

GAHC010209462022



AS:11847-DB

2024:GAU-

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/109/2022

NIM DAIMARY @ MOHIM
KARBI ANGLONG, DIPHU, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

B E F O R E

Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

Advocate for the appellant : Shri A. Ahmed, Amicus Curiae
Advocate for the respondent : Ms. B. Bhuyan, Sr. Advocate & Addl. PP, Assam assisted by
Ms. E. Murtaza.

Date of hearing : 22.11.2024

Date of judgment : 29.11.2024

JUDGMENT & ORDER

(S.K. Medhi, J)

The present appeal has been preferred from jail against a judgment and order dated 24.08.2022 passed by learned Sessions Judge, Karbi Anglong, Diphu in Sessions Case No. 30/2011 (G.R. Case No. 613/2006 and Howraghat P.S. Case No. 139/2006. By the impugned judgment, the appellant has been convicted with R.I. for life and a fine of Rs. 10,000/- (Rupees Ten Thousand) u/s 302 of IPC , in default, R.I. for 1 year only and further R.I. for 7 years and a fine of Rs. 10,000/- i/d R.I. for 1 year u/s 201 of Indian Penal Code.

2. The appeal involves the murder of the wife of the appellant.

3. The criminal law was set into motion by lodging of an *Ejaha*r by PW1 on 05.12.2006. It was stated that the deceased, who was his niece was married to the appellant about 20 years back and was living with him along with three children. However, on 09.06.2006, it was informed that the niece had eloped with someone else and after making a search, her whereabouts could not be found. Thereafter, from certain source, it was learnt that the appellant had confessed that on the same date, i.e. 09.06.2006 at about 10 p.m., he had killed the deceased and threw her into the Sonarijan River. The *Ejaha*r was lodged in the Dokmoka Outpost, whereafter the formal FIR was registered under the jurisdictional Howraghat Police Station. The investigation was accordingly made and after filing of the formal Charge Sheet, the charges were framed by the learned Deputy Commissioner, Karbi Anglong under Section 302 and 201 of the IPC. It may be mentioned that the said order was passed at a time when the Judiciary was not separated from the Executive and the powers were entrusted to the Deputy Commissioner to act as the Sessions Judge.

4. The prosecution had adduced evidence through 4 (four) numbers of witnesses. PW 1 is the informant who had deposed that the police had caught the appellant and enquired about the matter. He has also stated that the appellant had surrendered and confessed about killing the deceased. The *Ejahaar* was proved by him as Ext 1. PW 2 is a co-villager who had deposed that the appellant had confessed before him regarding his involvement in the killing of the deceased. PW 3 is the Magistrate before whom the appellant had made a confessional statement. He has deposed that necessary caution was given to the appellant including a reasonable time for reflection. He has also stated that during such time for reflection, the appellant was kept under the supervision of office peon and there was no involvement of the police. The confessional statement was proved by him as Ext. 4. PW 4 is the Investigating Officer who had deposed of receiving the *Ejahaar* on 05.12.2006 and making the investigation, drawing of sketch map and filing of the Charge Sheet.

5. After completion of the evidence of the prosecution, the circumstances against the appellant were put to him and his statement was recorded under Section 313 of the Cr.P.C. It may however be noted that on a specific question regarding the confession, the appellant had admitted of making such confession. Based on the aforesaid evidence and the materials on record including the confessional statement, the conviction has been made which is the subject matter of challenge.

6. We have heard Shri A. Ahmed, learned Amicus Curiae for the appellant. We have also heard Ms. B. Bhuyan, learned Sr. Counsel & Addl. Public Prosecutor, Assam assisted by Ms. E. Murtaza, learned counsel.

7. Shri Ahmed, the learned Amicus Curiae has submitted that apart from the confessional statement, there are no other materials to implicate the appellant.

It is submitted that the alleged occurrence would be of 09.06.2006 and after about 6 months, the *Ejhar* was lodged which itself would be fatal to the case of the prosecution. He submits that such delay is wholly unexplained and therefore there was no foundation at all to proceed in the matter. He has also submitted that there was neither recovery of any body of the deceased nor any articles pertaining to the alleged offence were recovered which would have included the apparels of the deceased.

8. On the aspect that the confession itself is not liable to be relied upon, the learned Amicus Curiae has submitted that the confession was recorded on 07.12.2006 and though the same has been proved as Ext. 4, the same would not reflect that the confession was voluntary and truthful. Highlighting on the requirement of both the aspects of voluntariness and truthfulness, he has submitted that the aspect of voluntariness cannot be readily inferred from the deposition of PW4 as well as Exhibit 4 - the confessional statement. He has also submitted that the truthfulness also appears to be doubtful as there is a huge time period from the alleged date of occurrence and the date when the confession was made. Highlighting the aspect of the requirement of providing Legal Aid before making such confession, the learned Amicus Curiae has submitted that admittedly, no Legal Aid was afforded to the appellant before he had made the confession. In this connection, the learned Amicus Curiae has relied upon the case of ***State of Assam vs. Rabindra Nath Rabha*** reported in ***1982 Cr.L.J. 216*** in which he submits that it has been laid down that before making a confession, an accused is liable to be given Legal Aid as otherwise it would be in violation of Article 21 of the Constitution of India. On the said aspect, the learned Amicus Curiae has also relied upon a case of the Division Bench of the Hon'ble Calcutta High Court in ***Abed Ali Jamadar vs.***

State reported in **1988 CrLJ 354**.

9. On the aspect of the requirement of truthfulness as well as voluntariness in a confessional statement, the learned Amicus Curiae has relied upon the case of **Sarwan Singh Rattan Singh vs State of Punjab: Harbans Singh Bhan Singh vs State of Punjab** reported in **[AIR 1957 SC 637]** in which the following has been laid down:

“10. ... Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case. ...

It is hardly necessary to emphasize that the act of recording confessions under Section 164 of the Code of Criminal Procedure is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section (3) of Section 164 are fully satisfied. It would of course be necessary in every case to put the questions prescribed by the High Court circulars but the questions intended to be put under sub-section (3) of Section 164 should not be allowed to become a matter of a mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. Incidentally, we may invite the attention of the High Court of Punjab to the fact that the circulars issued by the High Court of Punjab in the matter of the procedure to be followed, and questions to be put to the accused, by Magistrates recording confessions under Section 164 may be revised and suitable amendments and additions made in the said circulars in the light of similar circulars issued by the High Courts of Uttar Pradesh, Bombay and Madras. The whole object of putting questions to an accused person who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge against the accused person as mentioned in Section 24 of the Indian Evidence Act. There can be no doubt that, when an accused person is produced before the Magistrate by the investigating officer, it is

of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case. However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even longer period may have to be given to him before his statement is recorded.

11. There is, besides, another fact which is equally fatal to the prosecution case. Even if the confession is held to be voluntary, it must also be established that the confession is true and for the purpose of dealing with this question it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities in the case. ..."

10. He has also relied upon the case of ***Sankhi Chiba and Anr. vs. State of Arunachal Pradesh*** reported in **2008 (1) GLT 388** in which a Division Bench of this Court has laid down as follows.

"16. In Nazir Ahmed's case (supra), the Privy Council speaking through Lord Loche in a 5 Members Bench in dealing with the scope of Section 164 Code of Criminal Procedure, 1989, being peri materia with the Code of Criminal Procedure, 1973 observed as follows:-

"to this contention it was answered that there was no ground for reading the word 'may' in S. 164 as meaning 'must' on the principles described in 5 AC 214 (18). There is no need to call in aid this rule of construction well recognized in principle but much debated as to its application. It can hardly be doubted a Magistrate would not be obliged to record any confession made to him, if, for example, it were that of a self accusing madman or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognized rule, namely,

that where a power is given to do a certain thing in a certain way the thing must be done in that way or and not at all. Other methods of performance are necessarily forbidden. . "

11. The learned Amicus Curiae accordingly submits that the only material to come to the conclusion of guilt of the appellant being the confessional statement, which itself is not worthy of any credence, the impugned conviction and sentence is liable to be interfered with and the appellant be acquitted.

12. *Per contra*, Ms. B. Bhuyan, the learned Addl. Public Prosecutor, Assam has submitted that the aspect of delay has to be examined from the facts and circumstances of the case. It is submitted that the PW1 has duly explained the delay in which he has stated that initially a search was made of his niece who was stated to have eloped. He has further stated that on coming to know about the killing of his niece by the appellant, the matter was informed to the police where after the appellant had made a confession. She has also drawn the attention of this Court to the deposition of PW2 who indicates that there was an extra-judicial confession made before him. It is submitted that reading of the said deposition would not indicate that the confession before him was made in presence of any police personnel.

13. She submits that the important witness is the PW3, namely, the Judicial Magistrate before whom the confession was made. She has submitted that apart from the Exhibit 4 which reveals adherence to all the formalities before recording of such confession, the PW3 had deposed that he had taken all precautions and fulfilled the pre-conditions before recording such statement. PW3 had highlighted that the appellant was cautioned before making such confession and had ensured that proper reflection time of 2-3 hours was given to the appellant and there was no presence of any police personnel. The learned Addl. Public Prosecutor has also referred to Section 463 of the Cr.P.C. which is in

connection with non-compliance of the rigors of Section 164 or Section 281. For ready reference, Sections 463 and 281 are extracted herein below.

Section 463 – Non-compliance with provisions of section 164 or section 281

(1) If any Court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

Section 281 – Record of examination of accused.

(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the Presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined or, if that is not practicable in the language of the

Court.

(4)The record shall be shown or read to the accused, or, if he docs not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5)It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6)Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

14. The learned Addl. Public Prosecutor, has also referred to Section 80 of the Evidence Act on the presumption of veracity of a confession made before the learned Magistrate. It is submitted that in a given case, even the witness of the Magistrate before whom a confession is made may not be required which is indicated by the aforesaid Section 80. She has also referred to the case of ***Madi Ganga v. State of Orissa*** reported in ***(1981) 2 SCC 224*** in which the following has been laid down.

“5. We desire to express no opinion on the question whether the extra-judicial confession made to PWs 2 to 5 is barred under Section 24 of the Evidence Act. It is unnecessary for us to say anything on this question, since we are satisfied that the learned Sessions Judge was wholly wrong in excluding and the High Court was certainly right in acting upon the confessional statement made to the Magistrate. The learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain’s submission that the learned Magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorises the court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly taken in accordance with law. Shri Jain

submitted that if the Magistrate had been examined as a witness, the accused might have been in a position to show, by cross-examination that the confession recorded by the Magistrate was not voluntary. The Magistrate has appended a certificate that he was satisfied that the confession was voluntary. No circumstance has been brought out in the evidence justifying the calling of the Magistrate as a witness. We do not think that the circumstances of the case justify any comment on the alleged failure of the prosecution to examine the Magistrate as a witness."

15. The rival submissions have been duly considered and the materials placed before this Court including the LCRs have been carefully perused.

16. The present assailment has been made mainly on the grounds that the sole material on which the conviction is based is confession which has been argued not to be in accordance with law. To examine the aforesaid aspect, the confessional statement which has been proved as Exhibit 4 along with the deposition of PW 3 is required to be scrutinized.

17. Exhibit 4 is the confessional statement made on 07.12.2006 which was in the prescribed format prevalent at that time. The format, each page of which has been duly signed by the Magistrate also contains the aspect of a proper reflection time and absence of any police personnel. The learned Magistrate had also recorded the aspect of the voluntariness to give such statement.

18. At this stage, it would be also required to examine the case of **Rabindra Nath** (supra) which has been cited by the learned Amicus Curiae on the aspect of Legal Aid to be given before such confession. On a careful reading of the aforesaid judgment, it would be revealed that the observation on the requirement of Legal Aid was only the opinion rendered by one Hon'ble Judge of the Bench which however was not concurred with by the other Hon'ble Judge. In fact, in the concurring part by which the death reference was answered in

favour of the accused in that case, the other Hon'ble Judge had expressed his reservation on the aforesaid aspect of having the facility of Legal Aid to an accused before making a confessional statement.

19. Interestingly, the case of the Division Bench of the Calcutta High Court in ***Abed Ali*** (supra) which has also been cited by the learned Amicus Curiae has referred to the judgment of ***Rabindra Nath*** (supra). The Hon'ble Calcutta High Court has in fact made a meticulous observation of the reservation expressed by the other Hon'ble Judge who was in the Division Bench. The Hon'ble Calcutta High Court has in fact made the following observation.

“62. It may not be out of context to point out that Hansaria J., one of the learned judges constituting the Division Bench, while agreeing with the observations of Lahiri J., who delivered the judgment for the Bench, with regard to the other grounds for discarding the confession, reserved his thoughts on the subject of legal aid for some other occasion thereby, giving the indication that he had reservations with regard to the observation of Lahiri J. on the subject of legal aid. Therefore, the observation that a confession recorded without informing the accused of his right to consult and to be defended by a lawyer of his choice must be discarded as contravening Art. 21 of the Constitution, cannot be said to be the unanimous observation of both the learned Judges constituting the Division Bench.”

20. In view of the above, it would be difficult on our part to accept the contention that failure to grant Legal Aid to an accused before making a confession would be fatal in all cases. We are also fortified in coming to the aforesaid conclusion inasmuch as the prescription of law does not provide for giving Legal Aid as a matter of course.

21. Coming to the aspect of the delay in lodging the FIR, let us now examine the aspect of delay in lodging the FIR. Though delay would be a relevant factor, the same has to be examined from the facts and circumstances of each case and delay may not be fatal in all cases. In the case before us, the *Ejahaar* was lodged on 05.12.2006 of an incident which was about 6 months early. The detection of the death of the niece of the informant, however, was just prior to lodging of the *Ejahaar* which was also tried to be settled in a *Bichar* wherein some more time was consumed. The materials would also show that the appellant was taken to the police station where he had surrendered and immediately thereafter he had made a confessional statement which has been elaborately discussed above.

22. The learned Amicus Curiae had laid emphasis on the aspect of truthfulness and voluntariness of the confession statement for which he had cited the case of ***Sarwan Singh Rattan Singh*** (Supra). To examine the aforesaid aspect, we have to see the other available materials on record. The aspect of the confession was specifically put to the appellant after conclusion of the evidence of the prosecution under Section 313 of the Cr.P.C. The said statement which was recorded in the year 2022 had a specific question no. 15 regarding the said confession. However, it is seen that the appellant was consistent with the confession and rather he had admitted of making such confession. Under such circumstances, it would not be possible for us to accept the submission made by the learned Amicus Curiae raising the aspect of lack of truthfulness and voluntariness in the confessional statement. We have also noticed that not even a foundation was raised by the defence that the said confession was not voluntary or not truthful and rather, as observed above, in the Section 313 Cr.P.C. statement recorded after a long period of time in the year 2022, the

appellant was consistent with such confession.

23. A confession which has been found to be voluntary and truthful can be the sole basis of a conviction. In this regard one may look into the case of ***Petlu Konwar vs. State of Assam*** reported in **2016 CrLJ 4496** wherein a Division Bench of this Court has laid down as follows:

“53. A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefore the court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under Section 313 of the Code, in our considered opinion, can be fully relied upon.”

In the case at hand, even after a substantial period of time when the appellant was examined under Section 313 of the Cr.P.C. recorded on 05.08.2022, he had accepted of making the confession which was on 07.12.2006.

24. We have also noticed that the learned Magistrate who had recorded the confession had adduced evidence as PW3, wherein a presumption on the veracity of such confession is statutorily available under Section 80 of the Indian Evidence Act. We have also noted that under Section 463 of the Cr.P.C., it has been laid down that a confession recorded under Section 164 of the Cr.P.C. can be admitted in spite of certain non-compliance if the same does not injures the accused in his defence on the merits. For ready reference, the aforesaid provisions are extracted herein below:

Section 80 of the Indian Evidence Act.

“Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given

by a witness in a judicial proceedings or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any judge or Magistrate or by any such officer as aforesaid the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

25. As observed above, the Hon’ble Supreme Court in the case of **Madi Ganga** (supra) has explained the principles governing Section 80 of the Evidence Act. In the instant case, even that aspect is not liable to be gone into as the learned Magistrate was indeed examined as PW3.

26. Under the aforesaid facts and circumstances and the discussions made, we are of the considered opinion that the conclusion reached by the learned Sessions Judge, for convicting and sentencing the appellant are based on cogent materials and does not call for any interference. The appeal accordingly stands dismissed.

27. Send back the records.

28. Before parting we would like to record out appreciation for the assistance rendered by the learned Amicus Curiae and he would be entitled to the prescribed fee.

JUDGE

JUDGE

Comparing Assistant