

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.184 of 1994

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1. Lochan Jha son of Shri Yaduvir Jha, resident of village Deep Devhitol, Police Station Madhepur, district- Madhubani
 2. Mithilesh Jha
 3. Akhlesh Kumar Jha & Akhlesh Jha
 4. Radha Kant Jha @ Jhati Jha, appellant Nos. 2 to 4 sons of Shri Aedha Kant Jha, reswident of Kaithinia, Police Station Madhepur, district- Madhubani

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajiv Roy, Advocate
For the Informant	:	Mr. R.K.Shukla
	:	Mr. B.N.Jha, Advocates
For the State	:	Mr. S.B.Verma, APP

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date : 13-12-2017

The present appeal arises out of the judgment of conviction dated 9.3.1994 and order of sentence dated 11.3.1994 in Sessions Trial No. 162/1993 passed by 4th Additional Sessions Judge, Madhubani whereby the learned trial court convicted the appellants for offence under Sections 302/120B and 201 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life under Section 302 and five years under Section 201 of the Indian Penal code. However, both the sentences were directed to run concurrently.



2. The prosecution case in short is that in December, 1992 the informant Lutan Jha, his brother Gopaljee Jha and his agnates Radhakant Jha, Digamber Jha, Pawas Kumar Jha and Meghnath Jha were living in his quarter at Calcutta. On 11.12.1992 Lochan Jha, son-in-law of the Meghkant Jha who had also gone there, took his meal on the Chauki of the informant which was used for the purpose of worship. In course of the same, some food grains fell on the Chauki for which the informant rebuked Lochan Jha. Thereupon an altercation took place between the informant and his agnates, as a result of which the accused persons threatened the informant and they left his quarter. On 14.12.1992 the informant learnt that Lochan Jha had gone to his village home, on which he also proceeded to his village and reached there at 1.30 P.M. on 15.12.1992. There he came to know that Lochan Jha had come to the house of Radha Kant Jha on 14.12.1992 and that his son Manjit who had gone to play with his neighbor, Akhilesh Jha at about 9 A.M. had disappeared. Thereafter the informant made a search of his son but when he could not find him an information was given on 16.12.1992 at R.S. Sivar Police Station, Jhanjharpur. On 16.12.1992 itself the informant learnt that the accused persons had murdered his son and had concealed his dead body near Bhimnpur bandh. On 17.12.1992 the informant along with some



persons found the dead body and thereafter lodged an information at Madhepur Police Station.

3. The police after investigation submitted charge sheet against the accused persons for offence under Sections 302/120B and 201/34 of the Indian Penal Code. The case was committed to the court of Sessions for trial in view of the fact that the case was exclusively triable by the court of sessions, the accused persons pleaded not guilty on framing of charge and as such the trial proceeded against them.

4. On behalf of the prosecution altogether 20 witnesses were examined. Documentary evidence like seizure list, station diary, FIR, inquest report, post mortem report, case diary of Madhepur P.S. Case No. 49 of 1992, statement of Ashutosh Thakur and Gulavo Devi under Section 164 Cr.P.C. etc. marked as exhibits were also placed before the trial for deciding the case.

5. The trial Court considered the entire case under two heads: (1) whether Manjit Jha alias Raj Kumar Jha was murdered, if he was murdered, (2) who committed the murder of Manjit Jha alias Raj Kumar Jha. The trial court on the basis of evidence available on record including the identification of dead body by the informant and other witnesses including the deposition of IO, inquest report, post mortem report, seizure list, etc. came to the



conclusion that the Raj Kumar Jha alias Manjit Kumar Jha was murdered and arrived at a conclusion that the dead body recovered from the Bhimpur Bandh was of Manjit Kumar Jha alias Raj Kumar Jha and on the basis of the post mortem report came to the conclusion that the deceased was killed by way of throttling. The Trial Court thereafter examined the materials on record including the oral as well as documentary evidence and held out that out of seven charge sheet accused charges of committing murder is proved against Lochan Jha, Mithilesh Jha, Akhilesh Jha @ Awadhesh Jha and Radha Kant Jha alias Jhoti Jha and the other accused, namely, Mndakani Devi, Sarita Devi and Megha Kant Jha were acquitted of the charges.

6. Mr. Rajiv Roy, appearing on behalf of the appellants submitted that in the present case there is no eye witness to the commission of crime by throttling the deceased. The conviction of appellants is based on circumstantial evidence. He submitted that in the present case the Trial Court has committed error in relying upon the deposition of child witness, P.W.2. Mr Roy submitted that child witness is incompetent to make definite statement and relying on the version of P.W.2, the Trial Court has committed gross error in convicting the appellants accepting his version of last seen. According to Mr. Roy, there is none who has seen the



deceased in the company of the appellants. Mr. Roy has drawn the attention of the court to the deposition of P.W.2 to indicate that from the court question it is manifest that the P.W.2 was not competent to make statement as he was child and not in a position to understand. Referring to the suggestion to the P.W.2 he submitted that this witness has admitted that he was tutored in the way to the court what statement he has to make in the court.

7. Mr. Roy submitted that the prosecution has not been able to establish the motive of crime. Mr Roy submitted that in the present case based on circumstantial evidence the conviction of the appellants is unsafe for the reason that the chain of events are not complete. He submitted that the motive behind the commission of the crime by the appellants as to the alleged incidence of Calcutta does not find mention in the Sanha report lodged by the informant of the case. He submitted that there is no definite evidence led on behalf of the prosecution to establish that the deceased was last seen in the company of the appellants. He submitted that in the instant case charge was also framed under section 364 IPC but the Trial Court on the basis of the materials available on the record acquitted the appellants and others from the charge under section 364 IPC and as such the conviction of the appellants in the absence of proof of motive and complete chain



which unequivocally leads to only one conclusion that the deceased was killed by the appellants alone and ruled out any other hypothesis of his murder, was not followed by the Trial Court while convicting the appellants. Mr. Roy submitted that the Trial Court has convicted the appellants on mere conjuncture and surmises. There is no conclusive circumstance to establish that the appellants have committed crime.

8. He submitted with reference to the prosecution case that the prosecution case is based on the so called confessional statement of one Mandakani Devi. He submitted that the extra judicial confessional statement to the police is inadmissible under section 24 of the evidence act and the Trial Court has committed error in relying upon the show called confessional statement and in the absence of establishing the motive for commission of the crime, a conviction based on circumstantial evidence, is most unsafe and the appellants deserve to be acquitted in the present case.

9. Mr. Roy referring to the deposition of P.W.3, who was declared hostile in the present case submitted that this witness has explained during her cross-examination that she was tortured by the police and under the trauma of torture she has made statement under section 164 Cr.P.C where she has made statement about the killing the victim by throttling and disposal of the dead body by



the accused persons. Referring to the statement of P.W.3 he submitted that when P.W. 3 has been declared hostile, no part of her statement before the police or Magistrate was admissible for the conviction of the appellants.

10. Mr. Roy thereafter referring to the deposition of P.Ws. 8 and 9 submitted that the deposition of P.W. 8 that he has seen four persons carrying a bag on the carrier of the bicycle was not sufficient to connect the chain that after the throttling of the deceased the appellants who were identified by P.W.8, were carrying the dead body of deceased in the bag on the carrier of the bicycle on 15th December, 1992. Mr. Roy submitted that there is not sufficient evidence to conclude that after throttling of the deceased the appellants have carried the dead body in the bag for disposal. Adverting to the deposition of P.W.9 he submitted that P.W. 9 has not named all the appellants except Mishilesh Jha, Chhotai and Ram Lochan Jha. His (PW-9) claim that he has identified them in the light of the bus carrying bag in the carrier of the cycle cannot be relied upon and the conviction on the basis of the deposition of P.Ws. 8 and 9 for having seen the appellants carrying a bag on the carrier of the cycle does not lead that dead body was in the bag and the appellants were carrying it in the bag for disposal. Referring to the deposition of P.Ws. 8 and 9 he



submitted that neither P.W. 8 nor P.W. 9 have seen anything suspicious and as such it would not be safe to approve the conviction of the appellants on the deposition of the PWs. 8 and 9.

11. Mr. Roy has submitted that in the instant case in the Sanha entry the informant has not disclosed that the deceased was wearing monkey cap. However, during the trial, on the basis of the seizure of monkey cap from the house of the accused persons, the trial court has drawn adverse inference which is impermissible as it was not the case pleaded by the informant at the first instance in the Sanha.

12. Mr. Roy also submitted that the motive of commission of the crime also does not find any whisper in the Sanha as there is no reference of Calcutta episode which was the motive for killing the deceased. According to Mr. Roy, the motive attributed by the prosecution for commission of the crime does not appeal to reason as such a trivial matter cannot be a ground for committing such heinous crime. The story built up by the prosecution that in the instant case the crime was committed because Lochan Jha dropped some food material on the Chouki used for worship on which the informant rebuked him and thereafter Radha Kant Jha, Digambar Jha Pawan Kumar Jha, Meghkant Jha began to quarrel with him and they threatened that



they will give them lesson for such humiliation which the informant will remember in the whole life.

13. Mr. Roy next submitted that the Trial Court has relied upon confessional statement of Mandakini Devi and while examination of the accused persons under section 313 Cr.P.C, the appellants were not confronted with the confessional statement which was taken note by the Trial Court as a circumstance to convict the appellants for commission of murder of deceased and for the said purpose he placed reliance on the judgment of the Apex Court in the case of **Inspector of Customs, Akhnoor, Jammu and Kashmir Vs. Yashpal and another: (2009)4 SCC 769**, para 14 and relevant part of para 15 which is quoted below:

“14. Section 313 Cr.P.C. reads as follows:

313. Power to examine the accused.--(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court--

(a) may at any stage, without previously warning the accused, put such questions to him as the court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).



(2) No oath shall be administered to the accused when he is examined under Sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

15. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus:

342. Power to examine accused - (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under Sub-section (1).....”



14. Mr. Rajeev Roy also relied upon the judgment of the Apex Court in the case of **Ajay Singh Vs. State of Maharashtra: (2007)12 SCC 341** that extra judicial confession has to be examined with a pinch of salt and in the instant case the Trial Court committed error in relying upon the extra judicial confession of Mandakini Devi coupled with the fact that such circumstance was not confronted to the appellants during the course of examination under section 313 Cr.P.C. He placed reliance on paragraph 12 to 15 of the judgment which are quoted below:

“12. The purpose of Section 313 of the Code is set out in its opening words- 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' In *Hate Singh, Bhagat Singh v. State of Madhya Pradesh* (AIR 1953 SC 468) it has been laid down by Bose, J that the statements of accused persons recorded under Section 313 of the Code 'are among the most important matters to be considered at the trial'. It was pointed out that:

....8.... the statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to



be received in evidence and treated as evidence and
be duly considered at the trial.”

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

15. The importance of observing faithfully and fairly the provisions of Section 313 of the Code cannot be too strongly stressed.



“30.....It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.”

15. Ms. Shashi Bala Verma, APP appearing on behalf of the State submitted that in the present case the trial court has committed no error in convicting the appellants. The trial court after meticulous scrutiny of the entire facts and circumstances convicted the appellants. The trial court in most dispassionate manner scrutinized the whole case where the trial court noticed the materials on record and finding that the circumstances are not clinching extended the benefit of doubt to the accused. She submitted with reference to consideration by the trial court that the trial court has acquitted Megha Kant Jha, Mandakani Devi and Sarita Devi extending the benefit of doubt. She referred to the



discussion of the trial court, in para-12 where the trial court has discarded the statement of P.W. 15. She also referred to the discussion of the trial court in para-14 where the trial court noticing the retracted confession of Mandakani Devi has acquitted her and Sarita Devi for commission of murder and the disposal of the dead body of the deceased and submitted that the trial court has objectively considered the entire materials on record and has committed no illegality in convicting the appellants.

16. Mr. Rabindra Kumar Shukla, appearing on behalf of the informant submitted that in the present case there is no dispute that the deceased was brutally killed and the materials surfaced during trial are indicative of complete chain of circumstance starting from the deposition of P.W. 2 who has last seen the deceased with Mithilesh Jha who asked the deceased to accompany him to his residence and the deceased was seen at the door of the appellants and thereafter no one has seen the deceased alive. The other witnesses have seen the appellants moving towards the direction carrying bag on the carrier of the bicycle in the night and the dead body was found in the same direction at Bhimpur Bandh. Thus, he submitted that there is complete chain of events coupled with the motive of killing the son of the



informant on account of quarrel between the appellants and the informant at Calcutta.

17. We have heard counsel for the parties. The present case is based on circumstantial evidence. The chain of events is starting from Calcutta episode followed by the lodging of Sanha and last with recovery of dead body at Bhimpur Bandh. The witnesses deposed on the point that the deceased was last seen in the company of the appellant Mithilesh Jha moving at the door of the appellants, the unambiguous identification of P.Ws. 8 and 9 about the appellants carrying bag on the carrier of the bicycle in the night and recovery of dead body of the deceased in the same direction at Bhimpur Bandh are certain definite chain which stands more clarified by the deposition of P.W.3. PW 3 in her statement before the Magistrate under Section 164 Cr.P.C.where she has made important disclosure. Her statement before the police as well as before the Magistrate under Section 164 Cr. P.C. cannot be brushed aside because she has resiled from her statement before the police and the Magistrate. The evidence of such hostile witness is admissible for the purpose of contradiction and corroboration under Sections 145 and 147 of the Evidence Act. In fact the Apex Court has occasion to consider the deposition of hostile witnesses in the case of **Gudu Ram Vs.**



State of Himachal Pradesh (2013) 11 SCC 546, in paras 19 to 22

which are quoted below:

“19. The law on the treatment of the evidence of a hostile witness is that the evidence of such a witness need not be completely rejected only because he has turned hostile. The Court must, however, be circumspect in accepting his testimony and, to the extent possible, look for its corroboration.

20. In *Karuppanna Thevar V/s. State of T.N.*, (1976) 1 SCC 31 this Court held that the testimony of a hostile witness may not be rejected outright "but the court has at least to be aware that, prima facie a witness who makes different statements at different times has no regard for truth. The court should therefore be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence."

Similarly, in *Bhagwan Singh V/s. State of Haryana*, (1976) 1 SCC 389 this Court held:

"8....But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."



(Incidentally this passage is incorrectly attributed to P.N. Bhagwati, J in Rabindra Kumar Dey V/s. State of Orissa, (1976) 4 SCC 23. It should be correctly attributed to P.K. Goswami, J).

21. These basic principles have been reiterated recently in Bhajju V/s. State of M.P., (2012) 4 SCC 327 and Ramesh Harijan V/s. State of U.P., (2012) 5 SCC 777. In Bhajju one of us (Swatanter Kumar, J) held for the Court:

"37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law."

22. If we consider the totality of the evidence of Jai Pal Singh, it is clear that he categorically stated that the appellant attacked him with a wooden stick like a thapi and pushed him in the bushes. To this extent the evidence of Jai Pal Singh is quite clear and he did not recant from this. Then he goes on to say that though he noticed the appellant, he did not actually see him beat Dalip Singh or throw him in the bushes. But the fact is that Dalip Singh was beaten by someone and pushed into the bushes. There is nothing to suggest the presence of any third person. The presence of the appellant (and none other) at the scene of occurrence is not in doubt."



And also in the case of **Attar Singh Vs. State of Maharashtra:**
(2013) 11 SCC 719 in paras 14 to 16 the Apex Court held as follows:

“14. We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the Appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the testimony of the witness who has been declared hostile could be relied upon for recording conviction of the accused-Appellant. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used by the prosecution. It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well-settled by a catena of decisions that the Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this Court in the case of Syed Akbar v. State of Karnataka reported in AIR 1979 SC 1848 whereby the learned Judges of the Supreme



Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety.

15. Similarly, other High Courts in the matter of Gulshan Kumar v. State (1993) Cri.L.J. 1525 as also Kunwar v. State of U.P. (1993) Cri.L.J. 3421 as also Haneefa v. State (1993) Cri.L.J. 2125 have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in the matter of State of U.P. v. Chet Ram reported in AIR 1989 SC 1543 : (1989) Cri.L.J. 1785; it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in the case of Shatrughan v. State of M.P. (1993) Cri.L.J. 3120 that hostile witness is not necessarily a false witness. Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in the matter of Sat Paul v. Delhi Administration AIR 1976 SC 294.

16. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar



to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.”

18. The Apex Court has occasion to consider the conviction of accused in the case of circumstantial evidence recently in the case of **Vijay Shankar Vs. State of Haryana : (2015) 12 SCC 644**. In the said judgment the Apex Court has summarized the principles to be followed in the matter of circumstantial evidence. The Supreme court has held out that in the matter of circumstantial evidence if the prosecution established last seen theory inference can be drawn against the accused which may lead to the finding of his guilt. The Supreme Court also held out that motive is always not required to be proved. In that case the Apex Court has also considered the principle applicable in the matter of extra judicial confession. Para 16 to 18 of the said judgment is quoted for ready reference.

“16. If the prosecution establishes the last seen theory, an inference can be drawn against the accused which may lead to the finding of his guilt. Considering the evidence of PW-11 and the improbabilities, evidence of PW-11 neither inspires



confidence nor does it lead to a conclusion that the appellant was last seen with the deceased. As noticed earlier, PW-10 and Satish Kumar had three servants; two were sleeping in the adjoining room where deceased-Satish Kumar was sleeping and the third one was sleeping in the truck parked at some distance from the farm. From the post-mortem certificate Ex.PS, it is seen that the deceased has sustained number of injuries on the neck, chest and upper arm. From the post-mortem certificate it is also seen that deceased- Satish Kumar was well-built and nourished. Probably, deceased might have resisted and raised alarm, it is quite improbable that the farm servants never heard the noise and that none of the servants came to the rescue of deceased- Satish Kumar which again raises serious doubts about the prosecution case.

17. Extra-judicial confession:- Yet another circumstance relied upon by the prosecution is the extra-judicial confession allegedly made by the appellant to Budh Ram (PW-12). PW-12 has stated that he was a member of Gram Panchayat Dujana and on 19.03.1995, Vijay Shankar-appellant came to his residence where Har Sarup Numberdar was also present. PW-12 stated that Vijay Shankar gave an extra-judicial confession of inflicting injuries to deceased-Satish Kumar and requested PW-12 to save him. When PW-12 was only a member of Gram Panchayat and not a person of influence with the police, it is doubtful that the appellant-Vijay



Shankar had approached him making extra-judicial confession and requested him to save him. At this juncture, suggestion put to PW-10 during his cross-examination is relevant to be noted. In the cross-examination of PW-10, it was suggested to him that he has let out his shop to Budh Ram Gujar, brother of Badlu, on the condition that Budh Ram Gujar will depose in the case and therefore PW-12 cannot be said to be an independent witness.

18. Principles in respect of evidentiary value and reliability of extra-judicial confession have been summarized by this Court in Sahadevan & Anr. vs. State of Tamil Nadu, (2012) 6 SCC 403, which reads as under:-

- "i. The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution;
- ii. It should be made voluntarily and should be truthful;
- iii. It should inspire confidence;
- iv. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence;
- v. For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities;



vi. Such statement essentially has to be proved like any other fact and in accordance with law."

19. The Apex Court in the case of **Ashish Batham Vs. State of M.P.:P (2002) 7 SCC 317** has also considered the principle to be followed for conviction in circumstantial evidence. The court has enumerated the principle in paras 6 to 8 which are relevant for the present case and quoted below:-

6. The principles, which should guide and weigh with the Courts administering criminal justice in dealing with a case based on circumstantial evidence, have been succinctly laid down as early as in 1952 and candidly reiterated time and again, but yet it has become necessary to advert to the same, once again in this case having regard to the turn of events and the manner consideration undertaken, in this case by the courts below. In **Hanumant Govind Nargundkar & Anr. Vs. State of Madhya Pradesh [AIR 1952 SC 343]**, it has been held as follows:-

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in **Reg. V. Hodge, (1838) 2 Lewin 227** where he said:

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to



force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

These principles were needed to be restated even as late as in the decision reported in Sudama Pandey & Ors. Vs. State of Bihar [(2002) 1 SCC 679] and Subhash Chand Vs. State of Rajasthan [(2002) 1 SCC 702].



7. The learned Trial Judge adverted to the following circumstances said to have been shown against the appellant to establish his guilt:

(a) Motive to commit the crime is that the accused failed in the love affair with Ms. Priti, daughter of P.W.2, and failure to marry her;

(b) The accused, who had earlier served at Shajapur but transferred to and serving at Bhopal, was seen entering and leaving the house situated in the premises of District Hospital, Shajapur, where the two daughters of P.W.2 were found dead and was seen going towards the bus stand;

(c) Absence of the accused in suspicious circumstances one day before the date of incident and three days after the incident from his Bhopal Office and the improbable and unproved defence of alibi taken that he was with his sister at Dahod in Gujarat State;

(d) Seizure of the chain from the possession of the accused and the identification of the same by the mother and father of the deceased;

(e) The disclosure statement given by the accused under Section 27 of the Indian Evidence Act and seizure of the knife and the blood stained clothes, pursuant to the same;



(f) Presence of human blood in the chemical examination of the knife and blood stained clothes seized from the accused; and

(g) The conduct of the accused, non-disclosure of the facts in his knowledge and giving false explanation.

The High Court also, though chosen to refer to the very same, had modulated and multiplied it by adverting to the various facets of the same.

8. Realities or Truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touch



stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.”

20. Recently the Apex Court reiterated the principle to be considered for conviction on circumstantial evidence in the case of **Satish Nirankari Vs. State of Rajasthan: (2017) 8 SCC 497** in paras 29 to 31, which are quoted below:-

29. It is now well established, by catena of judgments of this Court, that circumstantial evidence of the following character needs to be fully established:

(i) Circumstances should be fully proved.

(ii) Circumstances should be conclusive in nature.

(iii) All the facts established should be consistent only with the hypothesis of guilt.

(iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the Accused (see State v. Dr. Ravindra; : 1992 (3) SCC 300); Chandrakant v. State of Gujarat : (1992) 1 SCC 473. It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence the influence of guilt can be justified only when all the incriminating facts and



circumstances are found to be not compatible with the innocence of the Accused or the guilt of any other person.

30. Following tests laid down in Padala Veera Reddy v. State of A.P. : 1989 Supp (2) SCC 706: 1991 SCC (Cri) 407 also need to be kept in mind:

“10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) 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 none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused and such evidence should not only be consistent with the guilt of the Accused but should be inconsistent with his innocence.

31. Sir Alfred Wills in his book Wills' Circumstantial Evidence (Chapter VI) lays down the following Rules specially to be observed in the case of circumstantial evidence:

(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond



reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced with the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.”

21. In the conspectus of the judgment of the Apex Court discussed above, when I consider the case of the appellants and analyse the entire materials on record, I find that the deposition of P.W. 2 before the court and before the Magistrate was consistent on the point of last seen of the deceased with the appellant, Mithilesh Jha who took the deceased to his house. He has answered the query of the Magistrate during his statement recorded under Section 164 Cr.P.C. and his statement was recorded with clear understanding that he was capable of understanding the question of the court and he has voluntarily



made that statement. On scrutiny of evidence of P.Ws. 8 and 9 it is seen that the two witnesses have identified the appellants carrying bag on the carrier of the bicycle in the night towards the direction in which the dead body of the deceased was found. These two witnesses passed the test of cross-examination and there is no material to disbelieve their depositions. On scrutiny of the deposition of P.w. 3, who was declared hostile, the court find that her previous statements are relevant to corroborate and complete the chain of events that the deceased was throttled by the appellants in their house and the dead body of the deceased was disposed of by them carrying in the bag with wheat husks as at the place where the dead body was recovered the wheat husks was found.

22. In view of the judgment of the Apex court in the case of Gudu Ram and Attar Singh 2013 11 SCC 546 and 719 (supra) , I am of the view that the statements of the P.W. 3, the hostile witness are relevant and admissible for the purpose of corroboration and to explain the circumstances in which the deceased was killed and his dead body was disposed of by the appellants.

23. Adverting to the question of non-confronting the accused with the adverse circumstances, i.e. non-confronting the



appellants with the confessional statement of Mandakani Devi by the trial court while examination under Section 313 Cr.P.C. it is seen that the said question was relevant qua Mandakani Devi and that was adverse material against Mandakani Devi and Mandakani Devi has been acquitted in this case and as such non-confronting the appellants with the aforesaid circumstances of confessional statement of Mandakani Devi is not fatal. In fact all the appellants were confronted with all the adverse materials and evidence starting from the question of rebuking the appellants side by the informant for throwing food stuff on the chouki used for worship to the adverse circumstances of the deceased last seen by the P.W. 2 and the circumstance that they were carrying the bag on the carrier of the cycle in the night and they were seen carrying such bag by P.Ws. 8 and 9 and recovery of dead body in the bag beneath wheat husks were confronted to the appellants.

24. Thus, I am of the considered view that appellants have not suffered any prejudice by non-confrontation of the confessional statement of Mandakani Devi during the trial. Such prejudice was only available to Mandakani Devi who has been acquitted by the trial court extending the benefit of doubt.



25. Thus, in the totality of the fact situation discussed above, I am of the considered view that the trial court has committed no error in convicting the appellants as the entire chain of events right from episode of Calcutta where the informant has rebuked the appellants side and the appellants have threatened followed by the action of the episode of lodging Sanha of missing of the deceased by the informant and recovery of dead body and thereafter witnesses have consistently explained the circumstances which leads to only one conclusion that the appellants alone have committed the crime and it does not admit any other hypothesis of commission of crime. The deposition of P.W. 2 is very consistent before the Magistrate under section 164 Cr.P.C. and the court on the point of last seen. The other witnesses, namely, P.Ws. 8 and 9 are also consistent on the point of the appellants carrying a bag on the carrier of the bicycle in the night and recovery of dead body in the same direction, the appellants were seen carrying the bag on the carrier of the bicycle recovery of dead body in the bag beneath the husks of wheat, the statement of the P.W. 3 before the Magistrate under section 164 Cr.P.C. which is on the line of the chain of evidence starting from last seen to the event of carrying bag on the bicycle and recovery of the dead body in the same direction are clinching material to conclude that appellants alone



have committed the offence and as such I do not find any merit in the appeal.

26. The appeal is, accordingly dismissed. The judgment of the trial court is affirmed.

27. Since the appellants are on bail, they are directed to surrender forthwith to serve the remaining sentences. In case the appellants fail to surrender within a fortnight, the District Administration shall take step to ensure their arrest to serve the remaining part of the sentences as per the judgment of conviction and order of sentence passed by the trial court.

(Anil Kumar Upadhyay, J)

Rajendra Menon: I agree.

spandey/-

(Rajendra Menon, CJ)

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