegedly informed PW-2 about the confession allegedly made before him by the accused Mahendra, has turned hostile. Thus, there is no supporting material to corroborate the evidence of PW-2 regarding the extra-judicial confession.

15. However, the First Appellate Court as well as the High Court, probably relying upon the version of PW-2 in paragraphs 29 to 30 of his deposition, concluded that the accused Mahendra did confess before PW-2 directly. Even if we take it that the accused Mahendra did confess before PW-2 directly, the same may not further or better the case of the prosecution, inasmuch as this is the solitary piece of material against the accused Mahendra, and that too in the form of an extra- judicial confession.

16. As argued by the learned amicus curiae appearing for the accused, an extra-judicial confession is a weak piece of evidence, and an accused cannot be convicted on its basis in the absence of other reliable evidence establishing the guilt of the accused. It will be pertinent to advert to the decisions relied upon by the learned amicus curiae at this juncture, i.e., Gopal Sah (supra) and Pancho (supra).

17. In Gopal Sah (supra), the Court held that an extra-judicial confession is, on the face of it, a weak piece of evidence and should not be relied upon to record a conviction, in the absence of a chain of cogent circumstances. In Pancho (supra) as well, the Court refused to convict the accused on the basis of an extra-judicial confession, in the absence of other evidence of sterling quality on record, establishing his involvement. In the Pancho (supra), the Court discussed the evidentiary value of an extra-judicial confession, as laid down by a Constitutional Bench of this Court in Haricharan Kurmi v. State of Bihar.3In this case, referring to S. 3 and S. 30 of the Indian Evidence Act, 1872, the Court came to the conclusion that an extra-judicial confession cannot be treated as a substantive piece of evidence against the co-accused, holding that the proper judicial approach is to use it only to 3AIR 1964 SC 1184.

strengthen the opinion formed by the Court after perusing other evidence placed on record. It is pertinent to refer to the observations of in Pancho (supra) in this regard-

“26. In Haricharan Kurmi v. State of Bihar [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] the Constitution Bench of this Court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act, 1872 and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This Court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also

against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence Act, "it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non- technical way". (Haricharan case [AIR 1964 SC 1184])

27. This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co- accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

28. This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."

18. Furthermore, in Sahadevan v. State of T.N.,4 this Court culled out certain principles regarding the reliability of an extra judicial confession, which have also been relied upon in Jagroop Singh v. State of Punjab,5 Tejinder Singh v. State of Punjab,6 and Vijay Shankar v. State of Haryana.7 The

4(2012) 6 SCC 403.

5(2012) 11 SCC 768.

6(2013) 12 SCC 503.

7(2015) 12 SCC 644.

principles as stated in Sahadevan (supra) are reproduced below:

> "16. Upon a proper analysis of the abovereferred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law." The proposition that extra judicial confessions are a weak type of evidence and should not be relied upon in the absence of corroborative evidence has also been affirmed by this Court in several other decisions, such as Pakkiriswamy v. State of Tamil Nadu,8 Makhan Sigh v. State of Punjab,9 Baldev Singh v. State of Punjab,10 and even recently in Satish v.

State of Haryana.11

19. Taking into consideration all the facts and position of law, discussed supra, we are of the opinion that the appellants herein cannot be convicted on the basis of only two extra- judicial confessional statements of the co-accused which were not corroborated by any cogent or reliable evidence. Needless to say, that the confessions of A-2 and A-3 made before the police are inadmissible. Now coming to the limited aspect concerning appending weightage to their recovery of rope in furtherance of the statement of A-3, before the Police under Section 27 of Indian Evidence Act.

20. The law under, Section 27, Indian Evidence Act is well settled now, wherein this court in Geejaganda Somaiah v. State of Karnataka, (2007) 9 SCC 315, has observed as under:

"As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police 8(1997) 8 SCC 158.

9(1988) Supp SCC 526.

10(2009) 6 SCC 564.

11(2018) 11 SCC 300.

> because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act"

21. The basic premise of Section 27 is to only partially lift the ban against admissibility of inculpatory statements made before police, if a fact is actually discovered in consequence of the information received from the accused. Such condition would afford some guarantee. We may additionally note that, the courts need to be vigilant while considering such evidences. This Court in multiple cases has reiterated the aforesaid principles under Section 27 of Indian Evidence Act and only utilized Section 27 for limited aspect concerning recovery [refer Pulukuri Kotayya v. King Emperor, 76 I.A. 65; Jaffar Hussain Dastagir v. State of Maharashtra, AIR 1970 SC 1934]. As an additional safeguard we may note that reliance on certain observations made in certain precedents of this court without understanding the background of the case may not be sustainable. There is no gainsaying that it is only the ratio which has the precedential value and the same may not be extended to an obiter. As this Court being the final forum for appeal, we need to be cognizant of the fact that this Court generally considers only legal aspects relevant to the facts and circumstances of that case, without elaborately discussing the minute hyper-technicalities and factual intricacies involved in the trial.

22. Coming back to factual aspects of this case, on the basis of the above confession of Chanchal Bhaskar [A-3], the only recovery which was made was one Rope, which was used in committing the offence, which the counsel rightly pointed, is a common material or thing which is available anywhere in the market or at every household. Further, we may note that, there is no investigation to link the rope recovered with the crime as no report concerning the forensic aspects of the fiber or any recovered strands are part of the record. Therefore, the major condition for application of Section 27 of the Evidence Act is not fulfilled. Accordingly, we cannot append any value to the confession of Chanchal Bhaskar [A-3].

23. In light of the discussion above, we set aside the orders passed by the trial Court as well as by the High Court and acquit the accused from all charges and the appeals are, accordingly, allowed.

24. We appreciate the assistance given by Mr. Annam D.N. Rao, learned Amicus Curiae in disposing of these appeals.

.....J. (N.V. RAMANA) .....J. (MOHAN M. SHANTANAGOUDAR) New Delhi, August 07, 2018