

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 394 of 2011**

Brij Kumar, Son of late Hariram, aged about 36 years, occupation Agriculturist,
R/o village Kukricholi, P.S. Chhal, Distt. Raigarh (CG)

---- Appellant

Versus

State of Chhattisgarh through P.S. Punjipathra, Distt. Raigarh (CG)

---- Respondent

For appellant	:	Mr. Prakash Tiwari, Advocate.
For Respondent/State	:	Mr. Rahul Tamaskar, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Chandra Bhushan Bajpai

C A V Judgment**Per Chandra Bhushan Bajpai, J.****04/12/2015**

1. This appeal arises out of the judgment of conviction and order of sentence dated 17-3-2011 passed by the 3rd Additional Sessions Judge, (FTC), Raigarh in ST No. 133/2010 convicting the accused/appellant under Section 302 of the Indian Penal Code (in brevity 'IPC') and sentencing him to undergo imprisonment for life.

2. As per case of the prosecution, deceased Hariram is father of the accused/appellant. It is alleged that on account of partition dispute, accused/appellant was annoyed with his father. On 7-8-2010 at about 9.30 p.m. the deceased was sleeping with his wife P.W. 6 Sadhmati Rathiya in varanda. P.W. 1 Hemlal Rathiya i.e. step brother of accused and son of the deceased was sleeping with his wife P.W. 9 Smt. Kavita Rathiya in a separate room. On hearing cry of P.W. 6 Sadhmati, mother, P.W. 1 Hemlal and P.W. 9 Kavita and other family members reached to the place where the deceased was sleeping and saw Hariram dead, there were injuries over his neck, blood was oozing and the accused/appellant was standing nearby holding an axe. There was blood in the axe. On 8-8-2010 at 2.30 am, P.W. 1 Hemlal reached to Police Station Punjipathra, lodged the FIR vide Ex. P-1 and also lodged merg intimation vide Ex. P-2. Police after notice to the witnesses conducted inquest vide Ex. P-5. The dead body was sent for post mortem. P.W. 11 Dr. Vijay Kumar Lakra noticed following injuries vide Ex. P-18-A on the body of the deceased :

i. Wound – back of neck- right side L/W+ spinal vessels and vertebral column

cut, downward size about 7.5 cm x 2 cm bone deep.

- ii. 1 cm below the 1st injury another bone deep lacerated wound cut major vessels and cut down.
- iii. Left side of neck lacerated wound size 5 cm x 1 cm x trachea deep, trachea cut in whole circumference.
- iv. below 2 cm, 6 cm x 2 cm x muscle deep lacerated wound grate vessels cut.
- v. Right side maxilla bone fractured and burst right eye ball.

The autopsy surgeon opined that cause of death was hemorrhagic shock due to excessive loss of blood and cut of spinal column and the death was homicidal in nature.

3. After due investigation, charge sheet was filed against the accused/appellant under Section 302, IPC followed by framing of charge under the same section.

4. In order to establish the guilt of the accused/appellant, prosecution examined as many as 15 witnesses. Statement of the accused/appellant was also recorded under Section 313 of the Code of Criminal Procedure (in brevity 'Cr.P.C.'), in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

5. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced him as mentioned in para 1 of this judgment. Hence this appeal.

6. Learned counsel for the appellant submitted as under :

- i. that query reports Ex. P-20-A and Ex. P-21-A given by P.W. 11 Dr. Vijay Kumar Lakra do not support the prosecution case. As per query reports, it cannot be said that stain of blood found over the axe is of human blood or not.
- ii. that, there are many omissions and contradictions in the statement of P.W. 6 Sadhmati, hence the same cannot be believed. She is not the eye-witness.
- iii. P.W. 9 Kavita Rathiya, wife of P.W. 1 Hemlal Rathiya has said that she woke up after hearing cutting sound of axe and as per this witness, P.W. 6 Sadhmati was not on the spot. As per para 10 of statement of this witness, relation between the accused/appellant and the deceased was cordial. There is no motive for the incident demonstrated by the prosecution.
- iv. that, there is no FSL report. The case of the prosecution does not get help from memorandum and seizure i.e. Ex. P-10, Ex. P-11 and Ex. P-12 by which the axe and the alleged blood stained shirt were seized.

v. that confession before police is not admissible under Section 25 of the Evidence Act. The extra judicial confession is a weak type of evidence. Same may not be believed unless corroborated by other evidence.

7. Learned counsel for the appellant placed reliance on **Sahadevan and another -v- State of Tamil Nadu**¹ in which Hon'ble Apex Court has held that extra judicial confession is a weak piece of evidence. The court must ensure that same inspires confidence and is corroborated by other prosecution evidence. Further reliance is placed on **Jethu -v- State of MP (now State of CG)**² in which the Division Bench of this Court has held that circumstantial evidence as adduced in the matter is not sufficient to prove guilt and its chain was not complete. He further placed reliance on **Dhan Raj Alias Dhand -v- State of Haryana**³ in which there were material discrepancies in the two extra judicial confessions and break up of chain of circumstances leading to the possibility of more than one inference, the Hon'ble Apex Court gave benefit of doubt in the matter. He also placed reliance on **Pancho -v- State of Haryana**⁴ in which Hon'ble Apex Court has held that extra judicial confession is a weak type of evidence, courts look for corroboration from other evidence and if the extra judicial confession is made after 5 months of an incident, the same is not credible. Learned counsel further placed reliance on **Fagu Singh -v- State of M.P. (now CG)**⁵ wherein three witnesses gave different versions regarding the extra judicial confession and the dead body was not recovered at the instance of the accused, the Division Bench of this Court held that conviction is not proper. He further placed reliance on **Ajay Singh -v- State of Maharashtra**⁶. Wherein Hon'ble Apex Court has held that extra judicial confession must be voluntary and the person to whom the confession is made should be unbiased and not inimical to the accused and there should not be any vital and material difference. Hence learned counsel for the appellant submitted that the prosecution has failed to prove its case against the accused /appellant, the appeal be allowed and the accused/appellant be acquitted of the charges.

8. On the other hand, learned Panel Lawyer appearing for the respondent / State supporting the impugned judgment submitted that the judgment passed by the court below is well founded. There is no scope of any interference. Conviction of the accused/appellant is not based on presence of blood in his shirt or in the axe. The conviction is made on the basis of evidence of eye-witnesses and the extra judicial confession made by the accused/appellant. Query report Ex. P-20-A supports the prosecution case as the doctor has opined that the injury found over

1 (2012) 6 SCC 403

2 2011(1) CGLRW 14(DB)

3 (2014) 6 SCC 745

4 (2011)10 SCC 165

5 2011(3) CGLJ 385

6 (2007) 12 SCC 341

the body of the deceased may be caused by the axe so seized. P.W. 6 Sadhmati is mother of the accused/appellant. There is no reason as to why a mother will falsely implicate his son, that too for murder of his own father. Ex. P-1 FIR and Ex. P-2 merg intimation have been lodged promptly. Motive though not proved, but as per prosecution case, on account of dispute regarding partition of land, the incident took place. There is no material omission or contradiction in the statement of P.W. 6 Sadhmati and the extra judicial confession made voluntarily by the accused/appellant immediately after the incident before P.W. 9 Kavita Rathiya. Hence the extra judicial confession is in support of the eye-witness. He submitted that the appeal may be dismissed.

9. Heard learned counsel for the parties and perused the material available on record.

10. P.W. 1 Hemlal Rathiya, lodger of the FIR has deposed that on the date of incident he was sleeping along with other family members and his father and mother were also sleeping in veranda. At about 9.30 pm he woke up after hearing the noise and saw that accused/appellant had killed his father. He lodged FIR Ex. P-1 and merg intimation Ex. P-2. Police prepared spot map Ex. P-3. He is also the witness of inquest Ex. P-5. This witness has been declared hostile. P.W. 2 Santoshi Rathiya, sister-in-law (wife of younger brother) of the accused/appellant is a hearsay witness. He saw the accused/appellant outside the house. She heard weeping of her mother-in-law i.e. P.W. 6 Sadhmati. P.W. 1 Hemlal informed her that his father is killed by the accused/appellant. P.W. 3 Umesh Rathiya is witness of inquest, has supported the inquest and has not supported other story of the prosecution. This witness has also been declared hostile. P.W. 4 Kustoram Rathiya is also a witness of inquest and declared hostile. P.W. 5 Urmila Rathiya has also been declared hostile and has not said anything.

11. P.W. 6 Sadhmati is wife of deceased Hariram and step mother of the appellant. As per this witness, in the night family members were sleeping in their respective rooms. She and her husband were also sleeping in veranda. The accused/appellant, his wife and his children were sleeping in adjoining room. The accused/appellant assaulted her husband by an axe at the neck. Thereafter she made call and cried. Family members reached to the place of incident where she and her husband were sleeping. Before the family members and other people, the accused/appellant confessed that he has killed his father by axe. She is also witness of spot map Ex. P-16.

12. P.W. 7 Shaniram Rathiya, son of the deceased has stated that he was sleeping in a room in the house. His father was sleeping in veranda with his mother P.W. 6 Sadhmati and son of Ramkumar. The accused/appellant and his

children were also sleeping in veranda. P.W. 1 Hemlal called him and he saw the accused/appellant sitting near the door holding axe having blood stains in his hand. The accused/appellant admitted in presence of the family members and villagers that he had killed his father. His father was lying dead having many injuries in the neck. As per this witness, police had not recorded his statement. P.W. 8 Devkumari Rathiya, daughter-in-law of the deceased has also supported the fact that when P.W. 1 Hemlal called them, she went to the spot and saw her father-in-law lying on the cot and blood was oozing from his neck. He had died. The accused/appellant was standing holding the axe in his hand. In the cross-examination, this witness remained very firm regarding the above facts. P.W. 9 Smt. Kavita Rathiya, daughter-in-law of the deceased has deposed that in the night of the incident, her father-in-law and mother-in-law were sleeping in the veranda. She was also sleeping with her husband in the room and other family members were also sleeping in their respective rooms. In the night she heard the cutting sound of axe. Her husband also woke up. Both went to the deceased. Her father-in-law had sustained injuries of axe caused by the accused/appellant and he was standing nearby. The accused/appellant caused 4 injuries to the deceased. Blood was oozing out from the neck of the deceased. The accused/appellant confessed that he had killed his father. P.W. 10 H.P. Singh, station house officer is investigating officer and has duly supported the investigation. P.W. 11 Dr. Vijay Kumar Lakra conducted post mortem and noticed the injuries - wound – back of neck- right side L/W+ spinal vessels and vertebral column cut, downward size about 7.5 cm x 2 cm bone deep, 1 cm below the 1st injury another bone deep lacerated wound cut major vessels and cut down, neck left side lacerated wound size 5 cm x 1 cm x trachea deep, trachea cut in whole circumference, below 2 cm, 6 cm x 2 cm x muscle deep lacerated wound grate vessels cut, right side maxilla bone fractured and burst right eye ball. The autopsy surgeon opined that cause of death was hemorrhagic shock due to excessive loss of blood and cut of spinal column and the death was homicidal in nature.

13. P.W. 12 Tikeshwar Patel, Head Constable recorded FIR Ex. P-1 and Merg intimation Ex. P-2. P.W. 13 Karam Singh Rathiya prepared patwari map Ex. P-16. P.W. 14 Ram Kumar Rathiya, step brother of the accused/appellant has also supported the prosecution case and has stated that he was sleeping in a separate room with his wife. Other family members were also sleeping in their respective places. In the veranda, the deceased, P.W. 6 Sadhmati and wife of the accused/appellant were sleeping and in adjoining room accused was sleeping. In the night he heard cries of his mother P.W. 6 Sadhmati. He along with other family members reached to the spot where he saw his father in an injured condition. Four

injuries over the neck, blood was oozing and the accused appellant was standing nearby holding axe. The accused/appellant also made extra judicial confession before the family members that as his father was not giving him land in partition, he had killed him. P.W. 15 Piritrarn Banjara is a witness of inquest Ex. P-5, memorandum Ex. P-10, seizure of axe Ex. P-11, seizure of blood stained soil and plain soil Ex. P-12 and also seizure of cloths vide Ex. P-13.

14. Minute examination of the evidence makes it clear that the accused/appellant and the deceased are son and father. In the fateful night deceased was sleeping with his wife P.W. 6 Sadhmati in veranda. The accused/appellant was sleeping in an adjoining room. Other family members were sleeping in their separate rooms. At about 9.30 pm on account of call of P.W. 6 Sadhmati, all the family members woke up, reached to the place of occurrence and noticed the appellant standing near the deceased holding axe, blood was oozing from the neck of deceased and the accused appellant made extra judicial confession to P.W. 9 and other witnesses voluntarily. As the FSL report is not adduced in the evidence, memorandum and seizure of the axe and alleged blood stained shirt is of no help to the prosecution. The present case is based on the statement of P.W. 6 Sadhmati. It is argued on behalf of the appellant that there are omissions and contradictions in the statement of P.W. 6 Sadhmati. There is no reason surfaced for false implication by her. There is promptly lodged FIR and merg. P.W. 9 Kavita Rathiya and other witnesses saw the accused/appellant standing nearby holding axe and he voluntarily made confession that he had killed his father. The motive in the present case is regarding land partition. As per prosecution case, as the accused/appellant was demanding land in partition and the same was not being given by the deceased, the present incident occurred. Present case is not based on admission in presence of police, hence submission made on behalf of the appellant under Section 25 of the Evidence Act is not applicable in the matter. Para 3 and 4 of the statement of P.W. 9 Kavita makes it clear that she saw the deceased injured and the appellant was standing holding axe and the appellant confessed that he had killed his father. P.W. 6 Sadhmati is a natural witness. As a wife she was sleeping with the deceased and she saw the appellant assaulting her husband and thereafter she raised cries and started weeping. The family members came at the spot. The accused/appellant was present at the spot holding axe in his hand. The axe was taken by P.W.1 Hemlal. He lodged FIR and merg promptly. The post mortem report Ex. P-18-A prepared by P.W. 11 Dr. Vijay Kumar Lakra corroborates the prosecution story regarding injury. The doctor also gave positive opinion that the injury caused over the body of the deceased may be caused by the axe sent to him for examination. There is no contradiction in the statement given by

P.W. 6 Sadhmati. On the basis of statement made in para 4 and 19 by P.W. 6 Sadhmati, it cannot be said that she is not the eye-witness. P.W. 9 Kavita in para 2 of her statement has stated that her father-in-law and mother-in-law were sleeping in veranda and she was sleeping with her husband in a separate room. On the basis of the entire statement of P.W. 9 Kavita Rathiya it cannot be said that P.W. 6 was not present at the spot. Though extra judicial confession is a weak type of evidence, but in the present case eye-witness P.W. 6 Sadhmati saw the incident which was further corroborated by P.W. 9 Kavita Rathiya. In the present case there is no reason to disbelieve P.W. 6 Sadhmati, the eye-witness which stands duly corroborated by P.W. 9 Kavita and other witnesses regarding the extra judicial confession. Hence on account of her statement being credible, trustworthy and on the basis of the extra judicial confession made before the P.W. 9 Kavita Rathiya and others, we are of the view that the appellant has been rightly held guilty for the murder of his father.

15. The case law cited on behalf of the appellant is of no help to the appellant as they are not applicable in the present case. Statements of P.W. 1 Hemlal, P.W. 6 Sadhmati and P.W. 9 Kavita Rathiya are truthful, natural and there is no reason to suspect their testimony.

16. Thus, this Court is of the considered opinion that the findings recorded by the Court below are based on due appreciation of the evidence available on record. That being so, the judgment impugned does not call for any interference. Accordingly, the appeal being without substance is liable to be dismissed and it is dismissed as such. Since the accused/appellant is already in custody no extra direction is needed regarding his surrender etc.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge