A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK
C.R.A No.331 of 1993

This is an Appeal under Section 374(2) of the code of Cr.P.C.

Annaniyo Raito	....	***Appellant***
	-versus-	
State of Orissa	....	***Respondent***

Appeared in this case by Hybrid Arrangement

(Virtual/Physical Mode):

For Appellant	**-**	Mr. S.K. Dash. Advocate.
For Respondent	-	Mr.T.K.Praharaj, Standing Counsel.

CORAM:

MR. JUSTICE A.C.BEHERA

Date of Hearing :14.09.2023 :: Date of Judgment : 13.10.2023

1. The appellant, by preferring this appeal, has challenged the Judgment of conviction and order of sentence dated 26.02.1993 passed by the learned Additional Sessions Judge, Paralakhemundi in Sessions Trial Case No.24 of 1992 arising out of G.R. Case No.205 of 1991 corresponding to Seranga P.S. Case No.34 of 1991 of the Court of learned Sub-Divisional Judicial Magistrate, Paralakhemundi.

2. The Appellant (accused) has been convicted for commission of offence under Section 314 of the Indian Penal Code, 1860. For the above conviction, he has been sentenced to undergo rigorous imprisonment for 3 (three) years.

Prosecution Case

3. The accused (Appellant) and the deceased are husband and wife respectively. Prior to marriage, there was illicit relationship among them. Due to such illicit relationship among them, the deceased had conceived. While the accused (Lasini Bhuyan) carrying three months of her pregnancy, that matter was brought to the light. For which, there was a meeting in their village. In that meeting, the accused and deceased both admitted their illicit relation between them and the accused had agreed to keep the deceased as his wife. After some days of that village meeting, the accused took the deceased for abortion of her pregnancy and returned after one day *i.e.* on 10.09.1991 with a dead child (foetus) and on that day, at about 01.00 P.M., the deceased felt severe pain in her belly. But, when the deceased was asked about the cause of her pain in their village meeting, then she (deceased) disclosed that, the accused had given some medicine to her and by the result of such medicine, her dead foetus came out.

4. The accused also told before the members of the Panchayat that he had given medicine for abortion of the deceased but on that day, the deceased (Lasani) expired on account of severe pain on her belly due to consumption of medicine provided by the accused for her abortion. Thereafter, one co-villager of the accused and the deceased, namely, Mane Bhuinya lodged a written FIR vide Ext.1 at Seranga Police Station alleging the above allegations against the accused.

5. Basing upon such FIR, in absence of the O.I.C of Seranga Police Station, S.I Mr. B.R. Praharaj registered Seranga Police Station Case No.34 of 1991 and he took up the investigation of the case.

During the investigation, he (I.O) examined the informant and the witnesses, visited the spot, held inquest over the dead body of the accused, prepared the inquest report (Ext.11), seized the dead foetus through seizer list (Ext.2), sent the dead body of the deceased through dead body Challan (Ext.9) for post mortem examination and accordingly, post mortem examination over the dead body of the deceased was conducted by the Doctor and the P.M. report (Ext.7) was prepared. Then, he (I.O.) arrested the accused and forwarded him to the Court. He (I.O.) received the P.M. report (Ext.7) and sent the viscera collected by the Doctor at the time of conducting the post mortem examination to the State Forensic Science Laboratory (SFSL), Rasulgarh, Bhubaneswar for chemical examination and report, then seized other incriminating documents and articles and after completing the investigation, he (I.O) submitted charge sheet against him (accused) under Section 304 and 314 of the Indian Penal Code, 1860.

6. Accordingly, after commitment of the case to the Court of Sessions from the Court of learned S.D.J.M, Paralakhemundi and on transfer of the same to the Court of learned Addl. Sessions Judge, Paralakhemundi, he (accused) was facing trial in that Court having been charged under Section 304 and 314 of the IPC,1860.

The plea of the defence was one of complete denial to the above alleged allegations of the prosecution against the accused. The specific plea/case of the defence as per the statements of the accused under Section 313 of the Cr.P.C. was that he (accused) has been implicated into the case falsely by the pastor of their church in order to remove him from his secretaryship of the village, but he (accused) is an innocent one.

7. In order to substantiate the aforesaid charges against the accused, prosecution examined altogether 12 witnesses as P.Ws.1 to 12 and relied

upon series of documents on its behalf vide Exts.1 to 12. But, whereas, the defence examined none on its behalf.

Out of 12 witnesses of the prosecution, P.W.1 is the informant, P.W.6 is the father of the deceased. P.W.2 is the pastor of the local church. P.Ws.3,4,5,8 & 9 are the co-villagers of the accused and deceased. The rest four witnesses *i.e.* P.Ws.7,10,11 and 12 are the official witnesses. Out of the said 4 official witnesses, P.W.10 is a Havildar of Seranaga Police Station, who had accompanied the dead body for post mortem examination. P.W.7 is the Doctor, who had conducted post mortem examination over the dead body of the deceased and had prepared the P.M. report vide Ext.7. P.W.11 is the scientific officer of SFSL, Rasulgarh BBSR who had examined the visceras of the deceased and P.W.12 is the sole investigating officer of the case, who had submitted the charge sheet against the accused after completion of the investigation.

8. After conclusion of the trial and on perusal of the materials and evidence available on record, the learned trial court found the the accused guilty for the offence under Section 314 of the IPC, 1860 that is for causing death of the deceased by his act with an intent to cause her miscarriage and convicted him thereunder and passed an order of sentence against him as stated above, vide Judgment dated 26.02.1993 in S.T. No.24 of 1992.

9. On being aggrieved with the aforesaid Judgment and order of sentence passed against him, he (accused) challenged the same by preferring this Appeal being the Appellant after taking several grounds in his Appeal memo.

10. I have already heard from the learned counsel for the Appellant (accused) and the learned Additional Standing Counsel for the State.

In order to assail the impugned Judgment of conviction and order of sentence passed by the trial court, the learned counsel for the Appellant contended that, the impugned Judgment of conviction and order of sentence has been passed by the learned trial court only on the basis of extra judicial confession, which cannot be sustainable under law. Because, the so called extra judicial confession of the accused, on which the learned trial court has placed reliance is not admissible under law. Therefore, according to him (the learned counsel for the Appellant), the impugned Judgment of conviction and order of sentence against him (Appellant/accused) cannot sustain.

11. But, on the contrary, the learned Addl. Standing Counsel for the State in support of the impugned Judgment of the learned trial court contended that the voluntary confession of the accused before P.Ws.1,2,3,4,5,6,8 and 9 about the causing of death of the deceased by providing medicine with an intention to cause her miscarriage is ultimately establishing the case of the prosecution for the offence under Section 314 of the IPC against the appellant (accused) beyond reasonable doubt. For which, the impugned Judgment of conviction and order of sentence passed against him by the trial court cannot be held unsustainable under law.

12. The learned trial court has given its finding in Para Nos.10 and 11 of the Judgment that, *"it is forthcoming from the evidence of P.Ws.1,2,3,4,5,6,8 and 9 that, the accused had confessed before them in their village meeting that he had provided medicine to the deceased (Lasini) for abortion, for which, her miscarriage has been caused, resulting her death. Therefore, the ingredients of Section 314 of the*

Indian Penal Code have been duly fulfilled and thus, the accused is liable to be punished under Section 314 of the IPC, 1860."

13. In the FIR vide (Ext.1) it has been indicated that, the accused had confessed in the meeting of his village Panchayat that, he had given medicine to the deceased for termination of her pregnancy, which is the reason of her miscarriage.

The above findings and observations made by the learned trial court in the Para Nos.10 and 11 of the impugned Judgment itself is going to show that, the learned trial court has convicted the accused (Appellant) for the offence under Section 314 of the IPC only on the basis of the extra judicial confession made by him before P.Ws.1,2,3,4,5,6,8 and 9 in the meeting of their village Panchayat.

14. During trial, the accused has totally denied to the above so-called extra judicial confession by him before the above witnesses *i.e.* P.Ws.1,2,3,4,5,6,8 and 9 in the village meeting.

15. It is the established propositions of law that, an extra judicial confession by its very nature is a weak piece of evidence and an order of conviction cannot be maintained on the basis of such extra judicial confession without corroboration. When an accused denies the alleged confession projected on behalf of the prosecution in his statements recorded under Section 313 of the Cr.P.C., the said confession is to be held as per law as retracted confession.

Retracted confession can be relied upon, if it is established on behalf of the prosecution that, the said confession was made by the accused voluntarily. So, burden of proving voluntary nature of confession is on prosecution. Mere absence of inducement, threat, promise etc., on the accused is not enough to make the confession admissible. In order to make an extra judicial confession admissible and relevant, it requires for

the prosecution to establish that, the person making such confession would gain any advantage or avoid any evil of temporal nature on him, for which, he had made such confession.

Therefore, in order to make an extra judicial confession admissible and relevant, it is the duty of the prosecution to prove the basis/reason, for which the accused had made such extra judicial confession.

Here in this case at hand, there is no evidence in the record on behalf of the prosecution to show through the evidence of any of the witness including P.Ws.1,2,3,4,5,6,8 and 9 that, the accused had made the alleged extra judicial confession before them in the village meeting voluntarily.

16. Therefore, the burden of proving voluntary nature of confession, which was upon the prosecution as per law has not been discharged properly. As the so-called retracted confession of the accused was said to have been made before P.Ws.1,2,3,4,5,6,8 and 9 in the village meeting of their Panchayat and none of the witnesses of the prosecution including the above P.Ws.1,2,3,4,5,6,8 & 9 has uttered a single word in their respective evidence that, the accused had made such confession voluntarily, then the scenario as stated above by the above witnesses about the confession made by the accused in the village meeting of their Panhayat before a huge gathering cannot be said to be voluntary confession.

17. The conclusions drawn above regarding the inadmissibility of the so-called extra judicial confession of the accused before the members of the village meeting of the Panchayat for the reasons stated above finds support from the ratio of the following decisions:

> ***59 (1985) CLT-167 & 1986 (1) OLR-663- Dasuri Dei @ Lakra Vs. State-Indian Evidence Act, 1872, Section 24- Extra judicial confession-Retracted extra judicial confession.***

"Accused denied confession in his statement under Section 313 of the Cr.P.C., it is held as retracted confession. In that case, the court should look for some corroboration."

(2010) 47 OCR (SC) 718 Noor Aga Vs. State of Punjab & Anr. Indian Evidence Act 1872-Section-24
"Retracted extra judicial confession can be relied upon if made voluntarily. Burden of proving voluntary nature of confession is on prosecution."

(2004) 29 OCR 884,Kanika Mistry @ Mandal Vs. State of Orissa-Indian Evidence Act, 1872-Section-24
"Extra judicial confession must be of voluntary in nature. A lady accused was called to village meeting consisting 30 villagers including Sarpanch and ex-Sarpanch where she was questioned about the death of her husband (the deceased). She stated to have administered poison to her husband in the food. Held, in such scenario even if some statements were made by the accused, it cannot be said to be voluntary confession. Such confession cannot be admissible under law."

So, by applying the principles of law enunciated in the ratio of decisions referred to supra to the evidence of P.Ws.1,2,3,4,5,6,8 and 9, it is held that the so called extra judicial confession of the accused before P.Ws.1,2,3,4,5,6,8 and 9 is not admissible under law.

18. Here, in this case at hand, the accused has been convicted for the offence under Section 314 of the IPC, 1860.

Section 314 of the IPC provides punishment for the death caused by the act done with intent to cause miscarriage.

19. There are four essentials of Section 314 of the IPC. The said four essentials are-:

"(i) That, the woman was with child,

(ii) That, the accused did an act to cause miscarriage,

(iii) That, he did so with that intention &

(iv) That, such act caused the death of the woman"

20. The IO (P.W.12) has specifically deposed in Para-4 of his examination-in-chief by stating that, "he searched the old lady, who had given medicines for abortion of the deceased. But, he could not get that lady."

As the evidence of the above own witness of the prosecution i.e. P.W.12 (IO) itself is going to show that, one old lady had given medicine to the deceased for her abortion, to whom, he (P.W.12) could not able to trace, then, the above evidence of the IO is not fulfilling the second and third essentials of Section 314 of the IPC i.e. the accused did an act to cause miscarriage of the deceased and he did so with that intention for her miscarriage.

21. The Doctor (P.W.7) who had conducted autopsy over the dead body of the deceased and had prepared the PM report (Ext.7) has specifically deposed in his deposition by stating that, "he has not given any definite opinion regarding the cause of death of the deceased. But, he has collected visceras for chemical examination." He (P.W.7) has also deposed by answering to the questions of the learned defence counsel, that abortion is caused in many ways. There is also natural miscarriage. Abortion is frequent within 3 months of the pregnancy. There are various reasons for abortion. From the PM examination, it is not at all possible to say in the present case, whether the abortion of the deceased is natural or not.

22. The above evidence of the Doctor (P.W.7) is not bringing any definite/specific conclusion relating the cause of abortion or miscarriage of the deceased and as well as the cause of her death.

23. The scientific officer of SFSL, Rasulgarh, Bhubaneswar that is P.W.11 (by whom the visceras of the deceased were examined) has deposed in his deposition by stating that, his report is not available in the

record and he cannot say all details of his examination without referring his report. So far, he remembers, he had examined the visceras of one lady and his opinion was negative. A copy of that report and the necessary copies are with him and the copies thereof, have also been sent to the concerned authorities. He is able to give the copy of the report, in case he will be summoned by the court.

The above evidence of the scientific officer of SFSL, Rasulgarh, Bhubaneswar (P.W.11) is not at all going to show that, the death of the deceased was due to consumption of medicine for her miscarriage.

24. On conjoint reading to the above evidence, the Doctor (P.W.7) and the scientific officer of SFSL, Rasulgarh, Bhubaneswar (P.W.11), it is forthcoming that, prosecution has not become able to establish firmly/definitely that, the death of the deceased was due to consumption of medicine for her miscarriage. As such, the fourth ingredient of Section 314 of the IPC, 1860 has also not been fulfilled on behalf of the prosecution.

25. On analysis of the facts and circumstances of the case as per the discussions and observations made above, the basis of conviction made against the accused by the learned trial court for the offence under Section 314 of the IPC has become inacceptable under law. Because the basis of conviction was solely on extra judicial confession and the said extra judicial confession of the accused has become inadmissible. That too prosecution has not become able to establish the 3 essentials *i.e.* essential Nos.2,3 & 4 of Section 314 of IPC. For which, the impugned Judgment of conviction and order of sentence passed by the learned trial court against the accused (Appellant) cannot be sustainable under law.

Therefore, there is justification under law for making interference with the same through this Appeal which filed by the Appellant.

26. In the result, the Appeal filed by the Appellant is allowed.

27. The impugned Judgment of conviction and order of sentence passed on dated 26.02.1993 by the learned Additional Sessions Judge, Paralakhemundi in the Sessions Trial Case No.24 of 1992 arising out of G.R. Case No.205 of 1991 under Section 314 of the IPC against the accused are set aside.

28. The accused (Appellant) is acquitted from the offence/charge under Section 314 of the IPC on the ground of benefit of doubt.

29. Accordingly, the accused (Appellant) is directed to be set at liberty forthwith after being discharged from his bail bonds.

(A.C. Behera),
Judge.

Orissa High Court, Cuttack.
13th October, 2023//Rati Ranjan Nayak//
Junior Stenographer