Allahabad High Court
Emperor vs Nanua on 4 December, 1940
Equivalent citations: AIR 1941 All 145
JUDGMENT

1. This is an appeal by the Provincial Government against the acquittal of Nanua who was tried for the murder of Mt. Shyama said to have been committed on 12th October 1939 between Maupur and Bhaupur villages, District Aiigarh. Mt. Shyama lived in Maupur village which is less than half a mile from Bhaupur where the appellant resides, and during the day on 12th October she had gone to Bhaupur wearing some silver and gold ornaments and carrying a scale and weights and similar things as she used to do a little business in the neighbourhood of Maupur. She did not return after dark, and P.W. Raghubir, her nephew, with whom she lived, became anxious and went to look for her. At about 10-30 P. M., her corpse was found in a well which lay between Maupur and Bhaupur. The medical evidence shows that she had a contused wound on the bridge of the nose which had fractured the nasal bone, an incised wound on the left nostril, a punctured wound on the left cheek and four broken ribs on the right side of the chest and three broken ribs on the left side of the chest. Death was due, in the opinion of the Civil Surgeon, to asphyxia and shock as the result of the injuries to the ribs and to her face. On the next morning at 7-30, Raghubir reported the occurrence saying that Mt. Shyama was greatly troubled with asthma and it appeared that she had committed suicide by throwing herself into the well. The Civil Surgeon when examined in the-Court of the committing Magistrate stated that the fracture of the ribs was caused: before death and could have resulted from a fall in a well, but death was due to asphyxia caused either by pressure on the chest or on the mouth or nose. She did not die from drowning, so that she was dead before she got into the well and the incised' and punctured wounds on the face could not have been caused by a fall.

2. Taking all the injuries together, it appears to us that the fracture of the ribs was due to the murderer kneeling on her chest while he was causing asphyxia. We may here add that her ornaments and the scale and other things which she was carrying were pointed out by the appellant and this fact also disproves the possibility of Mt. Shyama having committed suicide. Raghubir, the nephew, Mt. Sharbati, an aunt of the deceased, and Mt. Tirbeni, her daughter, who all lived in the same house, prove that the appellant owed a very small sum of money to the deceased. Mt. Tirbeni puts the debt at Be. 1 but the other two witnesses say he owed Rs. 2, and this is also the statement of P.W. Genda of Maupur who at 4-30 saw the appellant and the deceased near a tree quarrelling about that debt. Mt. Shyama according to him was demanding Rs. 2 and abusing the accused who promised to pay the money in two or three days. Considering that Mt. Tirbeni disagrees with three witnesses as to the amount owed we prefer the evidence of the greater number of witnesses especially as Genda is not connected with either side and his evidence is therefore not suspicious on the ground of partiality or for the matter of that on any other ground.

3. The next and very important witness is Ganga Sahai of the village of the appellant. He says that in the evening he saw the deceased leaving his village with the accused following her, which we only take to mean that he was walking in the same direction a few paces behind her. This was the last time that the deceased was seen alive and seeing how near Bhaupur and Maupur villages are it must have been only a few minutes before she was murdered. Ganga Sahai is an independent witness of

the village of the appellant who has no reason whatsoever to give false evidence against the appellant and we accept his statement as true. Sub-Inspector Harmohan Singh, who was absent when the report of the finding of the corpse was made, took up the investigation on the 14th and arrested the appellant on that day. The appellant took him and witnesses Ganga Ram, Maqsud Ahmad, Nand Ram and Sundar Lal to a place 45 paces from his house and dug out silver ornaments and two eight anna pieces of the deceased and handed them over. He then took the same persons to a sugarcane field where he picked up a bundle containing the balance, chadars, weights and other things which the deceased had with her at the time of the occurrence and handed them over. These two places are far one from the other, one being north of the village and the other being south of it. A dhoti which the appellant was wearing was taken from him and sent to the chemical examiner, and the dhoti was found to have a number of small blood stains, none being larger than half an inch. There were seven such places on the dhoti. The dhoti was sent to the imperial serologist, but somehow or other his report was not placed on the record, as it should have been, and there is no evidence therefore that the blood was human blood.

4. The appellant was sent up before a Magistrate and made a statement to the effect that he was standing in a field when Mt. Shyama was returning from Bhaupur to Maupur and she demanded money from him. He answered that he had not got the money then but would pay the following day and she became ready to beat him with shoes whereupon he struck her on the nose with his fist, so that she died, and he threw her dead body into the well where it was recovered, after removing her ornaments. If this purports to be a confession of murder it is difficult to say, for the appellant may have intended to allege that the death of the woman from his giving her a blow with fist on the nose was an accident and his offence would be only one of causing hurt. In any case we must find that the manner in which she met her death is not correctly described in the confession for the doctor's evidence makes it clear that the woman died from asphyxia and not from a blow on the nose. If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it the whole confession must be accepted by the Court, but this is not the case when part of it is proved false by other evidence, as is the case here. We are entitled therefore to rely on the statement against the appellant disregarding at the same time his statement as to how Mt. Shyama died.

5. It has however been urged by the learned Counsel for the accused that this confession is inadmissible because the Magistrate who recorded the confession did not comply with Section 164(3), Criminal P.C., which lays down that a Magistrate shall before recording a confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. As the Magistrate did not give this warning he has not entered in the certificate either that he gave such a warning. The Magistrate was examined but he has not been able to state that he certainly gave such a warning and we therefore must take it that he forgot to do so. Section 29, Evidence Act, however lays down that if a confession is otherwise relevant it does not become irrelevant because the maker of it was not warned that he was not bound to make such confession and that evidence of it might be given against him. We are of opinion that although the Magistrate did not comply fully with Section 164, Criminal P.C., the defect is not fatal in view of Section 29, Evidence Act, and our view is supported by Emperor v. Lal Singh ('38) 25 A.I.R. 1938 All. 625 and also by Vellamoonji Goundan v. Emperor ('32) 19 A.I.R. 1932 Mad. 431. The learned Counsel for the appellant has also urged that the handing over of ornaments and other articles by

the appellant amounts to a statement which is inadmissible in view of a Full Bench decision of this Court reported in Baldeo v. Emperor ('40) 27 A.I.R. 1940 All. 263. The question referred to the Full Bench there was as follows:

What portion, if any, of the statement to the efiect that the knife with which he and Baldeo and Lakhan had murdered Maharaj Singh was at his house under a heap of pyal alleged to have been made by the appellant Tirmal to the sub-inspector of police, Rafiq Ahmad, is admissible in evidence under Section 27, Evidence Act?

6. The decision of the Full Bench was that in view of the decision of their Lordships of the Privy Council in Pakala Narayana Swami v. Emperor ('39) 26 A.I.R. 1939 P.C. 47 no part of the statement was admissible. It is clear however that this decision was about a statement as opposed to an act, and here we have to consider whether an act and a statement stand on the same footing. For this the learned Counsel has relied on Hira Gobar v. Emperor ('19) 6 A.I.R. 1919 Bom. 162 and on Turab v. Emperor ('35) 22 A.I.R. 1935 Oudh 1 which followed it. This latter decision quotes the relevant portion of the Bombay judgment. In the Bombay case, Shah J. observed as follows:

In my opinion the evidence taken as a whole shows that it is evidence of a confession of the accused in the presence of a police officer. It is true that in terms it purports to establish that accused 1 pointed out the house and the various places connected with the offence and it is contended that it is really evidence of the conduct of the accused, and that therefore it is admissible under Section 8, Evidence Act. It is clear from the evidence that the real significance of the conduct arises out of the statements made by the accused at the time, and that the conduct, apart from the statements made either expressly or impliedly by gestures by the accused, has very little value. The meaning that was conveyed to the witnesses by what is contended to be the conduct of the accused and not his statements was really conveyed by the statements made at the time when he pointed out the various places. Such statements would clearly be inadmissible under Sections 25 and 26, Evidence Act, as they were made to the police officer or to the complainant in the presence of the police officer. It is common ground that no fact is deposed to as discovered in consequence of the information furnished by the accused and that Section 27, Evidence Act, does not apply. I am unable to accept the contention urged by the learned government pleader that this evidence, which is substantially evidence of the confession of the accused in the presence of a police officer, can be admitted as evidence of conduct, apart from the accompanying statements, under Section 8.

7. While Heaton J. stated:

As regards the other item, I entirely agree with my learned brother that in this case what the appellant was doing was that he was making a confession to a police officer. But the confession comprised not merely words but gestures, and what is sought to be done is, while not proving the words, to prove gestures and further to prove all that is necessary to give significance to those gestures. But I quite agree that gestures are just as much a part of a confession as are the words used. So that item of evidence also must be discarded.

8. With all respect to the learned Judges who decided those two cases we are unable to share their views. Section 25, Evidence Act, runs as follows : "No confession made to a police officer shall be proved as against the person accused of any offence," and Section 27 runs as follows:

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

9. In those cases the confession was found to be inadmissible apparently under Section 25, Evidence Act, because it was made to a police officer and, in the circumstances of those cases, Section 27 did not come into play, and not because the statements made to the police officer were inadmissible in evidence for the reasons given in the Full Bench decision of this Court to which we have referred. With all respect to the learned Judges who decided the Bombay and the Oudh cases we have difficulty in agreeing that the pointing out of property amounts to a confession. In Emperor v. Misri ('09) 31 All. 592 a distinction was drawn between Sections 24 and 27, Evidence Act, which deal with confessions and Section 8, for with reference to Section 27 we find the following words:

The section does not profess to and does not deal with evidence as to the conduct or acts of the accused, which is admissible under Section 8 or any of the preceding sections of the Evidence Act and is subject to no limitation so long as it is relevant.

10. Also in Emperor v. Rafique-ud-din Ahmad ('35) 22 A.I.R. 1935 Cal. 184 the following words occur:

Nextly, as regards production of articles, the evidence is relevant as evidence of conduct under Section 8, Evidence Act. Under that section statements accompanying or explaining conduct are also relevant as part of the conduct itself.

11. It appears to us from this that a distinction was drawn by the learned Judges between "acts" and "statements." The pointing out of a place whence property is recovered may denote nothing more than that the person pointing out the place is of opinion that something will or may be found there. A person may point out a place from which something is eventually recovered even if he does not actually himself know that there is something there, and we cannot in each and every case presume that because a person points to a certain place he knows it for a fact that a certain thing will be recovered there, nor can we presume that he himself put the property there or that he put the property there because he had committed a crime with respect to that property. We may perhaps say that his pointing out a place is an admission that he believes that it may lead to the discovery of something which may have some connexion with some crime, but no more. For instance, a person may point out a place because someone has told him that something has been buried there. The person who has received that information may be entirely innocent even if the information was given to him by a person who was guilty. In Section 8, Evidence Act, which deals with the relevancy of the conduct of any party, Expln. I draws a clear distinction between statements and acts. The explanation reads as follows:

The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

12. "Conduct" may in certain circumstances include statements as well as acts, but in doing so it still retains the difference between an act and a statement. The difference between a statement and an act is in our opinion clear. A statement must consist of words, be they spoken, be they written, or be they spelled out, as would be done by a mute person who spells out words on his fingers, and we are inclined to think that even words would not always be statements, as for instance, if a person recited the numbers from 1 to 10, if one considers a statement in the sense used in Section 162, Criminal P.C. Acts however exclude words and in our opinion cannot be translated into words. For instance, if a person points out a place it is impossible to say whether had he spoken he would have said "look there" or "dig there" or "you will find there..."or" I have buried there..."or" I have committed such and such a crime." We are unable to hold therefore that the fact that in the present case the appellant, by taking in his hands certain articles and handing them over, made a statement much less can we find that he made a statement which amounts to a confession. If he also stated anything whatsoever we do not know what he stated, for none of the witnesses who have given evidence about this say that the appellant made any statement whatsoever. We come to the conclusion therefore that the Full Bench decision of this Court which refers to statements only has no application in the present case and that Section 8, Evidence Act, applies. From the fact that the appellant went to two different places and that from each of those he took into his possession property that was with the deceased at the time of her murder and handed it over we infer that he knew that those articles were in those two places.

13. We next have to consider whether that knowledge was due to the appellant having committed a crime or is compatible with his innocence. The two places were at a distance of some furlongs from the scene of the murder and at a considerable distance one from the other. We cannot but come to the conclusion that they were put in those places by the person who committed the crime, and we can exclude the possibility that it was some person other than the appellant who having committed the murder took those articles and put them in those two places and that the appellant knew of the articles being there because he managed to follow the murderer and so came to know where the murderer had put them. One must not forget in this connexion that the appellant was seen a few paces behind the deceased going in the same direction very near the scene of the occurrence just before the murder was committed. We have stated above that because the confession is not correct in every particular we are not forced to disregard it altogether. The learned Sessions Judge has acquitted the appellant on the ground that his impression was that the confession did not contain that ring of truth throughout which would entitle him to rely upon it in spite of the evidence of the recovery of the articles, that the recovery of the article's was not by itself sufficient to support a conviction and finally because he thought that the deceased may have been a woman of loose morals as alleged by the accused and might therefore have been murdered for this reason by a person other than the accused. This allegation of loose morals was not made by the accused until he made a statement in the Sessions Court and in view of the fact that Mt. Tirbeni, the daughter of the deceased Mt. Shyama, is 30 years of age, Mt. Shyama must have been about 50, so it was not probable that she was of loose morals at that age.

14. The learned Judge, however, thinks that because the "lahanga" of the deceased was found separate from her body and she was almost naked when the corpse was taken out of the well one could infer that suggestion of the accused was correct. We need only say here that the place where the murder was committed was about 40 paces from the well where the corpse was recovered and the "lahanga" was recovered ten paces from the well. Had she been found by someone in a compromising position that could only have been where the "lahanga" was found ten paces from the well and there would have been no blood 40 paces from the well. It appears to us that the "lahanga" fell off after the corpse had been dragged some distance away and head constable, Hashmuddin, who inspected the locality found marks of something having been dragged from the place 40 paces from the well right up to the well. We have therefore no difficulty in finding that the theory of the woman being of bad character and, found by someone in a compromising position is entirely untenable. Taking the cumulative effect of all the evidence which we have described we come to the conclusion that the prosecution has succeeded in proving the guilt of the accused and we therefore setting aside the order of acquittal passed by the Sessions Judge allow the Government appeal, and finding the accused guilty of murder under Section 302, I.P.C., sentence him to death and order the sentence to be carried out according to law.