

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 546 of 2004**

1. Kartikram @ Kritiram Nageshia, S/o Sukhnath, Aged about 20 years, Occupation Agriculturist, R/o village Kere, at Presently R/o Village Kharvatoli, P.S. Jashpur, District Jashpur, Chhattisgarh.
2. Sujit Kujur S/o Rajesh Kujur, Aged about 19 years, Occupation Agriculturist and Student, R/o village Karanjtoli, PS Jashpur, District Jashpur, Chhattisgarh.

---- Appellants**Versus**

State of Chhattisgarh, Through: DM Jashpur, District Jashpur, Chhattisgarh.

---- Respondent**Acquittal Appeal No. 438 of 2010**

State of Chhattisgarh, Through Police Station Jashpur, District Jashpur, Chhattisgarh.

---Appellant**Versus**

1. Kirtiram @ Kritiram Nagesia S/o Sukhnath, Aged about 20 years.
2. Sujit Kujur S/o Rajesh Kujur Aged about 19 years, R/o village Karanjtoli, Thana: Jashpur, District Jashpur, Chhattisgarh.
3. Bersen @ Binsent S/o Timbu Aged about 60 years.
4. Kritichand @ Kirtichand S/o Anjlus, Aged about 35 years.

Resident of from Respondent No. 1, 3 and 4: Village Kharvatoli, Thana Jashpur, District Jashpur, Chhattisgarh.

---- Respondents

For Appellants	:	Sri Govind Ram Miri, Advocate
For Respondent/State	:	Smt. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

C A V Judgment

Per Navin Sinha, Chief Justice

18/03/2016

1. Kartikram @ Kritiram and Sujit Kujur, Appellants in Criminal Appeal No. 546 of 2004 have been convicted under Section 302 IPC to life imprisonment with fine of Rs. 500/- each, in the event of failure to pay which they were required to undergo fifteen days further rigorous imprisonment ordered by the Sessions Judge, Jashpur, dated 30.4.2004 in Sessions Trial No. 70 of 2003. The State challenges the acquittal of the two Respondents Bersen @ Binsent and Kritichand @ Kirtichand in Acquittal Appeal No. 438 of 2010 of the charge under Section 302 and 109 IPC.

2. The two convicted Appellants in custody since 10.10.2003 filed I.A. No. 1 of 2015 for early hearing. The appeal was directed to be listed for hearing immediately. On 4.3.2016 no one appeared on behalf of the Appellants. On 8.3.2016 we considered it prudent in the interest of the Appellants to request the High Court Legal Services Committee to nominate a panel lawyer notwithstanding the observations in (2014) 14 SCC 222 (Surya Baksh Singh v. State of Uttar Pradesh) as follows :-

"26.....The argument that the High Court was duty-bound to appoint an amicus curiae is not legally sound.....In the case in hand the High Court has manifestly discussed the evidence that has been led, and finding it of probative value, has come to the conclusion that the conviction is above appellate reproach, correction and interference. In view of the analysis of the law the contention raised before us that it was essential for the High Court to have appointed an amicus curiae is wholly untenable. The High Court has duly undertaken the curial responsibility that fastens upon the appellate court, and cannot be faulted on the approach adopted by it. In this respect, we find no error."

After the hearing concluded and judgment was reserved but before rising of the Court at the end of the day, Sri Amit Sharma, Advocate appeared and submitted that he represents the Appellants. We have heard him briefly also.

3. The deceased, wife of PW-1, Pulikar was assaulted murderously in her house on 5.10.2003 at about 2:00 pm. PW-2, Remish Khess, the village Chowkidar lodged FIR (Exhibit P-4) on 6.10.2003 at about 11:30 am against unknown. The Appellants were taken into custody and allegedly blood stained brick, lungi with blood stains, a gents and ladies' watch and a plastic rope with blood on it and a wooden bait with blood stains were recovered from the place of occurrence. Though the seized materials were sent to the FSL nearly 20 days later, no report was received till conclusion of the Trial.

4. Learned Counsel from the High Court Legal Services Committee representing the Appellants submitted that the FIR was lodged belatedly and there is no explanation for the delay. The deceased was the concubine of PW-1, Polikar. Her previous husband would also visit her. The deceased was last seen with PW-1, Polikar as he was home alone. His conduct in having come home from the market, and finding his wife dead but raising no commotion immediately and rather waiting for the village Chowkidar to come to him next morning, after which FIR was lodged by the latter and not the witness is suspicious and unnatural behaviour. The Appellants did not have any motive to assault the deceased which is an important consideration in a case of circumstantial evidence. PW-4, Susena Lakda and PW-5-Tarun Kanti named by PW-1, Polikar as having been told by him to inform the villagers in the evening have turned hostile. PW-11, Parsuram spoke of an extra judicial confession by Appellant Kartikram @ Kritiram for the first time in Court only and made no such statement before the police. The only material against Appellant- Sujit is the extra judicial confession of the co-accused. In the circumstances, the possibility that the occurrence may have taken place in some other manner and the assailant may

have been someone else cannot be completely ruled out. If there exists the possibility that the occurrence may have taken place in some other manner and two views are possible the benefit of doubt must be given to the Appellants.

5. Learned Counsel for the State submitted that PW-4, Susena Lakda despite going hostile has acknowledged that she was a neighbour of the deceased. She was also related to some of the accused and turned hostile to save them. Appellant- Kartikram @ Kritiram was a servant in the house of the deceased. He was persuaded by the acquitted accused, one of whom Bersen, had a land dispute with PW-1, Pulikar to assault the deceased. Motive for the assault therefore existed. Appellant Kartikram @ Kritiram made a voluntary extra-judicial confession to PW-11, Parsuram of having assaulted the deceased with the aid of Appellant Sujit. The witness had spoken of the extra judicial confession by Appellant- Kartikram @ Kritiram both in his police statement and also Court statement. He did not make the statement in Court for the first time. The Appellant Kartikram @ Kritiram was well known to the witness and was living with him after the death of his parents till the witness got him employed in the house of PW-1, Polikar. The witness also hid him in his own house to save him from the ire of the villagers. The relationship between them was one of faith and trust, which is an important consideration to test the reliability of the extra judicial confession. Appellant Kartikram @ Kritiram in cross examination or his defence under Section 313 Cr.P.C. did not challenge the extra judicial confession or that it had not been made voluntarily. The extra-judicial confession was convincing and reliable to base conviction upon the same. Even if no FSL report was received, the conviction of Appellant Kartikram @ Kritiram required no interference.

6. Learned Counsel for the State next relied upon Section 30 of the Evidence Act to contend that the extra judicial confession was also admissible against co-accused Sujit for his conviction as they were both being tried jointly for the

same offence and a confession made by one of them could be considered against the other.

7. We have considered the submissions on behalf of the parties and perused the evidence on record also. PW-1, Polikar came home from the market at about 4:00 pm and found his wife dead. He called PW-4, Susena Lakda and PW-6 Donatus Khalko and told them to inform the villagers. Even if PW-4, Susena Lakda turned hostile in Court, her entire evidence does not get effaced. So much of it that is credible and reliable finding corroboration from PW-1, Polikar is admissible in evidence. PW-4, Susena Lakda has acknowledged that she is a neighbour of PW-1, Polikar. It lends corroboration to the statement of the latter including his conduct that he called the neighbours and asked them to inform the villagers. His wife had been murderously assaulted at home while he was away. There is no evidence that there were other inmates in the house also. Naturally PW-1, Polikar must have been in a state of shock and had to attend to the dead body unable to leave it alone. The police station was approximately 20 KMs away. PW-6, Donatus Khalko then went and informed PW-2, Remish Khes at 7:00 am the next morning and FIR was lodged. It was the month of October and darkness sets in early. Communication modes in villages are poor, a fact of which judicial notice can be taken including that at the time of occurrence even mobile phones had not entered the villages like today. The substance of the information as mentioned in the FIR has remained the same during trial which also lends credibility to it. It was a mere information of a crime said to have been committed by an unknown. There is nothing which prompts us to conclude that the conduct of PW-1, Polikar as the husband of the deceased was unnatural so as to doubt the manner of occurrence entirely. In the circumstances it cannot be said that the FIR was unduly delayed so as to doubt its truthfulness making it a suspicious document. In (2013) 12 SCC 765 (Shanmugam v. State) on the question of delay in lodging of the first information report it was observed that there could be no hard and fast rule. Much would depend on the facts and

circumstances of a case and the sequence of events as explanation for the delay and what would amount to delay in a case. Succinctly put it was observed as follows :-

“9.1. Delay in the lodging of the FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it loses its significance.

9.2. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut-and-dried formula for determining whether the explanation is or is not acceptable.”

8. Motive cannot alone be an incriminating or exonerating factor. Its absence or presence cannot by itself be the basis for conviction or acquittal. It may be a corroborative factor only. In cases of circumstantial evidence existence of motive may become an additional incriminating factor against the accused. In the present case, even if motive was not explicit it was certainly latent at the instigation of the acquitted accused Bersen who had a land dispute with the deceased and Appellant Kirtiram @ Kritiram was found to be a convenient mode for committing the offence as he was working as a servant in the house of the deceased and had easy access to her facilitating the occasion for the assault.

9. An extra-judicial confession is normally considered as weak evidence. It may constitute corroborative material to be considered collectively with other materials collected during investigation. But criminal jurisprudence does not prohibit that if the extra-judicial confession was made voluntarily and inspires confidence in the Court that it was not obtained any duress, threat or undue influence, the Court if satisfied can base conviction solely on the extra-judicial confession also. To test the veracity of an extra-judicial confession, the person to whom it was made, the relationship between the parties, the circumstances under which it came to be made are all relevant factors.

10. PW-11, Parsuram has reiterated the extra-judicial confession made to him by Appellant Kartikram @ Kritiram both in his police statement and in Court. The non marking of the police statement as exhibit but nonetheless available in the Trial Court records is an irregularity which does not vitiate it or wash it off. In any event no prejudice is caused to the Appellants. Even if it is considered to have been disclosed by PW-11, Parsuram for the first time in Court, so long as it is cogent, convincing and reliable, without any objection by the Appellant it can safely be considered for acceptance. The parents of Appellant Kartikram @ Kritiram were dead and the witness was looking after him. It was the witness who had arranged job for him at the house of PW-1, Pulikar as a servant. The witness hid the Appellant in his house to save him from the ire of the villagers. The Appellant Kartikram @ Kritiram started to cry after making the extra judicial confession to the witness. The witness and the Appellant were both well known to each other and the relationship between them was one of faith and trust. No challenge has been laid out to the extra judicial confession either in cross examination or in defence under Section 313 Cr.P.C. either that it was never made or that it was made under threat or duress and was not voluntary. We therefore find no reason not to believe the extra-judicial confession made as being voluntary and therefore convincing and reliable to uphold the conviction of the said Appellant Kartikram @ Kritiram.

11. Conviction on basis of reliable and convincing extra judicial confession without the necessity for independent corroboration is always dependent on the facts and circumstances of a case was noticed in (2001) 2 SCC 205 (Gura Singh v. State of Rajasthan) observing :-

“6. It is settled position 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 alleged. 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.the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be a 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.it is not open to the court trying the criminal case to start with a 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 witnesses who speak for such a confession.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. 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. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinised.the extra-judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."

12. The only material against the Appellant-Sujit Kujur is the extra-judicial confession made by Appellant- Kartikram @ Kritiram. Section 30 of the Evidence Act reads as follows:

"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

13. In our opinion it will not be safe to exclusively rely upon the extra judicial confession of Appellant Kartikram @ Kritiram to convict Appellant-Sujit Kujur. The Trial Judge has erred in convicting the latter exclusively on basis of the same. Since the extra judicial confession implicating a co accused can also be made or other reasons possibly, it would be appropriate to first look for independent evidence against the co accused and then corroborate it with the

extra judicial confession. The wooden bait found on the spot cannot be said to have been recovered on his confession. There is no FSL report also with regard to the same. There is no other material against the co accused. The manner in which the extra judicial confession of an accused may be considered with regard to another co accused named therein was considered in (2011) 10 SCC 165 (Pancho v. State of Haryana) observing as follows :-

“27. This Court in *Haricharan case* further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

28. This Court in *Haricharan case* clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.”

14. The Trial Court has acquitted the Respondents in Acquittal Appeal No 438 of 2010 observing that the prosecution had failed to prove the charge of the two Respondents having instigated Appellant- Kartikram @ Kritiram to commit the offence. The witnesses before whom the instigation is alleged to have been given have turned hostile and there is no other evidence to hold that any instigation was done by them much less on any particular date, time and manner. The fact that there may have been a land dispute between the

Respondent-Bersen and PW-1, Pulikar may raise suspicion against them but cannot be sufficient evidence to conclude for instigation by proof.

15. Section 107 IPC defines abetment in clause first as instigating a person to do a particular thing. Section 109 IPC provides punishment for abetment for which no express provision is made for its punishment. The explanation to the Section stipulates that if the offence is committed in consequence of abetment or in consequence of instigation or in pursuance of a conspiracy, it would constitute abetment. The prosecution has led no evidence whatsoever with regard to any conspiracy. An order of acquittal is not to be lightly interfered with unless there is gross perversity, misappreciation of evidence or the material was such that no prudent person would have arrived at such a conclusion. In the facts of the case, the prosecution having failed to prove abetment or conspiracy against the acquitted Respondents, the Court finds no reason to interfere with the same.

16. Resultantly, the appeal of Appellant Kirtiram@ Kritiram is dismissed. The appeal of Appellant Sujit Kujur is allowed and he entitled to release in accordance with the provisions of Section 437A Cr.P.C unless wanted in any other case. The Acquittal appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE