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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal No. 187 of 2012

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Reserved on: 31st August, 2012
Date of Decision: 11th September, 2012

PRAMOD

.....Appellant
Through Mr. Ajay Verma, Advocate.

Versus

STATE

...Respondent
Through Mr. Sanjay Lao, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.

The appellant Pramod, a rickshaw puller, impugns his conviction, vide judgment of the trial court dated 21st April, 2011, under Section 302 of the Indian Penal Code, 1860 (IPC) for having committed murder of Giriraj, a property dealer, on the night intervening 26th – 27th April, 2009. By order of sentence dated 16th May, 2011, the appellant has been sentenced to undergo life imprisonment and to pay fine of Rs.12,000/-, and in default of payment of fine, to further undergo simple imprisonment for six months.

2. Homicidal death of Giriraj has been established from the post mortem report (Ex. PW7/A) which was proved by Dr. B.N. Mishra, who conducted the post mortem on 28th April, 2009. Ex. PW7/A records that a dead body was found in a park near Palam Railway Station. As per the post mortem, the dead body had external and internal injuries. Ligature mark was present all around the neck and horizontally placed below the thyroid cartilage, measuring whole circumference of the neck with ill-

defined margins, with contused underneath tissue of the neck, with collection of scattered blood clots into the soft tissue of the neck. Further, the sub scalp haematoma of size 5x4 cms was present at occipital region of the head, with cherry red coloured blood clot, with fracture of occipital bone of skull. The body was highly decomposed, swelled up, bloated, emitting foul smell, with peeling of skin. The mouth was partially open with protruded tongue. White colour pyjama was encircled around the neck with two fold in situ. The cause of death was stated to be asphyxia caused by ligature strangulation using the block present in situ. The time of death was about 1.3 days (or 40 hours) before post mortem, which was conducted from 3.45 to 4.45 PM on 28th April, 2009.

3. The real question is whether the prosecution has been able to show and establish that the said injuries or the “act” was caused and done by the appellant Pramod? The prosecution version is that the deceased had received a missed call from mobile No. 9958293716 belonging to (PW-6) Amit. The deceased thereupon spoke to the appellant Pramod on the said telephone number, and thereafter met Pramod, the rickshaw puller, and was with him in his rickshaw. The appellant rickshaw puller purchased liquor from the liquor shop and both of them, i.e. the appellant and the deceased, drank liquor together in the park. Thereafter, the appellant killed the deceased.

4. There are no eye-witnesses. The prosecution’s case is based purely upon circumstantial evidence. It is primarily based on circumstances of last seen, extra judicial confession and recovery.

5. To establish the evidence of last seen, the prosecution heavily relies upon statement of PW-12, Gajanand. (PW-12) Gajanand has stated that on 27th April, 2009, at about 8.00 AM, he came to know that his

neighbour Giriraj had not returned from his shop, since evening of 26th April, 2009. He went to the house of Giriraj, met his son, and informed him that he had seen Giriraj on 26th April, 2009, near the liquor shop in Sector 20, Marble Market, on a rickshaw and that

“..... I had also seen the rikshaw puller purchasing some liquor and a water bottle and handing over the same to Giriraj and further that I had asked Giriraj as to where was he going on which he had told me that he was going to attend a party and thereafter Giriraj had gone towards CNG filling station in the same rikshaw, after which I had returned to my house after purchase some usable articles for my house.

On this information being given to me by Vijay, I along with Vijay, his cousin Kamal and his relative Raja Ram went to PS Palam where one Satish Lamba, friend of the deceased was already present. He told us that on 26.4.2009 Giriraj had received a missed call on his mobile phone at about 7.30 PM and after receiving the said missed call he had gone out of his shop.....”

6. Is PW-12 a chance witness or a planted witness, who had last seen the appellant with the deceased? PW-12 has been disbelieved by the trial court and in our opinion rightly. The statement shows that the rickshaw puller was not known to PW-12. The said witness has not stated that he knew the rickshaw puller from before or that Giriraj and rickshaw puller were going to drink liquor together. As discussed below, PW-12 was very close to family of the deceased. He has stated that he remained with Vijay Kumar, son of the deceased and other police officers on 27th and 28th of April 2009. Yet his statement under Section 161 was recorded only after the dead body of deceased was recovered on 28th April, 2009. This creates a grave doubt on the statement of PW-12 that he had seen deceased Giriraj with the appellant rickshaw puller. It is difficult to perceive and believe that Giriraj, a property dealer and a man of means, would like to have liquor with a rickshaw puller in a park. PW-12 seems to be a planted witness to this extent. There is a grave suspicion that the

aforesaid statement has been made to plug in the gaps in the prosecution version. It is difficult for us to place reliance on PW-12 Giriraj's aforesaid statement to implicate the accused appellant.

7. DD entry No. 44B was recorded on 27th April, 2009, at 12.05 PM on a call made from telephone No. 9311755777. This number belongs to Vijay Singh (PW-10), son of the deceased. PW-10 in his examination in chief had stated that on 27th April, 2009, he had made a call on number 100 and also called the police station. The DD entry records that the caller from the said number had stated that some people had abducted his father Giriraj "uthakar le gaye". PW-12's statement that he had an occasion and had seen the deceased with the appellant and had also spoken to PW10 on 27th April, 2009 is not supported and is contrary to what PW-10 had informed on telephone and was recorded in DD No. 44 B. PW-12's statement that he had seen a rickshaw puller purchasing liquor and water bottle etc. does not inspire confidence and is not believable.

8. As per PW-12, Giriraj had remarked that he was going to a party and thereafter he had gone towards CNG filling station in a rickshaw. In case Giriraj had gone or was going to a party, then the evidence of last seen viz. the appellant has to be disbelieved. The deceased could have gone to the party and his death may be subsequent. These and other gaps, contradictions and improbabilities in the prosecution version and statements have been discussed below.

9. In *State of U.P v. Satish* (2005) 3 SCC 114, the Supreme Court held that last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead, is small. The principle being that there is a possible link between the said person and the death of the

deceased. But this principle fails when there is a possibility of any other person other than the accused being the author of the crime. Facts of each case therefore have to be examined. (See *Mohd. Azad v. State of West Bengal* 2008 (15) SCC 449 and *State v. Mahender Singh Dahiya* 2011 (3) SCC 109).

10. Supreme Court in *Sahadevan and Anr. v. State of Tamil Nadu* 2012 (5) SCALE 415 elucidated the evidentiary value of the “last seen” evidence and when and how it can be used in criminal prosecution:-

“31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this court. The court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.

34. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

11. In case of *State of Karnataka v. M V Mahesh* (2003) 3 SCC 353 the Supreme Court noted that merely being seen last together was not enough. What has to be established in a case of this nature is that there should be definite evidence to indicate that the deceased had been done to death of which the accused was or must be aware, as also proximate to the time of being last seen together. If no such clinching evidence was put forth, the prosecution case may fail. No doubt that even in the absence of the *corpus delicti*, it was possible to establish in an appropriate case commission of murder on appropriate material being

made available to the court but in the said case no such material was made available.

12. Other evidence on the question of last seen, extra judicial confession and recoveries may now be examined and considered. PW13, Satish Lamba was a Constable in Delhi Police. In examination in chief, he had stated that the deceased worked, in partnership with Ramesh Solanki, as a property dealer. PW-13, his neighbour, had friendly relations with the deceased and he used to sit with him. On 26th April, 2009 at 7.30 PM, he was sitting with deceased at his shop in Raj Nagar when the deceased received a missed call on his mobile phone and went out of the shop to talk. He did not know about the contents of the conversation. Deceased came back and gave him the key to his office and instructed him to shut down the shop because he had to go somewhere on personal business. He closed the shop at about 7.45 PM and as instructed gave the key at the residence of Giriraj. In cross-examination, he admitted that he was a Constable in Delhi Police and was posted in Vikas Puri, Delhi. He had reached the shop of the deceased at 7.00 PM and in his presence only one missed call was received by the deceased. PW-13 did not know the appellant though he accepted and stated that he knew the deceased and his family. He did not know where the deceased had gone and what was the reason why the deceased asked him to close the shop and take the key home?

13. Amit (PW-6) has stated that on 26th April, 2009, the appellant had taken his phone and made a missed call. He had come to know the appellant only 4/5 days prior to the incident, as the accused appellant also used to ply rickshaw outside Metro Station, Sector 9, Dwarka. He did not know with whom Pramod had talked and what the conversation was about.

14. Vijay Singh (PW-10), son of the deceased, had stated that on 26th April, 2009 at about 9.30 PM, he had made a call on his father's mobile phone but the phone was switched off. He went to sleep. At about 3.30 AM, he was woken up by his mother who told him that his father had not returned. He informed his neighbours, cousin and brother-in-law Raja Ram. He called up relatives but without any success. Next morning at 10.30 AM, they went to Police Station, Palam and met ASI Radha Kishan and the SHO. They got details of their father's mobile number (9971551348) from the concerned service provider (mobile company) and realized that a call had been made to number 9958293716, at 7.30 PM on 26.4.2009. They called back on the said number and came to know that this phone number belonged to one Amit who plied rickshaw at the Metro Station. Amit told them that the appellant, another rickshaw puller, had made the call. Amit had stated that Pramod was introduced to him by one Jai Bhagwan, who was a sweeper at the Metro Station and who knew him. They met Jai Bhagwan and Pramod at 7.30 AM, on 28th April, 2009, along with several persons. Pramod confessed to Vijay Singh (PW-10) that he had murdered Vijay's father. No police officer was with them. Appellant volunteered to take them to the dead body of Vijay's father and took them to the park at Sector 20, Dwarka, opp. CNG filling station where he showed them the dead body. Appellant, Amit and Jai Bhagwan were beaten up by the public persons present there. Thereafter, police officers came. From the spot, police seized one spectacle, pieces of broken glass bottle and one pair of black colour leather slippers lying near the dead body. PW12 has stated that the appellant Pramod had told them that his father was murdered pursuant to a plan hatched by him with Amit and Jai Bhagwan. All three of them were arrested by the police. However, on 30th April, 2009, appellant Pramod gave another statement PW10/H,

stating that he had falsely implicated Jai Bhagwan and Amit so that they would save him, as they were local residents of the area. On the basis of the said disclosure statement, the appellant voluntarily led them to the pit in the same park and from the right side of the spot, he took out one black coloured purse which had Rs.2500/-, driving Licence of the deceased, one note of foreign currency and one slip of State Bank of India of Rs.40, 000/- marked Ex. PW10/K. On 5th June, 2009, a NOKIA mobile was recovered from Vinod Kumar and he identified that it belonged to his father. In the cross-examination, Vijay Singh (PW10) had first stated that the mobile phone of his father was recovered from the accused Pramod, in his presence. He, however, immediately changed the statement and stated that the purse was recovered from possession of Pramod but not the mobile phone. This is contrary to what PW10 had stated in examination in chief that on 5th June, 2009 he was called to the Police Station where one Vinod was present, from whom mobile phone was recovered.

15. Vinod Kumar appeared as PW14 and had stated that he was working as a teacher in a school, at Delhi Cantt. Kishan, a sweeper at the school, had sold him a mobile phone for Rs.500/-. He did not give any bill or phone charger. He had used his Idea SIM card No. 9812170312 on the said phone. On 5th June, 2009, he received a call from his brother-in-law Naveen inquiring if he had purchased a mobile phone and/or had used his SIM card in some-one's mobile phone. Next day on 6th June, 2009, he along with Naveen went to Police Station, Dwarka and had produced the said mobile phone having IMEI No. 352738017771832. In the cross-examination, PW-14 had stated that he did not know that the value of the new Nokia mobile phone in question

was Rs.5000/-. He also accepted that his brother in law was working as a Constable in Delhi Police.

16. Naveen Kumar had appeared as PW15. He had stated that on 29th April, 2009, he received a call from mobile No. 9812170312, which belonged to his brother-in-law Vinod Kumar. 2-3 days later, police officials from PS Dwarka came to him and made enquiries about the said call. He immediately called Vinod who confirmed having purchased the said mobile phone. He along with Vinod Kumar had gone to the police station Dwarka, with one Kishan.

17. Kishan was, however, not produced and his statement in the court was not recorded. As per order sheet dated 9th July, 2010, Kishan had reportedly left the given address. Order dated 20th September, 2010, again states that Kishan was not available and had left the given address. By order dated 25th October, 2010, prosecution evidence was closed recording that several opportunities had been granted. It was also recorded that Kishan was unserved on the ground that his latest address was not known. By order dated 9th November, 2010, application moved by the prosecution for summoning of Kishan at his permanent address was allowed giving one last opportunity. Kishan Kumar could not be served and on 27th November, 2010, the trial court denied further opportunity for summoning Kishan Kumar. The said Kishan Kumar it is stated is the father in law of the appellant.

18. Pawan Singh (PW-9) has proved on record the application form for issue of telephone SIM made by Vinod Kumar, along with ID proof Ex. PW9/A & PW9/B. A computerised phone record which mentions IMEI number phone of SIM no's 9812170312 was marked Mark A and was not exhibited. Details could not be proved. The call details of mobile number 9812170312 were not produced and filed. PW-9 was not

asked and called to file the same. The Investigating Officer did not collect the said details and place them on record, inspite of the prosecution version that they reached PW-15 and then PW-14 through the call details. There is no explanation and reason why these were not produced and filed in court. This creates doubt about the recovery of the phone of the deceased. PW-14 has stated that he had purchased the said phone on 29th April, 2009 after the appellant had been arrested one day earlier on 28th April, 2009. This aspect has been also referred to below.

19. PW-18, SI Amar Pal had stated that he was on day emergency duty from 8.00 AM to 8.00 PM, at P.S. Dwarka. On receipt of DD entry No. 13B, he along with Constable Bajrang Lal reached the spot i.e. Sector 20 Park opp. CNG filling station, Dwarka where one male dead body was lying. Public persons had gathered there. On verification, the name of the deceased was disclosed as Giriraj. One spectacle, one pair of lakhani leather slippers, broken pieces of glass liquor bottle and one plastic bottle were lying. Crime team and other officers reached at the spot. The said articles were seized and lifted. Post mortem was conducted. Appellant was arrested at about 11.45 AM. He was at the park. In his cross-examination, he admitted that appellant Pramod and Jai Bhagwan were at the spot but he could not tell whether Amit was also present. PW-17, Constable Bajrang Lal had stated the ASI Amar Pal had received DD Entry No. 13B and he along with ASI Amarpal reached Sector 20 Park, Dwarka where huge crowd had gathered. A dead body of a male was found in a pit. There were injuries on the dead body. Police officers and crime team reached there. Two persons, namely appellant and Jai Bhagwan were held by the crowd gathered there. Jai Bhagwan and appellant were interrogated. In the cross-examination, he admitted that both of them had been beaten by the public and were only

wearing underwear on their bodies. Narender Singh (PW-19) had stated that after DD No. 13B was recorded, they reached the spot at about 8.20 AM. Constable Bajrang and SI Amar Singh were also present there. One decomposed male dead body was lying in the park. Two boys, i.e. appellant and Jai Bhagwan, who had been beaten by the public, were produced before the police. But he did not remember whether the appellant and Jai Bhagwan were only in underwear or not, as they were busy controlling the public. Tilak Raj Mongia (PW-20), has made a similar statement that the appellant and Jai Bhagwan were produced by the public which included Vijay Singh. It was further stated that Vinod Kumar, Naveen and Kishan Kumar had joined investigation on 5th June, 2009 and Vinod Kumar had produced one NOKIA mobile phone, having SIM card No. 9971551348. Surprisingly, no further details regarding this recovered SIM were filed/produced before this Court. ASI Radha Krishan had appeared as PW-1 and had stated that on request of Vijay Singh, they had collected details of mobile phone of his father and came to know that a call was received from 9958293716. The call was made by some unknown person. When the said number was dialled, one person Amit, who was a rickshaw puller, had stated that the appellant had made a call from his mobile on 26th April, 2009. He was not aware of the address of Pramod but stated the Pramod used to come to Jai Bhagwan who was working at Sector-9 Metro Station, Dwarka. He along with Vijay Singh and some relatives went to the Metro Station and met Jai Bhagwan and made enquiries about Pramod. Jai Bhagwan had stated that he did not know Pramod's address but would help them in tracing Pramod. Next day he came to know that dead body of Giriraj was found.

20. It is not very clear how ASI Radha Krishnan (PW-1) got the call details of the telephone number of the deceased. There is no evidence or material to show that any application was made to the service provider, i.e. Bharti Airtel for providing the said details. No evidence or material has been produced on record to show that Bharti Airtel had informed and given the said details. As per the prosecution case, mobile phone of the deceased was not with Vijay Singh (PW-10). They did not know anyone with the telephone number 9958293716. ASI Radha Krishna (PW-1) has stated that the number was an unknown number. This causes grave suspicion and doubt regarding the prosecution version about how they reached Amit and then Jai Bhagwan and the appellant Promod. PW-12 had stated that ASI Radha Krishan (PW-1) had got the call details of mobile phone of Giriraj, the deceased, from ACP's office. This is not stated by PW-1, ASI Radha Krishan. The call details placed on record for 9971551348 (Exhibit PW-11/A) for 26th April 2009 was generated, as per the printout from the system on 28th April 2010 at 4:35:44 PM. After the phone call to telephone no. 9958293716, there were two more phone calls. A call was made to telephone no. 9818259044 at 7.36 PM and at around 8.00 PM a call was received from telephone number 9868079978. Prosecution has not placed names and details of the person to/from whom these calls were made and received. What was the conversation between the deceased and the said person is not stated. The call details do not indicate whether any missed call was received from the telephone phone no.9958293716. If the call details were obtained on 27th April, 2009, then the same should have been placed on record. This was relevant and important in the present case keeping in view the nature, type, character and quality of evidence relied and collected by the prosecution. When the prosecution states that part material and details have been selectively brought on record or

investigated, it takes a risk when there is a substantial degree of doubt on quality and credibility of the said evidence. In such cases, the failure to place material/evidence or fully investigate and collect evidence can result in the accused getting benefit of doubt. On the same ground, four other aspects were noticed:-

(a) The appellant is an illiterate person and a rickshaw puller. There is no evidence or material to show that he knew or was in touch with the deceased. He did not even have a mobile phone. How did he come to know about the telephone number of the deceased is not stated or indicated? The application form and the subscriber details of the telephone number 9958293716 have not been produced and brought on record by the prosecution. We do not know who the recorded subscriber of this telephone number is. What has been placed on record by (PW-21) Vishal Gaurva, Nodal Officer, Bharti Airtel Ltd, are the call details of telephone number 9958293715 for one day i.e. 26th April, 2009.

(b) Photographs of the deceased marked Exhibit PW8 A7 and PW8 A8 show wound on the back side of the head and substantial blood had oozed out. On the said aspect there is no investigation.

(c) As noticed and considered above, PW-12's statement u/s 161 was recorded on 28-4-2009 after the dead body had been recovered and not before recovery of the dead body and arrest of the appellant. The case diary reveals that investigation virtually began and started on 28-04-2009.

(d) The charge sheet filled before the trial court states that, Jai Bhagwan and Amit, alleged accused persons were thoroughly interrogated in front of the complainant and his relatives but they were let off as Amit was

working and Jai Bhagwan was present in his house. The charge sheet records that Amit was working as a sweeper at Sec-9 Metro Station up to 10 PM that day. Charge sheet further goes on to state that his presence in CCTV footage was seen. The prosecution did not put forth these footages for the Court to examine. If accused Pramod had approached Amit, to borrow a phone, CCTV recording of Amit's movement on the said day at the relevant time was material and crucial evidence. CCTV recording of Amit, it is apparent, was seen but either not taken on record or filed/produced before the Court. It is difficult to understand why this CCTV footage was not filed or taken on record considering it would have facilitated a fair and just decision in the present case given the nature and quality of evidence available.

21. Moreover Amit (PW-6) had stated that he was a rickshaw puller and Jai Bhagwan was working as a sweeper in the Metro. The charge sheet to his extent is contrary to the statements of PW-10, PW-12 and PW6 as it states that Jai Bhagwan was the rickshaw puller and Amit PW6 was working in the metro.

22. It appears that the family of the deceased was well connected and knew several persons in the police force. (PW-13) Satish Lamba was constable in Delhi Police and was well known to the deceased. In these circumstances, it is not understandable, why and for what reasons, police officers have denied and have stated that they did not go in search of appellant Pramod after they were able to speak to Amit (PW-6) and had been able to locate Jai Bhagwan at the said metro station. PW-12 Gajanand who was with the police throughout and Vijay Singh (PW-10) on 27 and 28th April, 2009, has stated as under:-

“After that I along with ASI Radha Krishan, Vijay, Raja Ram, Kamal and some other public persons went to Sector-9, metro station Dwarka. Amit met us in the parking of

Metro Station. He was interrogated by ASI Radha Krishan who told us that accused Pramod was introduced to him by one Jai Bhagwan and with his assistance Jai Bhagwan, an employee in Metro Station Sector-9, Dwarka was located. On interrogation, Jai Bhagwan disclosed that he had arranged a rickshaw for accused Pramod on hire basis and he was residing somewhere in Pochanpur village.

Next day with the help of Amit and Jai Bhagwan, we along with police officials reached house of accused Pramod present in court today (currently identified by witness) who was found present at his room. On interrogation, accused Pramod gave his disclosure statement already Ex-PW10/F bearing signature at point B. Then accused led us to the place where dead body of Giriraj was lying in an open park Sector-20, Dwarka, opposite CNG Filling station. In the meantime, someone informed local police at PS Dwarka about the dead body lying in the park on which local police also reached there. Statement of Vijay was recorded by SI Narender and got the case registered against accused Pramod.”

23. As per PW-12, police officers were with them when he, along with Vijay Singh (PW-10), had gone to the house of the appellant Pramod. PW-10 has also stated that somebody had informed local police station about the dead body in the park. This creates a doubt about discovery of the dead body pursuant the alleged statement of the appellant. In case the dead body had been recovered and this fact was already known, statement and disclosure by the appellant is of no value under Section 27 of the Evidence Act.

24. Examination of site plan Ex. PW5/A shows that the recovery of the dead body was made from the park adjacent to the main road having a foot path. The body had decomposed. A foul smell was there. The death as per the post mortem had taken place on the intervening night of 26th& 27th April, 2009. Body was found after one and a half day on 28th April, 2009 morning. It is difficult to accept and believe that no one had noticed the said body during this period and for over 24 hours in a park and when there was a foul smell.

25. PW-12 has stated that on 28th April, 2009, they with the help of Jai Bhagwan, Amit and the Police Officers went and arrested Pramod. As per Vijay Singh (PW-10), he along with Raja Ram, Kamal, Gajanand and other neighbours had gone and apprehended Pramod and no police officer was present. There is a material contradiction in the statements of PW-10 and PW-12. Police officials have denied their presence but the statement of PW-12 is clear and categorical. He was not declared hostile and cross examined on the said statement on this vital aspect. In case a police officer was present at the time when the appellant was apprehended from his home in the morning on 28th April, 2009, then the extra judicial confession is not admissible except to the extent permitted by Section 27 of the Evidence Act. Thus the alleged extra judicial confession by Pramod to Vijay Singh (PW-10) and Gajanand (PW-12), that he had murdered his father, is not admissible. There is evidence on record that the appellant Pramod and Jai Bhagwan were badly beaten up. As per the statement of Amar Pal Singh (PW-18), they were not wearing any clothes except underwear when they were arrested/detained on 28th April, 2009 in the morning. MLC of the appellant has not been placed on record. This creates a doubt about the alleged extra judicial confession.

26. Evidentiary value of extra judicial confession even otherwise in the present case is minimal and weak. Caution and care is required before extra judicial confession is accepted as a voluntary statement which was true and was made by the accused in a fit state of mind. Supreme Court in *Sahadevan and Anr. v. State of Tamil Nadu* 2012 (5) SCALE 415 has dealt with evidentiary value of extra judicial confession in cases based on circumstantial evidence and held that:

“12. ...In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the

accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

It laid down the following principles which would make an extra judicial confession a reliable and trustworthy piece of evidence capable of forming the basis of conviction of an accused:

22....The Principles:

- (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.”

27. There are two disclosure statements of the appellant mark Ex. PW10/F and PW10/H. In the disclosure statement PW10/F, dated 28th

April, 2009, as per the prosecution, the appellant had stated that he along with Jai Bhagwan and Amit, had hatched the plan and killed Giriraj. This part of the disclosure statement is not admissible but PW-10 had stated that the three of them were arrested by the police. Further on the basis of the second disclosure statement dated 30th April, 2009 ExPW10/H vide seizure memo PW10/I dated 1st May, 2009, one purse, Rs.2500/-, driving licence and one bank receipt of the deceased it is alleged were recovered from the park and seized. In this purported statement dated 30th April, 2009 ExPW10/H, the appellant, as per the prosecution version, had confessed that he was the only one who had committed the crime and Amit or Jai Bhagwan were not involved. It is surprising that the said recoveries were made on 1st May, 2009 and that no recoveries were made between 28th April, 2009 and 1st May, 2009. Recoveries were made only after the names of Amit and Jai Bhagwan were deleted and they were not suspected. As per PW10, Vijay Singh, son of the deceased, both of them were earlier arrested on 28th April, 2009. Another reason to suspect the said recovery is that there was no reason for the appellant, a rickshaw puller, to leave behind Rs.2500/- in the purse in the park. Rickshaw pullers in Delhi are poorest amongst the poor. Rs.2500/- is a big amount for them. This also belies and goes against the prosecution version that the appellant had taken away the mobile phone of the deceased with him but he did not feel it appropriate and necessary to take and pocket Rs.2500/-. Thus the recoveries made on 1st May, 2009 on basis of alleged disclosure statement dated 30th April, 2009 become a suspect and cannot be a ground to implicate the appellant.

28. Recovery of the Nokia mobile phone belonging to the deceased from PW14 Vinod Kumar is also not clear and the story is not

believable. It is surprising to note that the police got in touch with PW-14 through his brother in law who was in police –Naveen Kumar (PW-15). Why did they not get in touch with Vinod Kumar (PW-14) directly, is not explained and answered. As per the prosecution case PW-14 had purchased the said mobile phone of the deceased from Kishan, father in law of the appellant on 29th April, 2009 for merely Rs 500/- without the phone charger. PW-14 in cross-examination had stated he did not know that the market price of the said model was Rs 5,000/-. However, one day earlier, on 28th April, 2009, the appellant had been arrested and had made a disclosure statement. The mobile phone was not recovered pursuant to any disclosure statement but, as per the prosecution version, on the basis of enquiries and investigation done by the police. Failure of the prosecution to satisfactorily establish and prove the recovery of the mobile phone after more than a month in June, 2009 from PW14 has been adversely commented upon earlier.

29. In view of the aforesaid discussion, the appeal is allowed. The conviction is set aside and the appellant is acquitted giving him benefit of doubt. The appellant will be released unless required to be detained in another case.

(SANJIV KHANNA)
JUDGE

(S. P. GARG)
JUDGE

September 11th, 2012
kkb