

GAHC010023452017



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

Case No. : Crl.A./170/2017

SRI BETALUS EKKA
S/O ISDOR EKKA, VILL. DAFALABILL, P.S. RANGAPARA, DIST. SONITPUR,
ASSAM.

VERSUS

THE STATE OF ASSAM and ANR

2:IGNUSH MINJ
S/O LT. TOLO MINJ
VILL. DAFALA BILL
P.S. RANGA PARA
DIST. SONITPUR
PIN 784505
ASSAM

Advocate for the Petitioner : MS.M KONCH

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE THE CHIEF JUSTICE (ACTING)
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 21-12-2023

(Kardak Ete, J)

Heard Mr. A. Choudhury, learned counsel for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor, Assam.

2. This criminal appeal is preferred by the appellant against the judgment and order dated 09.03.2017 passed by the Court of Sessions Judge in Sessions Judge, Sonitpur at Tezpur, in sessions Case No.08/2016, whereby the appellant Sri Betalus Ekka has been convicted under Section 302, IPC 1860 for committing the murder of his brother Bosco Ekka and sentenced to undergo Rigorous Imprisonment (RI) for life and also to pay a fine of Rs. 5,000/- (Rupees Five Thousand) only and in default to undergo Rigorous Imprisonment (RI) for 6 (six) months.

3. The case of the prosecution, in nutshell, is that on 19.11.2015 an ejahar was lodged by one Sri Ignesh Minse before the Officer-In-Charge of Rangapara Police Station alleging that on or about 10 pm at night of 18.11.2015 Sri Betalus Ekka killed his brother Bosco Ekka by means of axe in the course of a quarrel. After assaulting the deceased, Sri Betalus Ekka informed the informant. On receipt of the ejahar, the Officer In-Charge Rangapara Police Station has registered a case being Rangapara. P.S. Case No.18/2015 under Section 302 IPC, 1860. On completion of investigation, the Officer In-Charge, Rangapara Police Station, filed a charge-sheet against the appellant under Section 302, IPC. The learned Judicial Magistrate, 1st Class, Tezpur committed the case being GR Case No.3139/2015 to the Court of Sessions, Sonitpur, Tezpur on 08.01.2015. On 12.01.2016, charge has been framed against the appellant/accused Betalus Ekka under Section 302, IPC 1860. The charge was read over and explained to the accused person to which the accused person/appellant pleaded not guilty.

4. During the course of trial, the prosecution has examined 7 (seven) numbers of witnesses. After completion of prosecution witnesses, the appellant/accused

was examined under Section 313 Cr.P.C. The defence plea is total denial and accused declined to adduce evidence. Upon consideration of the evidenced adduced on record, the learned Trial Court concluded that the prosecution has been able to prove the charge that the accused assaulted the deceased Bosco Ekka severely causing fatal injury resulting in his death and accordingly appellant Sri Betalus Ekka has been convicted under Section 302, IPC 1860 for committing the murder of his brother Bosco Ekka and sentenced to undergo Rigorous Imprisonment (RI) for life and also to pay a fine of Rs. 5,000/- (Rupees Five Thousand) only and in default to undergo Rigorous Imprisonment (RI) for 6 (six) months.

5. Mr. A. Choudhury, learned counsel for the appellant after taking this Court to the depositions of the prosecution witnesses has submitted that PW-1, Alexa Ekka wife of the victim/deceased gave two different versions and accordingly, was declared hostile. He further submitted as follows:-

a. PW-2, Gabriel Topno had deposed that he alongwith Lajrush went to the house of Gaonburah Ignis Minse and accused Betalus told Gaonburah that he has killed his elder brother. In the cross examination he stated that he had consumed liquor. He further deposed that it was he on his own informed the Gaonburah and Lajrush about the incident. He further deposed that there was a village meeting before making statements before the police. He also deposed that, he did not state before the police that accused had disclosed before the Gaonburah that he had killed his elder brother.

b. PW-3, Prem Uday Suren, former V.D.P. Secretary, had deposed that Gaonburah/PW.4 told him that the accused has killed his elder brother. In the

cross he had stated that earlier an FIR was lodged by Gaonburah but found to be incorrect so he lodged the 2nd FIR Exhibit-1. He also deposed that he did not state before the police that the accused told him that he has killed elder brother. He also stated that he has not heard by his own that Betalus had informed the Gaonburah that he had killed his elder brother.

c. PW-4, Ignesh Minse, Gaonburah/Village-Headman, he had deposed specifically that accused Betalus told him that he killed his brother. He further stated that he saw injury marks on the right side of the face of the deceased and in the cross examination he stated that he did not inform the police after knowing the incident. He also did not discuss with the wife and children before lodging FIR. He specifically stated that Lajrush and Gabriel informed him about the incident. He also stated that he did not state before the police that accused/Betalus told him that he killed his brother. In the cross he again deposed he did not notice any injury on the dead body.

d. PW-5, Lajrush Horro, had deposed that Betalus came to his house with nephew Rahul Ekka. In the cross deposed he did not notice any bloodstain and he also deposed that he had a discussion while giving confessional statement. He did not state before the police that Betlus had killed his brother.

e. PW-6 , Basanta Kr. Borah, the I/O. In his cross, had specifically stated that he did not examine the neighbours such as Benjamin Horo, Juwel Kuju and John. Further the weapon of assault, the axe, has no blood stain. The wearing apparels also had no blood stain. The seized weapon and cloths were not sent for chemical examination. He had stated that did not notice any cut injury on deceased. Before recording of the statements of the witnesses medical

examination was not conducted as to their alcoholism. Suggestion was put to him that, the statements of Alexa Ekka was dictated by him.

f. PW-7, Dr. Sanjoy Roy, had, inter-alia, stated that apart from the injuries, he cannot remember whether the injuries found by the police on the deceased as stated in the inquest report is in conformity with the injuries mentioned in the post mortem report. He also did not bring the original register of the PM report to ascertain the injuries shown in Exbt-9.

6. Mr. A. Choudhury, learned counsel for the appellant thus submits, on the analysis of the above depositions, it is clear that that the prosecution has miserably failed to establish the guilt against the appellant for which he prays that the impugned judgement and order dated 09.03.2017 may be set aside and quashed and the appellant be acquitted from the offence charged with.

7. In support of his submissions, learned counsel for the appellant has placed reliance on the following judgments:-

1. ***Datar Singh –vs- The State of Punjab***, reported in **(1975) 4 SCC 272**, wherein in the Hon'ble Supreme Court has observed which is reproduced herein below:-

“ 23. Here, we may refer to the evidence of Ballistic expert Shri J. K. Sinha, D-W. 10. Assistant Director of the Forensic Science Laboratory, who was not produced by the prosecution probably because he had made a report showing that it was not possible to connect the cartridges with the gun as the impressions made by the hammer were too indistinct. The gun was proved, from its licence, to belong to Mohan Singh, the son-in-law of Thakar Singh. It was not sent for examination of any finger prints on it. Had there been such evidence of the appellant's finger prints on the gun, it would have furnished strong corroborative evidence. In the circumstances of the case, we find it difficult to link the gun with the actual weapon with which the murder was committed. It is not inconceivable that it was left deliberately outside by someone

to confuse the investigating authorities.”

2. **Chandrapal (Earlier M.P.) –vs- State of Chhattisgarh**, reported in **2022 LiveLaw (SC) 529**, wherein in the Hon’ble Supreme Court has held which is reproduced herein below:-

“12. In Sahadevan & Anr. Vs. State of Tamil Nadu , it was observed in para 14 as under :

“14. 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.”

The said ratio was also reiterated and followed by this court in cases of Jagroop Singh Vs. State of Punjab⁵ , S.K. Yusuf Vs. State of West Bengal⁶ and Pancho Vs. State of Haryana⁷ , wherein it has been specifically laid down that the extra judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution. It should be truthful and should inspire confidence. An extra judicial confession attains greater credibility and evidentiary value if it is supported by chain of cogent circumstances and is further corroborated by other prosecution evidence. In the instant case it is true that the co accused Videshi had allegedly made self-inculpatory extra judicial confession before the PW-4 Bhola Singh, and had made extra judicial confession before the other witnesses i.e., PW-5 Chandrashekhar, PW-6 Baran Singh Thakur and PW-7 Dukaluram stating, inter alia, that the other three accused i.e., Bhagirathi, Chandrapal and Mangal Singh had committed the murder and he (i.e. Videshi) was asked to assist them in disposing the dead bodies and concealing the evidence. However, the High Court, considering the inconsistency between the said two extra judicial confession made by the co-accused Videshi, did not find it safe to convict the other accused i.e., Bhagirathi, Mangal Singh and Videshi himself, and the High Court surprisingly considered the said extra judicial confession made by Videshi as an incriminating circumstance against the appellant Chandrapal for convicting him for the offences charged against him. In our opinion if such weak piece of evidence of the co accused Videshi was not duly proved or found trustworthy for holding the other co accused guilty of committing murder of the deceased Brinda and Kanhaiya, the High Court could not have used the said evidence against the present appellant for the purpose of holding him guilty for the alleged offence.”

3. **State of Himachal Pradesh –vs- Vinder Singh alias Sundru**,

reported in **2014 CRI. L.J. 4992** wherein it has been observed as under:-

“23. In the instant case, PW 4 Dineshwar Singh has admitted that he was not having cordial relations with the accused. He was heavily drunk and was under the influence of liquor. The prosecution has not explained why in these circumstances the accused would make statement before PW 4 Dineshwar Singh. He could not narrate the exact words.

24. Their Lordships of the Hon'ble Supreme Court in Jagta V. State of Harayana, AIR 1974 SC 1545 have held that the evidence about an extra-judicial confession in the nature of things is a weak piece of evidence and if the same is lacking in probability there would be no difficulty in rejecting the same. Their Lordships have held as under:

14. So far as the alleged extra judicial confession of the accused is concerned, the prosecution has relied upon the evidence on Ram Singh (PW 4). After having been taken through the evidence of that witness, we find the same to be lacking in credence and devoid of any ring of truth. The police was admittedly present in the office of the co-operative society in village Farmana on the morning of January, 15, 1972. We find no reason as to why the accused, instead of surrendering himself before the police, should go to the house of Ram Singh in village Farmana, blurt out a confession before him and ask him to produce the accused before the police. Nothing has been shown to us as to why the accused could not himself go and appear before the police. We have mentioned above that an attempt has been made in this case to introduce the story of the recovery of ornaments belonging to Phul Pati deceased from the accused. The attempt of the investigating agency to introduce a false story about the removal of the ornaments of the deceased and their recovery from the accused would in our opinion, also affect the credibility of the evidence regarding the extra judicial confession alleged to have been made to Ram Singh PW. The evidence about an extra judicial confession is in the nature of things a weak piece of evidence. If the same is lacking in probability as it is in the present case, there would be no difficulty in rejecting the same. We are, therefore, not prepared to place any reliance upon the evidence regarding the extra judicial confession of the accused.

25. An extra-judicial confession stated to have been made before PW 4 Dineshwar Singh lacks probability and does not inspire confidence.

27. In the instant case, an extra-judicial confession alleged to have been made before PW 4 Dineshwar Singh is not truthful.

33. According to PW 4 Dineshwar Singh, he was heavily drunk and was under the influence of liquor. In view of his also, an extra-judicial confession made to him by the accused cannot be relied upon.”

4. **Deoraj Goala and Anr vs- The State of Assam**, reported in **2011 CRI.L J. 817** wherein the Hon'ble Supreme Court observed as under:-

“45. Assessing the evidence in a criminal case, the Court should go for strict proof on the face of which the accused can be connected with the commission of offence like murder and when the case is based entirely on the circumstantial evidence, the circumstances relied by the prosecution has to be fully established if the chain of events which can connect the accused with the crime in any way happened broken, then there would be no other option before the Court except to come to a reasonable conclusion consistent with the innocence of the accused. In the instant case, though the prosecution proved the circumstances, that the dead body of the deceased was found in the courtyard of the accused persons, but failed to connect the same with the torture by the mother-in-law of the deceased by spoon and further to the recovery of the material bamboo foot used in the commission of offence, even the extra judicial confession of the accused appellant Giridhari in view of the evidence of PW 12, the I.O of the case.

46. it is also not clear to us as to why the trial Court did not consider the fact that the deceased was suffering from insanity as stated by P.W. 10, the husband of the deceased when the husband of the deceased himself not ruled out the possibility of her drowning in the water of the well. A prosecution witness whose evidence to some extent corroborated by D.W. 1 and according to us, when the fact relating to insanity of the deceased is available in the prosecution witness, the Court is supposed to examine the said fact of insanity and if the fact of drowning of the deceased in the well is probable due to her insanity, then the same cannot be ruled out when the inmates of the deceased like the mother-in-law and the accused Giridhari also searched about her in the house of PW 2. Why the PW. 10, husband of the deceased, who had no quarrel with the deceased, would allow the real culprits to be escaped from the punishment for murder of his wife, even if they are the relatives like the accused appellants, for committing such offense and in this case, admittedly, the PW. 10 has not even suspected the accused appellants. More so, it appears from the record that the deceased was the mother of three children, but none of those children were also examined by the prosecution, even some other witnesses, who were present at the time of recovery of the dead body were also not examined by the prosecution which also creates some doubt regarding the prosecution case.

47. For the foregoing reasons, we are of the view that the prosecution has failed to prove its case beyond reasonable doubt and the trial Court was not justified in convicting the appellants and accordingly, the appeal is allowed. The conviction and sentence of the appellants are set aside and they are acquitted from the charge leveled against them. As the appellant Deoraj Goala is on bail, his bail bond is accordingly discharged. The appellant Giridhari Goala is directed to be released forthwith, if not required in connection with any other case.”

8. On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor, submits that **it is** no res-integra that if a witness turns hostile, his statements

cannot be nullified in its entirety. The positive statement supporting the case of the prosecution can always be relied on. In the instant case, the wife of the deceased, although she turned hostile, during her cross-examination by the prosecution, she made few positive statements to the effect that she had stated before police that her husband, the deceased used to torture her and on that particular night, the deceased came home in an inebriated state and fought with her as well as the appellant and during that fight, the appellant killed him by an axe. These statements, which can by every stretch, be relied on makes this an eye witness and since one eye witness is enough to bring home the guilt, the statement of the wife proves the instant case beyond reasonable doubt. Further the said evidence is corroborated by other witnesses. She submits as follows:

(i) That PW No.1 had deposed in her cross examination that after the occurrence, the accused along with Rahul went to the house of Lajrush, PW No.5 to inform him.

(ii) That not finding Lajrush at his house, the appellant went to Topno's house where Lajrush was also present there and confessed before them that he had killed his elder brother.

(iii) That Lajrush in his statement said that he was at topno's place where appellant came with Rahul and confessed.

(iv) That Gabriel Topno in his statement also stated that appellant came and confessed.

(v) Then both the witnesses, Lajrush and Topno stated that they with the appellant went to Gaonburah's house where the appellant again confessed.

- (vi) That Gaonburah in his statement had proved this fact
- (vii) Then Lajrush, Topno, Gaonb urah along with the appellant went to the VDP Secretary and there too, the appellant confessed,
- (viii) That the VDP secretary in his statement had proved this fact,
- (ix) That the axe was seized from the house of the appellant, being handed over by his wife, PW No.1,
- (x) That the extra-judicial confession before all the 4 witnesses,
- (xi) That Witnesses's statement under Section 164 Cr.P.C corroborates their statement before the Trial Court
- (xii) That the explanation given by the appellant in his examination under Section 313 Cr.P.C. was in the facts, incorrect and
- (xiii) That the Doctors evidence corroborates the prosecution case.

9. Learned Addl. PP submits that the evidence of PW No.1 while giving her positive statement during her cross-examination by the prosecution, she at one point said that out of fear her brother in law assaulted her husband. At this defence has taken the plea that out of fear, she made the statements before police but on reading the statement, the defence plea does not stand. For the sake of argument, even if it is taken as such, the following circumstances could be culled out which make out a complete chain in the instant case as the accused, the deceased, the wife of the deceased and the entire family stay together. The occurrence took place at 10 0' Clock in the night. The wife said the deceased was injured and was lying on an wooden plank. Immediately

thereafter, the appellant went with Rahul and divulged that he killed the deceased to Gabriel Topno and Lajrush. Both these witnesses came to the house of the appellant and saw the body lying dead. They thereafter along with the appellant went to Gaonburah's house and informed hi. Then, the gaonburah, along with the two witnesses as well as the appellant went to the house of VDP secretary and informed him about the same. Next morning, the appellant was handed over the police. On the next day, the police seized the axe from the house of the appellant, being handed over by PW No.1, the wife of the deceased. The Witness's statement under Section 164 Cr.P.C. corroborates their statement before the Trial Court. The explanation given by the appellant in his examination under section 313 Cr.P.C. was in the facts incorrect. The Doctors evidence corroborates the prosecution story.

10. In support of her submissions, the learned Additional Public Prosecutor has placed reliance on the case of **Govindaraju –vs- State of Ors.**, reported in **(2012) 4 SCC 722** wherein, in paragraph 20 the Hon'ble Apex Court has held which is reproduced herein below:-

“20. It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eye-witness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The Court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.”

11. We have considered the rival submission of the learned counsel for the parties and carefully examined the materials/evidences on record.

12. To appreciate, we would refer to the depositions of the prosecution witnesses:

13. PW-1, Smt. Elexia Ekka, is the wife of the deceased, who was declared hostile. She had deposed that accused is her brother-in-law. Deceased was her husband. The incident occurred about three months ago. On the day of incident at about 10 p.m. her husband came to her house in an inebriated condition. When he tried to enter into the room he fell down. When he came out of his house for urination she saw her husband and he called her. Her husband was alive at that time and he was breathing. She saw injuries on his chest and face. She does not know how her husband died. In her cross-examination by defence, she stated that on the day of the incident, apart from her children, Rahul Ekka, the son of her husband's sister was also present in her house. Since last five years her family resided with the accused. The relationship between the accused and the deceased was good. On the day of the incident there was no altercation between the accused and her husband. When the accused saw her husband lying on the door step he was in a badly drunken state. Her husband was lying on a piece of wooden plank. The accused picked up her husband who was in injured condition and put him on a bed. At that time, her husband did not tell anything to her and he was alive at that point of time. Thereafter, the accused along with Rahul Ekka went to the house of the one neighbor namely Lajrush Horro. Not finding Lajruj in his house as he was staying in Grabial Topno's house, so the accused and Rahul went to Grabial's house and both of them called to his house as the condition of the deceased was not good. Thereafter, accused, Rahul, Grabial Topno, Lajrush Horro and Gaonburah Ignish Minse came to their house. The accused was all along present with her husband till the next morning. On the next day, accused, Gaonburah and one another

person went to Rangapara Police Station for giving information about the incident. Thereafter, police arrested the accused. She does not know how her husband died. She has not seen the accused assaulting her husband. Her husband used to drink everyday. Her husband had taken loan from different persons of their village. For this, on many occasion there was altercation between the money lenders and her husband. For this reason, people of their village did not like her husband.

14. PW-2 Sri Grabial Topno, had deposed that deceased Bosco Ekka was the elder brother of the accused. At about 10 p.m. he along with Lajrush Horo were sleeping in his house. At that time Betalus came to his house and he was calling Lajrush to wake up. He addressed Lajrush as Dada. He and Lajrush woke up and Betalus informed them that he had killed his brother Bosco and has kept the dead body in his house. He and Lajrush along with Betalus Ekka went to his house and saw that the dead body of Bosco was lying inside the house. The dead body was shown to them by Betalus. Thereafter, they went to the house of the Gaonburah Ignish Minse. The gaonburah was sleeping at that time. Betalus woke him up. He was asking them as to why they had come to his house at the night and Betalus told the gaonburah that he had killed his elder brother. The gaonburah asked as to why he killed his brother. This time they, accompanied by Gaonburah went to the house of VDP Secretary Uday Suren. Next morning, police was informed by gaonburah Ignish Minse. During investigation, he gave statement. In that statement he had given thumb impression. He stated before the Magistrate all the facts which he has narrated.

During cross-examination, he admitted that he went to work in the tea garden in early at 8 a.m in the morning and come back at 4 p.m.. On the day of occurrence also he had gone to works as usual. The accused is not his relative.

The deceased Bosco had his wife Alexia Ekka in his house. The house of the accused does not have electricity. His house is situated at a distance of 100 meters from the house of the deceased. On the date of occurrence he had gone to bed at 7 pm in a routine manner. When the accused visited his house on the day of the occurrence, the accused was accompanied by the wife of the deceased. They were not accompanied by any others. At the relevant time he himself and Lajrush were sleeping in two different rooms in his house. when the accused came to his house he did not enter his house and he was standing in his courtyard. Lajrush Horo came out after about 15 minutes. He belongs to Adivasi community. They often had liquor in their house as a customary practice. The accused hardly stayed in his house for about five minutes and thereafter left his house. As soon as he woke up from sleep and immediately opened the door and he found Betalus standing in his door step. Lajrush is his brother-in-law.

15. PW-3, Sri Prem Uday Suren, had deposed that the occurrence took place on 18.11.2015. At about 10.30 p.m. Grabial, Betalus, Lajrush and Ignesh Minse had came to his house on the day of occurrence. He woke up from sleep. The gaonburah Ignesh Minse told him that the accused had killed his elder brother. He asked Betalus as to how he had killed his elder brother and Betalus replied that he had killed his brother with an axe. He told them that in the morning only necessary actions would be taken and on hearing that they went away from his house. Next morning they again came to his house and he took them to the police station. He had written the ejahar in the police station and the Gaonburah Ignesh Minse had put his signature in the ejahar. Ext.1 is the said ejahar and Ext.1(1) is his signature. In his cross examination, he had stated that the Police Station is situated at a distance of 7/8 km away from their village. At the time of

occurrence he had the telephone number of Rangapara P.S. since he was the VDP secretary at that time. On the day of occurrence he did not inform anything about the occurrence to police by telephone or in wiring. He had not seen the incident. On the date of filing the ejahar police had asked him about the incident. He did not know how many children the deceased had but he knows that the deceased had his wife in the house. He had never visited the house of the deceased because he resides in a separate locality.

16. PW 4, Ignesh Minse, had deposed that the occurrence took place on 18th November, 2015. On the day he was at his house. At about 10 pm he was sleeping in his house and Gabriel, Betalus and Lajrush had come to his house on the day of occurrence. They were calling him as "Nana". He woke up from sleep and came out of the house. He asked them why they had visited his house in such an hour. Betalus told him that he had killed his elder brother with an axe and the dead body was lying in his house. Thereafter, he came to his house with Gabriel and Lajrush. He woke him up and told him that Betalus had done something and he should be questioned by him. VDP secretary Prem Uday Suren questioned Betalus and he told the VDP Secretary that he had killed his elder brother with an axe. It was late at night therefore they advised Betalus to go to his house and to stay there till morning. They also told him that they will approach police in the morning. Next morning he went to the house of the VDP Secretary Prem Uday Suren. Both of them went to the police station. VDP Secretary Prem Uday Suren wrote the ejahar and he had put his signature therein. Ext.1 is the ejahar and Ext 1(2) is his signature. Police came immediately and they also came along. Police brought out the dead body of the deceased inside the house. Police prepared the inquest report. Ext. 2 is the

Inquest report and Ext.2(1) is his signature. At the time of inquest he saw injury marks on the right side of the face of the deceased and on the chest. On being shown by the accused Betalus Police seized the axe. Ext.3 is the seizure list and Ext.3(1) is his signature thereon. Material Ext.1 is the seized axe. Thereafter on 20.11.2015 he was brought by police to the court for giving statement and he gave the statement. Ext. 4 is the statement and Ext.4(1) to 4(3) are his signatures. In cross-examination, he had stated that he did not visit the place of occurrence. He visited the place of occurrence when police had visited the said place. As a routine manner he usually go to sleep at 8 p.m. in the evening. He had no electricity in their house. When Lajrush, Gabriel and Betalus had visited his house at that time he did not notice if they were accompanied by a small child named Rahul Ekka. It was Lajrush and Gabriel who initially informed him about the occurrence for the first time. On the day when he had lodged the ejahar, at that time his statement was recorded by police.

17. PW.5, Sri Lajrush Horro, had deposed that the accused and deceased are brothers. The occurrence took place on 18th November, 2015. On that day he was sleeping in the house of Gabriel. At about 10 pm, Betalus had come there told them that he had killed his elder brother with an axe and the dead body was lying in his house. They went to the house of the Bosco and saw he was lying dead inside the house. Grabial and himself took Betalus to the house of Gaonburah Ignesh Minse. He was sleeping at that time and Betalush called him as Nana. Before the Gaonburah, Betalush had confessed that he had killed his elder brother with an axe. This time they again went to the house of Bosco along with Gaonburah and Betalus showed the axe by which he had killed his elder brother. Thereafter, they went to the house of VDP secretary. He did not

know who had filed the ejahar before police. When police came to the place of occurrence he was present there. Police brought out the dead body of the deceased from inside the house. Police prepared inquest over the dead body. Ex 2(2) is his signature. Police seized the axe after it was shown by the family members of the deceased. Material Ext.1 is the axe seized by police. Ext. 3 is the seizure list and Ext 3(2) is his signature. Thereafter, on 20.11.2015 he along with Gabrial and Gaonburah Ignesh Minse were brought by police to the court for giving statement and he gave statement. Ext. 5 is his statement and Ext. 5(1) and 5(2) are his signatures.

18. PW.6, Basanta Kr. Borah, the I/O, had deposed that on 19.11.2015 he was posted at Rangapara Police station as attached Officer and on that day Inspector Jiaur Rahman, O.C. Rangapara PS received one FIR from Ignush Minse of village Daphalabil stating that on 18.11.2015 at about 10 p.m. one Bosco Ekka has been killed by his brother Betalus Ekka with an axe during the quarrel between them and reported to the informant. After receipt of information, the informant reported the matter to VDP and handed over the accused to the police on 19.11.2015 at Rangapara Police Station. After receiving the FIR, O.C Jiaur Rahman registered a case and endorsed the case to him for investigation, Ext. 1 is the said FIR and Ext.1(3) is the signature of O.C Jiaur Rahman which is shown to him on communication. He stated that he had recorded the statement of the informant and interrogated the accused in the police station. On the same day he visited the place of occurrence i.e. the house of Bosco Ekka at Daphalabil. He has also recorded the statements of witnesses at the place of occurrence. He has also prepared a sketch map of the place of occurrence. Ext. 6 is the sketch map and Ext. 6(1) is his signature. Thereafter, he has prepared the inquest report on the dead body of the deceased Bosco

Ekka in presence of witnesses in the house of the deceased. Ext. 2 is the Inquest report and Ext 2(3) is his signature. He has also seized an axe, the weapon of assault, which is used by the accused at the time of incident, from the place of occurrence. Ext.3 is the seizure list and Ext 3(3) is his signature. Material Ext. 1 is the said axe which was seized vide Ext.3. He has sent the dead body for post mortem examination vide dead body challan. Ext. 7 is the dead body challan and Ext. 7(1) is his signature. On the same day he has arrested the accused and on 20.11.2015 forwarded the accused to the Hon'ble Court. On the same day he has sent the witnesses namely, Sri Grabial Topno, Lajrush Horo and Ignesh Minse to the Court for recording their statements u/s 164 Cr.C.P. Accordingly, he has collected the statements u/s 164 Cr.P.C. of the said witnesses. During investigation, he has also collected the post mortem report of the deceased and on 30.11.2015 filed charge-sheet against the accused Betalus Ekka u/s 302 of the IPC. Ext. 8 is the charge-sheet and Ext 8(1) is his signature.

The witness Alexia Ekka (PW 1) stated before him that "out of fear her borther-in-law i.e. the accused Betalus had killed her husband with an axe", said witness also stated to me that "there was an altercation between her husband and the accused as well as herself and the accused assaulted her husband with an axe". She also stated to him that the "accused assaulted her husband inside their house". She also stated to him that she has been assaulted her husband by the accused. Ext.9 is the case diary and Ext.9(1) is the relevant statement of witness Alexia Ekka (PW1) and 9(2) is his signature. In cross examination, he stated that the distance between the place of occurrence and the Rangapara Police Station is 12 kms. The VDPs are commonly found in an around the villages of Rangapara Police Station. On the next day of incident the informant Ignesh Minse along with the accused came to the police station and no other

persons were available along with them. He does not know if some VDP personnel have filed any FIR prior to the instant FIR (Ext.1). at the time of seizure of the weapon of assault, i.e. axe, the said axe has no any blood stains. He has also not seized the clothes of the deceased. The seized axe was not sent for chemical examination. He sent all the three witnesses to the Court for recording their statement u/s 164 Cr.P.C through a requisition on 19.11.2015. In the statement of PW 1, Akexia Ekka has not stated that at them of incident no any quarrel took place between the deceased and the accused. Alexia Ekka is the wife of the deceased Bosco Ekka. She herself has not filed any ejahar in connection with this case.

19. PW.7, Dr. Sanjay Roy, Medical Officer, stated that on 19.11.2015 he was working as Sub-Divisional Medical & Health Officer at Kanaklata Civil Hospital, Tezpur and on that day, at about 3.30 p.m. he performed post-mortem examination, on the dead body of Bosco Ekka. Doctor found the following:-

External appearance.

A middle aged male deadbody wearing blue jeans pant white T-shirt, Rigor mortis present.

Average built and height. Muddy complexion and black hair. Abnormal movement of jaw fracture of mandible. Contusion seen over face, throat and abdomen. Frcture of lower ribs left side. Nature of weapon-blunt object.

Abdomen:

Spleen- rupture of spleen. Paritonium-clotted blood seen

Mouth, pharynx, oesophagus-paritonium clotted blood seen.

Other organs are healthy.

All the injuries are antemortem in nature.

He opined that the cause of death is hemorrhage and shock as a result of injuries sustained by the deceased.

These injuries are sufficient to cause the death of a person.

Ext. 9 is the Post-mortem report and Ext 9(1) is his signature and Ext.9(2) is the signature of Joint Director of Health Services, Sonitpur, Tezpur which is known to him. In the cross-examination he stated that the injuries sustained by the deceased caused by blunt object. In column No.5 of the PM report it reveals that in the muscles bones and joint there is no any deformative fracture or dislocation. Before conducting the post mortem report he has gone through the inquest report and the injuries found by the police done during the inquest report. He cannot remember whether the injuries found by the police on the deceased as stated in the inquest report is in conformity with the injuries mentioned in his post-mortem report.

20. On scrutiny of the depositions of the prosecution witnesses, it is clear that there is no any eye witness to the occurrence. The prosecution hinges the case against the accused/appellant on the basis of circumstantial evidence on the ground that the evidence recorded in the course of trial and the weapon of assault exhibited shows that there are several circumstance which pointed guilt towards the accused and on extra judicial confession.

21. An FIR was lodged by PW-4, informant Ignesh Minse, on the very next day of the incident that took place at the night of 18.11.2015. But according to him, he came to know about the incident when accused along with PW-2 and PW-5 came to his house on the night of the day of the incident. He has first time knowledge about the killing of the deceased by the accused because when they have visited his house at night, PW-2 and PW-5 told him that accused had killed his elder brother. Thereafter, accused alongwith the PW-2, PW-4 and PW-5 went to the house of PW-3. PW-3 asked accused/appellant as to how he had killed his elder brother and accused appellant replied that he had killed his brother with an axe. PW-3, told the PW-2, PW-4 and PW-5 that in the morning only necessary actions would be taken and on hearing that they went away from his house. The informant clearly described the incident on being narrated by the accused.

22. On perusal of the testimony of the prosecution witnesses, it is discernable that the deceased was killed by the accused. There is no any evidence that the accused forced to confess his guilt by making such statement in form of extra-judicial confession. Admittedly, in the present case at the relevant time in the house of a accused there were accused and the deceased. PW-2, PW-3, PW-4 and PW-5 clearly deposed that the accused had admitted and made the statement in form of extra judicial confession immediately after the incident. Their statements are corroborated with each other and in sync with their statements made before the police u/s 161 Cr.P.C. and before the Magistrate u/s 164 Cr.PC. It is rightly held by the learned trial Court that there is no evidence that at the time of making such statement by accused in form of extra judicial confession before PW-2, PW-3, PW-4 and PW-5 the accused was in drunken state. PW-2, PW-3, PW-4 and PW-5 have not cross-examined nor even

suggestion has been made by defence that at the relevant time the accused was in drunken state.

23. A profitable reference may be made to the Hon'ble Supreme Court's observation that while dealing with a circumstance of extra judicial confession one must keep in mind that is a weak type of evidence and requires appreciation with great caution. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The word of 'witness' must be clear, unambiguous and clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction if it passes the test of credibility.

24. It is settled proposition of law that extra-judicial confession, if true and voluntary, it can be relied upon by the Court to convict the accused for the commission of the crime charged with. Despite inherent weakness of extra judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. It has been held Hon'ble Supreme Court that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the confession was true and voluntarily made, then the conviction can be founded on such evidence alone. The Hon'ble Supreme Court cautioned that "it is not open to the court trying the criminal case to start with presumption that extra-judicial confession is always a weak type of evidence. It would depend on the nature of the

circumstances, the time when the confession is made and the credibility of the witness who speak for such a confession. The retraction of extra-judicial confession which is a usual phenomenon in criminal cases would be itself not weaken the case of the prosecution based upon such a confession.

25. The Hon'ble Supreme Court has held that an unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicious and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent sections 25 and 26 of the Evidence Act. The court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true.

26. Reverting back to the present case, the extra-judicial confession was made by accused/appellant before the PW-2, PW-3, PW-4 and PW-5 immediately after the incident and all were present. There is no evidence that at the time of making such statement accused was in drunken state. We find that the confession by accused has been made instantaneously immediately after the occurrence and is not said to have been made under any undue influence, coercion or pressure. Thus, the evidence in the form of extra judicial confession made by the accused before PW-2, PW-3, PW-4 and PW-5 is reliable and convincing as the was made voluntarily and in fit state of mind.

27. On careful scrutiny of the evidences on record, we concur with the finding of learned trial court that the prosecution has been able to proved the case beyond reasonable doubt on the following circumstances- That the accused made the extra-judicial confession before the PW-2, PW-3, PW-4 and PW-5. There is no any evidence that the PW-2, PW-3, PW-4 and PW-5 have any quarrel or enmity with the accused to implicate the accused/appellant falsely. The statements made by the PW-2, PW-3, PW-4 and PW-5 are corroborated with the confession of the accused/appellant in the form of extra-judicial confession and in sync with their statements made before police u/s 161 Cr.P.C and also before the Magistrate u/s 164 Cr.P.C. The injury sustained by the deceased as reported by Doctor who conducted post mortem examination, i.e. fracture of mandible, Contusion seen over face, thorax and abdomen and fracture of lower ribs left side is corroborated as such injury may be caused by backside of an axe i.e. a blunt object. As per the testimony of PW-4, as shown by the accused, the police has seized the axe vide seizure list Ext. 3 and Ext. 3(1) is his signature. But, defence has failed to cross-examine that the said axe was seized by police as shown by the accused Betalus. The said seized axe was exhibited by prosecution before the court as Material Exhibit. But the defence has failed to cross-examine about the said Material Exhibit. Incriminating circumstances is that the incident took place at the night of 18.11.2015 and there is a clear evidence of prosecution particularly, the PW-2, PW-3, PW-4 and PW-5 that after the incident, at about 10.30 p.m. PW-2, PW-4 and PW-5 came to the house of PW-3 and woke him up, the PW-2 and PW-4 told him that the accused had killed his elder brother. PW-3 asked the accused/appellant as to how he killed his elder brother as to that he told him that he had killed his brother with an axe. Similarly, PW-4 and PW-5 also supported the evidence of

PW-3 as to the visit of the house of PW-3 immediately after the incident. That while the accused's statement was recorded u/s 313 Cr.P.C. he could not explain clearly how his own brother has died by sustaining severe injury who was living with him. Though in this statement, he stated that on the night of occurrence they have searched their brother Bosco Ekka but could not find him. But later on they found him lying in the left side of the road in serious condition. But he failed to substantiate his statement rather contrary to his statement, there is un-rebuttable evidence of PW-2 that the dead body of the deceased was lying inside the room which was shown by the accused to him. PW-2 and PW-5 clearly stated that the dead body was found inside the house of the deceased.

28. In view of the above discussion and the law laid down by the Hon'ble Supreme Court , we are of the view that the prosecution has been able to establish guilt of the accused appellant beyond reasonable doubt. Thus, we find no infirmity in the judgment and order dated 09.03.2017 passed by the Sessions Judge, Sonitpur, Tezpur in Sessions Case No.8/2016 under Section 302 IPC, 1860. Accordingly, we affirm the judgment and order dated 09.03.2017 passed by the learned Sessions Judge, Sonitpur, Tezpur.

29. In the result, Criminal Appeal stands dismissed.

Send down the LCR.

JUDGE

CHIEF JUSTICE (ACTING)

Comparing Assistant