

GAHC010117052019



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

Case No. : CRL.A(J)/38/2019

BARKA MURMU
KOKRAJHAR

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR A TIWARI, AMICUS CURIAE

Advocate for the Respondent : MS. B BHUYAN(ADDL.PP, ASSAM)

BEFORE

HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR

HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 11.04.2023

Date of judgment : 06.06.2023

JUDGEMENT AND ORDER (CAV)

(Malasri Nandi, J.)

Heard Mr A Tiwari, learned counsel appearing on behalf of the accused/ appellant and

Ms B Bhuyan, learned Additional Public Prosecutor for the State of Assam.

2. This appeal is directed against the Judgment and Order dated 20.12.2018, passed by the learned Sessions Judge, Kokrajhar, in connection with Sessions Case No. 103/2017, under Section 302 IPC, whereby the accused appellant was convicted and sentenced to undergo Rigorous Imprisonment for Life and to pay a fine of Rs. 3,000/- (Rupees Three Thousand) only, in default of payment of fine, further imprisonment for 6 months.

3. To begin with the prosecution story, it has been revealed from the FIR that the informant, Sumita Kisku lodged an FIR on 14.03.2017, before the In-charge, Tipkai Outpost under Bagribari Police Station, stating inter alia that on 13.03.2017, at about 11:00 pm, her elder sister, Helena Kisku was brutally assaulted with bamboo stick and branch of a tree, as a result of which, her sister died in the house of the accused appellant. On the next day, i.e., on 14.03.2017, she visited the house of her sister and found her dead. Later on, she came to know that her sister was killed by her brother-in-law.

4. On receipt of the complaint, a case vide Tipkai OP GD Entry No. 195 dated 14.03.2017 was recorded and forwarded to the Officer-In-Charge, Bagribari Police Station for registering a case under the proper sections of law. Accordingly on receipt of the written FIR, a case was registered vide Bagribari PS Case No. 25/2017, under Section 302 IPC and investigation was initiated. During investigation, the Investigating Officer visited the place of occurrence, recorded the statements of witnesses and conducted inquest on the dead body of the deceased and forwarded the dead body to Kokrajhar Civil Hospital for Post-Mortem Examination.

5. During investigation, the husband of the deceased was arrested and he was sent to jail.

After completion of investigation, charge sheet was submitted against the accused appellant under Section 302 IPC before the Court of learned CJM, Kokrajhar. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the case was committed accordingly.

6. During trial, on appearance of the accused appellant before the Court of Sessions, charge was framed under Section 302 IPC, which was read over and explained to the appellant, to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused, the prosecution examined 8 (eight) witnesses. On the other hand, the accused appellant did not adduce any evidence in support of his defence. After completion of trial, the statement of the accused appellant was recorded under Section 313 CrPC and the incriminating evidence adduced by the witnesses were put before him, to which he denied the same and pleaded his innocence. After hearing the arguments of learned counsel for both the parties, the accused appellant was convicted as aforesaid. Hence, this appeal.

8. Learned *Amicus Curiae* Mr A Tiwari has argued before this Court that there is no eye-witness to the incident. The case is based on circumstantial evidence, but which is not proved beyond reasonable doubt. The accused was convicted purely on conjectures and surmises. There are lots of contradictions in the evidence of witnesses regarding presence of the accused appellant in the house at the relevant time of incident. As such, the judgment of conviction cannot be sustainable in law.

9. It is also the submission of the learned *Amicus Curiae* that the judgment of the learned trial Court is based on extra-judicial confession, which is also not proved beyond reasonable

doubt. According to PW-1, the accused appellant confessed his guilt before Sanjay Mardi, Labbi Mardi and Lakshi Ram Saren. But the prosecution has failed to examine those persons, who were present at the time of confessing guilt by the accused/appellant.

10. It is also submitted by learned counsel for the appellant that none of the witnesses have specifically stated that the accused appellant had confessed his guilt before them that he had killed his wife Helena Kisku. Therefore, the conviction and sentence of the appellant on the basis of such extrajudicial confession cannot be taken into consideration and the impugned judgment is liable to be set aside. In support of his submissions, the learned *Amicus Curiae* has relied upon the following case laws-

- 1) **(2008) 11 SCC 722; (*Bathula Naga Malleswara Rao & Ors. vs State of Andhra Pradesh*)**
- 2) **2020 0 Supreme (SC) 645; (*Chunthuram Vs. State of Chhattisgarh*)**
- 3) **2020 (2) GLR 506; (*Sri Motilal Gorh @ Lity And Anr vs The State Of Assam & Anr.*)**
- 4) **2022 5 Supreme 404; [*Chandrapal Vs. State of Chhattisgarh (Earlier Madhya Pradesh)*]**

11. Per contra, learned Additional Public Prosecutor, Ms B Bhuyan has submitted that whenever 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 corroborated by other prosecution evidence. In the case in hand, the witnesses are categorical in stating that the accused appellant had confessed his guilt before them that he had killed his wife, Helena Kisku. Under such backdrop, the learned trial Court

has rightly convicted the accused/appellant on extrajudicial confession and circumstantial evidence. As such, the judgment and order dated 20.12.2018, does not call for any interference by this Court.

12. Learned Additional Public Prosecutor has relied on the following caselaws:-

- 1) **(2007) 12 SCC 230; (Aloke Nath Dutta & Others vs. State of West Bengal)**
- 2) **(2010) 2 SCC 583; (Aftab Ahmad Anasari vs. State of Uttaranchal).**
- 3) **(2012) 6 SCC 403; (Sahadevan & Anr. vs. State of Tamil Nadu)**

13. We have considered the submissions made by the learned counsel for the parties . We have also perused the judgment of the learned trial Court.

14. Admittedly, the present case is of circumstantial evidence, as no one has seen the commission of crime. The law in the case of circumstantial evidence is well settled. The leading case being **Sharad Birdichand Sharda vs. State of Maharashtra**; reported in **1984 4 SCC 116**,. According to it, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence". The said principle set out in the case of **Sharad (supra)** has been consistently followed by the Hon'ble Supreme Court.

15. In a recent case, **Shailendra Rajdev Pasvan and Others vs. State of Gujarat; AIR 2020 SC 180**, Hon'ble Supreme Court observed that in a case of circumstantial evidence, law postulates two-fold requirements. Firstly, that every link in the chain of

circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, all the circumstances must be consistent pointing out only towards the guilt of the accused.

16. In the above backdrop of the settled legal propositions, we now proceed to deal with the facts, circumstances and evidence of the present case and find out as to whether each link of the chain of circumstances is fully established by the prosecution or not.

17. PW-1 is Sumita Kisku, who is the informant and sister of the deceased. She deposed in her evidence that the incident occurred on 13.03.2017, at about 11:00 pm. The accused assaulted and killed his wife, Helena Kisku at night. She had heard the sound of assaulting her sister. The accused appellant assaulted Helena by a bamboo stick vide Material Exhibit-1. When she visited the house of the deceased, she found her sister lying dead. Subsequently, she noticed some injuries on the body of her sister. Then she lodged the FIR vide Exhibit-1.

18. In her cross-examination, PW-1 replied that she had not witnessed the incident. The accused confessed his guilt. The villagers were present at the time of confessing guilt by the accused. Sanjay Mardi, Labbi Mardi, Lakshiram Saren were present at the time when the accused appellant was confessing his guilt.

19. PW-2 is Moben Marak. From his deposition, it reveals that on the date of incident, the accused killed Helena at night. The accused confessed his guilt before him.

20. In his cross-examination, PW-2 replied that Police did not ask him about the incident. Police took his signature. He did not know why the Police took his signature.

21. PW-3 is Rogot Tudu, who is the brother of the deceased. He deposed in his evidence that the incident occurred at night on the day of Holi festival. The accused appellant

confessed his guilt before him that he killed his wife. He saw the dead body of Helena in the morning. The accused appellant killed Helena by bamboo-stick.

22. In his cross-examination, PW-3 replied that he did not say about killing of Helena by Baska to Police. Police took his signature in a piece of paper. He did not know why his signature was taken by Police.

23. PW-4 is Som Murmu, who is the neighbour of the deceased and the accused. He deposed in his evidence that accused committed the offence of murder. Baska killed his wife Helena at night. He visited the residence of the accused. The victim was lying dead with injuries on her person. The accused appellant confessed before them. The accused appellant showed them the stick by which he killed Helena.

24. In his cross-examination, PW-4 replied that he did not see killing of Helena.

25. PW-5 is Pawan Tudu. This witness also stated that the accused appellant killed Helena by assaulting. The incident occurred on the day of Holi festival. The accused appellant confessed his guilt of killing Helena before Police.

26. PW-5 also stated in his cross-examination that he did not see killing of Helena by the accused appellant.

27. PW-6 is Dr. Brojendra Kumar, who conducted Post-Mortem Examination of the deceased on police requisition and on examination of the deceased he found the following-

“An average built female dead body of approximately 40 years examined.

Rigormortis present. Clotted blood seen in both lower limbs and clothes.

(1) bruises seen multiple in number in both upper limb and lower limb and back

of the chest,

(2) Multiple tear of anal canal and clotted blood following perforating injury and;

(3) There is complete fracture of right upper end of humerus, both collection of blood around the soft tissue.

28. Doctor opined that cause of death was neurogenic shock and hemorrhage following hit by a blunt weapon of high velocity, which is ante mortem in nature and the time since death is 12-16 hours.

29. The Medical Officer proved the Post-Mortem Report, vide Exhibit-2.

30. The cross-examination of PW-6 was declined.

31. PW-7 is the Investigating Officer, Sri Ganesh Sarkar. He deposed in his evidence that on 14.03.2017, he was working as In-charge of Rupshi Police Outpost. On that day, at about 09:30 am, Sumita Kisku came to their outpost and informed that her sister had been killed by the accused appellant. Accordingly, a GD Entry was recorded vide Rupshi Outpost GDE No. 195 dated 14.03.2017. Then he visited the place of occurrence and when he reached the house of the accused, he saw the dead body of Helena Kisku and the accused was also present at that time. Accordingly, he apprehended the accused, drew a sketch map of the place of occurrence, vide Exhibit-3 and recorded the statement of the witnesses. The inquest of the dead body was done by the Magistrate and thereafter, he sent the dead body for Post-Mortem Examination. After completion of investigation and collecting the PM Report, he had submitted the charge-sheet vide Exhibit-4, against the accused appellant under Section 302 IPC. This witness also stated that during investigation he seized one broken branch of tree and one bamboo stick with blood stain and also seized one saree with blood stain, vide

Exhibit-2, Seizure list.

32. In his cross-examination, PW-7 replied that he seized the items from the place of occurrence which was shown by the accused but not from the possession of the accused. Though he had noticed mark of blood stain in the bamboo stick, but he did not send the bamboo stick to the FSL for examination.

33. PW-8 is the Executive Magistrate, who conducted inquest on the dead body of the deceased, in presence of the witnesses.

34. After going through the evidence of the witnesses, it reveals that none of the witnesses were present when the incident took place. According to PW-1, she had heard the sound of assaulting on her sister, but in her cross-examination, PW-1 replied that she used to reside adjacent to the house of the accused. However, the distance between her house and the house of the deceased is about one kilometre. The Investigating Officer also stated that the house of the informant is half kilometre away from the house of the accused. If that is so, if the distance between the house of the accused and informant is half kilometre or one kilometre away, it is not believable and acceptable that the informant had heard the sound of assaulting from her house. It is also interesting to note that none of the witnesses had stated in their evidence that at the time of incident, the accused was found in his house, along with his wife. Only the Investigating Officer stated that when he visited the house of the accused, i.e., on the next day on 14.03.2017, he had seen the dead body of the deceased in the house of the accused and he was also present at that time, i.e., after one day of the incident. Under such backdrop, it can be said that the chain of circumstances to kill the deceased by the accused appellant, is not complete.

35. As far as extrajudicial confession is concerned, the law is well settled. Generally, it is a weak piece of evidence. However, conviction can be sustained on the basis of extrajudicial confession, provided that the confession is found to be voluntary. It should be free from any inducement. It also depends as to whom it is meant. Going by the natural course of human conduct, normally a person would confide about a crime committed by him only with such a person, in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances, in which it is made. As a matter of rule, corroboration is not required. However, if an extrajudicial confession is made it acquires more credibility.

36. In the case in hand, according to PW-1, the villagers namely, Sanjay Mardi, Labbi Mardi, Lakshiram Saren were present when the accused appellant made his confession, but they were not examined by the prosecution. There is no explanation offered by the prosecution for not examining the aforesaid three persons who were present when the alleged confession was made. The other witnesses, i.e., PW-2, PW-3, and PW-4 did not utter a single word regarding presence of other villagers, who were present at the relevant time when confession of guilt was made by the accused.

37. PW-2 simply stated that the accused confessed his guilt before him, but what were his confessions, it is not disclosed in his statement. PW-2, PW-3 and PW-4 are totally silent as to who were the other persons present at that time, when the accused appellant confessed his guilt.

38. According to PW-3, the accused/appellant confessed before him that he killed his wife

by a bamboo stick, but subsequently, he replied in his cross-examination that he did not say about killing of Helena by the accused, while his statement was recorded by the Police. PW-4 stated that the accused/appellant confessed his guilt before them that he killed his wife Helena, but PW-4 is also silent as to who were the other persons present at that time, when the accused/appellant confessed his guilt in respect of killing of his wife by a bamboo stick.

39. Hon'ble Supreme Court in the case of ***S Arul Raja vs. State of Tamil Nadu***; reported in **(2010) 3 SCC Cri. 801** had observed that -

*"..The concept of an extra-judicial confession is primarily a judicial creation, and must be used with restraint. Such a confession must be used only in limited circumstances, and should also be corroborated by way of abundant caution. This Court in ***Ram Singh v. Sonia & Others***, reported in **(2007) 3 SCC 1**, has held that an extra-judicial confession while in police custody cannot be allowed."*

40. The evidentiary value of the extra-judicial confession must be judged in the facts and circumstances of each individual case. Extra-judicial confession, if voluntarily made and fully consistent with the circumstantial evidence, no doubt, establishes the guilt of the accused. The extra-judicial confession, if voluntary, can be relied upon by the court along with other evidence in convicting the accused. However, the extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved, can be relied upon by the Courts.

41. The Hon'ble Supreme Court in the case **of** [Pakkirisamy v. State of Tamil Nadu](#), reported in **(1997) 8 SCC 158** has held that-

"8. It is well settled that it is a rule of caution where the court would

generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession. It is no doubt true that extra-judicial confession by its very nature is rather a weak type of evidence and it is for this reason that a duty is cast upon the court to look for corroboration from other reliable evidence on record.

*Such evidence requires appreciation with a great deal of care and caution. If such an extra-judicial confession is surrounded by suspicious circumstances, needless to state that its credibility becomes doubtful and consequently it loses its importance. The same principle has been enunciated by this Court in the case of **Balwinder Singh v. State of Punjab**; reported in **1996 AIR 607**."*

42. In another case, i.e., **State of Andhra Pradesh v. Kanda Gopaludu**, reported in **(2005) 13 SCC 116**, the Hon'ble Supreme Court held that extra-judicial confession is admissible if it inspired confidence and made voluntarily.

43. The Hon'ble Supreme Court in the case of **Kavita v. State of Tamil Nadu**; reported in **(1998) 6 SCC 108** held as follows"-

"4. There is no doubt that convictions can be based on extra-judicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the court to decide on the acceptability of the evidence having regard to the credibility of the witnesses."

44. In view of the above case law, it is made clear that an extra-judicial confession is a

weak piece of evidence. Though it can be made the basis of conviction, due care and caution must be exercised by the Courts to ascertain the truthfulness of the confession. Rules of caution must be applied before accepting an extra-judicial confession. Before the Court proceeds to act on the basis of an extra-judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution. First, whether the evidence of confession is reliable and second, whether it finds corroboration.

45. In this case, the extrajudicial confession has been retracted by the accused appellant, while his statement was recorded under Section 313 CrPC. It is therefore necessary to examine whether the retracted confession of the accused alone can be formed the basis of conviction. It has been held by higher authorities that such confession is a weak piece of evidence. In other words, from independent source, conviction cannot be based solely on the retracted extrajudicial confessional statement of the accused. The Hon'ble Supreme in the case of ***Heramba Brahma And Anr. vs State Of Assam***; reported in **AIR 1982 SC 1595**, held that extra judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed.

46. On perusal of the facts and circumstances of the present case and the evidence on record, we find that not only the prosecution has failed to corroborate the extra-judicial confession by any other independent witness, but also it has failed to satisfy the test as referred to above. There is nothing on record to show the motive or a reason for making an extrajudicial confession. It is further noticed that the story of confession in this case, consisting of three stages, first according to PW-1, the villagers, namely, Sanjay Mardi, Labbi

Mardi, Lakshiram Saren were present when the accused made his confession, but they were not examined by the prosecution. Secondly, PW-1 is totally silent whether PWs-2, 3 and 4 were present when the appellant was confessing his guilt. Thirdly, according to PW-5, the accused confessed killing of his wife Helena before the Police.

47. From the foregoing discussions, we are inclined to hold that the extrajudicial confession of the appellant, said to have been made before PWs-2, 3 and 4 cannot be relied upon to form the basis of conviction of the appellant. As already noticed earlier, prosecution has laid no other witness pointing out towards the guilt of the accused petitioner. The seizure said to have been made at the instance of the accused appellant have not been legally proved nor do such seizures, at all connect the accused with the alleged crime.

48. In view of the above discussions, we do not find any corroborating evidence to support the extrajudicial confession, rather the evidence led by the prosecution is inconsistent with the same. We find that the major links of the chain of circumstances have not been proved by the prosecution witnesses and as such, it would be unjust to uphold the conviction of the accused appellant. Hence, the accused would be entitled to benefit of doubt.

49. Accordingly, the appeal is allowed. The Judgment and Order dated 20.12.2018 is set aside. The accused appellant is acquitted of all the charges leveled against him.

50. The accused appellant be released forthwith, if not wanted in any other case.

51. The Criminal Appeal accordingly, stands disposed of.

52. Before parting with the record, this Court extends the appreciation to the services rendered by Mr A Tiwari, learned *Amicus Curiae* and recommend that the Registry may make

arrangement for payment of necessary remuneration to the learned *Amicus Curiae* as per the existing norms.

53. Send down the LCR.

JUDGE

JUDGE

Comparing Assistant