

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.307 of 2013

Arising Out of PS.Case No. -113 Year- 2008 Thana -SINGHWARA District- DARBHANGA

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Upendra Sahni S/O Late Ramashish Sahni Resident Of Village and P.S.-
Singhwara, Distt.- Darbhanga

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 314 of 2013

Arising Out of PS.Case No. -113 Year- 2008 Thana -SINGHWARA District- DARBHANGA

=====

Ranjit Sahni @ Kharha Sahni Son Of Sri Ram Sevak Sahni Resident Of Village -
Singhwara, P.S. Singhwara, District - Darbhanga

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

=====

Criminal Appeal (DB) No. 299 of 2013

Arising Out of PS.Case No. -113 Year- 2008 Thana -SINGHWARA District- DARBHANGA

=====

Harish Chandra Kahar @ Hari Charan Kahar S/O Ram Prasad Kahar Resident Of
Village- Singhwara, P.S.- Singhwara, District- Darbhanga

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 316 of 2013

Arising Out of PS.Case No. -113 Year- 2008 Thana -SINGHWARA District- DARBHANGA

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Shambhu Kahar Son Of Seval Kahar Resident Of Village - Singhwara, P.S.
Singhwara, District - Darbhanga

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s



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Appearance :

(In CR. APP (DB) No.307 of 2013)

For the Appellant/s : Mr. Y.C. Verma, Sr. Advocate & Mr.
Pramod Kumar Sinha, Advocate

For the State : Mr. S.N.Prasad, APP

(In CR. APP (DB) No.314 of 2013)

For the Appellant/s : Mr. Ajay Kumar Thakur & Mr. Ravi Ranjan
Advocates.

For the State : Mr. S.N.Prasad & Ms. S.B.Verma, APP

For the Informant : Mr. B.P.Pandey, Sr. Advocate.

(In CR. APP (DB) No.299 of 2013)

For the Appellant/s : Mr. Ajay Kumar Thakur & Mr. Ravi
Ranjan Advocates.

For the State : Mr. S.N.Prasad & Ms. S.B.Verma, APP

For the Informant : Mr. B.P.Pandey, Sr. Advocate

(In CR. APP (DB) No.316 of 2013)

For the Appellant/s : Mr. Ajay Kumar Thakur & Mr. Ravi Ranjan
Advocates.

For the State : Mr. S.N.Prasad & Ms. S.B.Verma, APP

For the Informant : Mr. B.P.Pandey, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 19.-07-2017

These four appeals each filed by one appellant question the legality of the judgment of conviction dated 12.02.2013 and order of sentence dated 13.02.2013 passed by the learned *Ad hoc* Additional Sessions Judge III, Darbhanga, in Sessions Trial No. 33 of 2010. The trial Court convicted all the appellants under Section 302/34 of the IPC and Section 120B of the IPC and sentenced them to undergo RI for life with fine having default clause and R.I. for 14 years respectively. Appellant Ranjit Sahni @ Kharha Sahni of Cr. Appeal no. 314 of 2013 was additionally held guilty under Sections 380 and 411 of the IPC and sentenced to undergo S.I for 03 years with



fine having default clause and R.I. for one year respectively.

2. The factual background of the prosecution case as unraveled at the trial is that on the morning of 25.08.2008, the SHO of Singhwara P.S. on receiving a message regarding the murder of a couple in the village Singhwara north Ramkunj Mohalla records a '*Sanha*' and proceeds to the village where the statement of PW-22 was recorded on the same day at 9 A.M. PW-22 disclosed in the '*fardbeyan*' (Ext. 9) that in the morning of 25.08.2008 Shatrudhan Bhagat (PW-16) informed him that when he visited in the morning the house of the deceased Sita Ram Jha @ Rabindra Nath Jha for supplying milk, he did not find any response from the inmates. He also noticed blood spots on the '*darwaja*' of his house. On hearing this, the informant (PW-22) with some of the villagers went to the house of the deceased only to find that the doors were ajar. As he entered into the bed room Rabindra Nath Jha and his wife Kalpna Jha (the two deceaseds) were seen lying dead in a pool of blood. The articles kept in the room were scattered. There was profuse bleeding on the floor in which the foot print of the miscreant was also seen. He further stated that the entire details of the belongings of the deceased which might have been stolen and the reason for causing death of the couple shall be explained by the two sons and daughter of the deceased couple. After recording the '*fardbeyan*'. PW-25 took up the investigation of the case and inspected the place of occurrence which was the house of



the deceased couple having a fenced front yard. Through a grille gate entry into the house was possible through verandah whereafter there were two bedrooms. In one bedroom the two deceased(s) were found lying in pool of blood tied their legs with a white cloth. Immediately, he prepared the '*punchnama*' of the dead body of Rabindra Jha (Ext. 11/1) in presence of PW-22 and PW19 whereas '*punchnama*' (Ext.11) of the dead body of his wife Kalpna Jha was drawn in presence of PW-1 and PW3. Their signatures over the '*punchnama*' of deceased Kalpna Jha are marked as Exts.1/1 and 1/2 respectively. Similarly, the signatures of PW-22 and PW-19 have also been proved. The seizure of the some of the noted articles from the place of occurrence were also effected by the I.O.(PW-25) which have been proved at the trial as Exts-12. The two dead bodies were dispatched for holding post mortem examination(s). In course of investigation, the appellant Shambhu Kahar was arrested on 12.10.2008 and his confessional statement (Ext.15) was recorded by the I.O. On disclosure made by him, from the paddy field near the house of the appellant Shambhu Kahar, one iron 'katta'(dabiya) (Ext.VII) without wooden handle wrapped in a cloth was discovered/recovered which was seized under Ext. 16. On the same day the I.O. along with appellant Shambhu Kahar visited the jewellery shop of PW-7 and his statement was recorded. From the shop of PW-7 some golden balls, gold chain and 'nugs' used in the ring etc. were seized under Ext. 17. The I.O. thereafter recorded



the statement of Sarovar Kahar (PW23) who is full brother of appellant Shambhu Kahar. On 19.10.2008 appellant Ranjit Sahni of Cr. Appeal no. 314 of 2013 was arrested at Bithouli chowk and his confessional statement was recorded. On disclosure made by the appellant Ranjit Sahni a Nokia (model 1108) cell phone was recovered (Ext. V) from tiled roof of '*Bathan*' (cow shed) of the said appellant in presence of PW-4 and PW-14. The signatures of PWs-4 and 14 on the seizure memo have been proved as Exts. 1/4 and 1/11 respectively. The police laid the charge sheet against the present appellants on 09.01.2009 and kept investigation pending in respect of others, whereon cognizance was taken and the case was committed to the Court of Sessions on 17.02.2011. In course of trial one of the co-accused(s), namely, Dilip Kahar absconded. His case was separated. While the evidence was being led, on an application filed by the prosecution under Section 319 of the Code of Criminal Procedure (for short 'the Code') co-accused, Prabhash Jha (son of the informant of the present case) was summoned to stand the trial. The trial Court separated the trial of co-accused Prabhash Jha and continued with the present trial of the appellants wherein charges were framed on 04.03.2010 against all the appellants under Sections 302/34, 380, 396/34, 412 and 120B of the IPC which were read over and explained to the appellants. They abjured the guilt and claimed to be tried. Their defence was complete denial of their involvement in the case.



3. In order to substantiate the charge, the prosecution, in all, examined 28 prosecution witnesses. It is profitable to give out the details of the witnesses with specific reference to the point on which they deposed. PW-1 Prem Shankar Jha is a witness to the inquest of the dead body of one of the deceased(s), namely, Kalpna Jha. PW-2 Vijay Kumar Jha is a witness to the seizure of the iron pipe from the pond which was a weapon of assault used in the crime. PW-3 Jagarnath Mishra is also witness to the inquest report of one of the deceased(s). He has proved his signature on the inquest report of deceased Kalpna Jha as Ext. 1/2. He is also witness to the seizure list (Ext. 12) made by the I.O. at the place of occurrence. PW-4 again is a witness to the recovery of iron pipe from the pond in front of the house of the deceased on 27.08.2008 (Ext. 19). He has proved his signature on the seizure memo (Ext. 1/4). The iron pipe recovered from the pond is material Ext. VI. PW-5 Jyoti Krishna Jha is a witness who had deposed on the recovery of Nokia mobile set (Model 1108) on 19.10.2008 (material Ext. V) from the tiled roof of the cow shed of appellant Ranjit Sahni @ Kharha Sahni. The seizure memo prepared in this regard is Ext. 18. This witness has proved his signature on the seizure memo as Ext. 1/5. PW-6 Shoaib Akhtar is the village chowkidar of Singhwara P.S. who brought the material Exts. I to IV before the Court. PW-7 is the owner of the jewellery shop from where, on the disclosure made by the appellant Shambhu Kahar, recovery of chain,



golden balls, 'nugs' of the ring etc. was made by the I.O.. The seizure memo is Ext. 17 and signatures of the witness thereon is Ext. 1/6. PW-8 Himanshu Shekhar is son of the deceased who arrived from Bangalore on hearing the sad news of the murder of his parents. PW-9 Kamlesh Thakur is the brother of PW-7 who has stated that appellant Shambhu Kahar had come to the shop of PW-7 in his presence to sell the gold chain, ring etc. He is also a witness to the seizure memo (Ext. 17). His signature on the seizure memo is Ext. 1/8. PW-10 Puroshottam Jha is an agnate of the informant (PW22) who had accompanied him to the place of occurrence and also an attesting witness to the '*fardbeyan*'. He has proved his signature on the '*fardbeyan*' (Ext. 1/9) PW-11. Shyam Chandra Thakur is again a witness to the seizure of chain, gold balls and 'nugs' etc. from the shop of PW-7. He has proved his signature on the seizure memo Ext. 1/10. PW12 Saroj Kumar Choudhary is the brother of deceased Kalpna Jha. On hearing the news of the murder of his sister and brother-in-law, he reached the place of occurrence in the evening of 25th of August, 2008. PW-6 Shoaib Akhtar is again examined as PW-13 when he carried material Ext. V (Nokia mobile).He has also proved the signature of the SHO on the seizure memo (Ext.2).

4. We have heard Mr. Y.C. Verma who appeared for the appellant of Cr. Appeal No. 307 of 2013, Mr. A.K.Thakur who



appeared on behalf of the appellants of rest of the appeals, Mr. S.N.Prasad APP for the State as well as Mr. B.P.Pandey for the informant.

5. Before we notice and discuss the rival contentions it may be noted that the I.O. (PW-25) on getting an information in the morning of 25.08.2008 of the death of the couple in the village immediately proceeded to the place of occurrence whereat the '*fardbeyan*' of PW-22 was recorded. The place of occurrence was inspected by him which is the double storied house of the two deceased(s). The main entry in the house was through a grille gate leading to a '*veranda*' from where a passage connecting the two rooms of the house of the ground floor existed. One of the rooms was used by the deceased(s) as guest room. In the adjoining room on the western side the two dead bodies were found lying on the floor near the bed. The legs of both the dead bodies were tied with a white cloth (*Dhoti*). The belongings of the deceased(s) were found scattered. Profuse blood was found near the two dead bodies. The room, '*veranda*' and the anterior part of the house were spotted with blood stain marks. He seized broken part(s) of gold chain, one LG mobile without sim and a piece of card board ('*kutt ka tukada*') containing foot print mark of the intruder. In other part of the house, some pieces of broken bangles fallen on the ground were also seized.

6. It has been urged by Mr. Verma, who appeared in Cr.



Appeal no. 307 of 2013 that the appellant had not made any confessional statement which was recorded either by the I.O. or the learned Magistrate. There is no recovery of any incriminating material from the possession of the appellant. It is a case where no one had seen the presence of the appellant at the place of occurrence or even going away from the place of occurrence during the relevant time or immediately preceding thereto. The only material against the appellant is that he was found absconding from the village soon after the occurrence as deposed by the I.O. (PW-25 in paragraph no. 38). There is absolutely no legal material against the appellant to prove that he was in conspiracy with the other appellants of the case as a result whereof the crime was committed. In these circumstances, the case of the appellant shall not be covered by Section 30 of the Evidence Act.

7. Mr. Thakur, on the other hand, submits that even, according to the prosecution, the case is based on circumstantial evidence. There is no witness who has spoken about the appellant going to and/or coming from the house of the two deceased(s). The trial Court fell in error in convicting the appellants based on the confession(s) made to the police by appellant Shambhu Kahar (Ext. 15). Although there is no confessional statement of co-accused Ranjit Sahni @ Kharha Sahni but the prosecution has inappropriately relied on the recovery of the Nokia mobile (Material Ext. V) from the tiled roof of the 'bathan' of the appellant (Ext. 18). He also criticized the



judgment of the learned Trial Court, where reliance was placed on the Test Identification Parade (T.I.P.) (Ext. 21) of the stolen articles in which PW-17 [one of the sons of the deceased(s)] identified few of the belongings of his parents, such as, Nokia Mobile(material Ext. V) , gold chain (material Ext. I) and ‘Nugs’ of the ring (material Ext. II). It may be noted that co- appellant Shambhu Kahar was apprehended by the I.O. on 12.10.2008 along with his brother PW23 Sarovar Kahar and his mother and at the police station the confession of the appellant Shambhu Kahar and his brother Sarovar Kahar (PW-23) were recorded. PW-23 was later produced before the learned Judicial Magistrate (PW-27) for recording his statement under Section 164 of the Code which was actually recorded on 21.10.2008 (Ext. 20). It would also be pertinent to notice here that before formally effecting arrest of appellant Shambhu Kahar the I.O., acting on the disclosure made by him, took him to the disclosed place i.e. a paddy field belonging to Ram Sevak Kahar from where Shambhu Kahar picked up ‘katta’ (dabiya; a heavy sharp cutting weapon) wrapped in a cloth which was seized by the I.O. (Ext. 16) in presence of appellant Shambhu Kahar, PW-21 and PW-15. The ‘Katta’(dabiya) recovered on disclosure made by appellant Shambhu Kahar is material Ext. VII. On the same day in the evening at about 5 P.M. he was taken to the jewellery shop of PW-7 wherefrom recoveries of the chain and other looted/ stolen articles sold by appellant Shambhu Kahar to PW-7 for a



sum of Rs. 6,550/- were recovered and seized vide Ext. 17 in presence of Kamlesh Thakur (PW-9) and Shyam Chandra Thakur (PW11). The I.O. recorded the statement of the Jeweller (PW-7) and his brother (PW9) who categorically stated that on 25.08.2008 appellant Shambhu Kahar had come with some ornaments including broken gold chain and gold ring fitted with 'nugs' and sold them on the plea that he required money for treatment of his wife. The ornaments sold to him was remanufactured into a gold chain after separating the 09 pieces of 'nugs' fitted in the ring, which too, were seized from the shop. It may be highlighted here that on finding complicity of the appellant Shambhu Kahar he was thereafter arrested. The dead bodies were found to have received several sharp cutting injuries on their person(s) caused by heavy sharp cutting weapons. Although it may not be relevant for the case, however, it is stated that two days after the recording of the F.I.R. on 27.08.2008 an excavation of the pond in front of the house of the deceased(s) was carried out with the help of fishing net in which one iron pipe (material Ext. VI) was excavated and seized as per seizure memo Ext. 19.

8. Mr. Thakur would urge that there were several irregularities committed in conducting the TIP which makes the TIP chart (Ext. 21) wholly unreliable. In this connection, he has drawn our attention to the evidence of PW-6 Chowkidar who produced gold chain (material Ext. I) and several pieces of the 'nugs' of the ring (material



Ext. II), small gold balls (material Ext. III) and the evidence of PW-13 who produced the Nokia mobile in sealed packet (material Ext. V) in order to submit that neither the articles were sealed in presence of the I.O. nor they were kept in the '*malkhana*' after seizure. The '*malkhana*' register showing entry of these material Exts. has not been produced. PW-20 is A.S.I. of the police who produced the recovered iron pipe (material Ext. VI) and 'katta' (dabiya) (material Ext. VII) which was recovered consequent upon the confession made by the appellant Shambhu Kahar on 12.10.2008. Making similar criticism, it has been submitted that those materials Exts. were not found properly sealed when presented before the Court inasmuch as they did not contain any special mark of identification. He has further submitted that the statement of PW-23 made before the police and subsequently before the learned Judicial Magistrate cannot be relied upon as PW-23 in his evidence before the Court has narrated about the oppression perpetrated on him before recording his confession. He has retracted from his confession. The conviction of the appellants based on confessional statement made before the police is wholly unjustified. Except the confessional statement there is no other legal material on record.

9. Mr. Prasad, in contra, appearing for the State as well as Mr. Pandey, however, supported the findings of guilt recorded against the appellant(s). They have contended that for any laxity on the part of



the I.O. the case of the prosecution shall not suffer if otherwise there is ample and convincing evidence on record to hold the guilt of the accused(s)-appellants. Although it is a case based on circumstantial evidence but if the facts proved at the trial, which lay in pieces, are carefully culled out and woven into a thread the irresistible conclusion would be the guilt of the appellants. They relied on the confession made by co-accused Shambhu Kahar leading to the recovery of the weapon of assault (Katta) and the stolen articles (ornaments) by the accused(s) from the house of the deceased(s). Apart from his confession, it is contended, there is an extra judicial confession made by appellant Shambhu Kahar before his brother which has been reproduced by him before the learned Magistrate in his statement under Section 164 of the Code on 21.10.2008 (Ext. 20). Referring to the evidence of the Doctor (PW-24) as well as I.O. (PW 25), it has been submitted that the death of the two deceased(s) was caused by using heavy sharp cut weapon ('katta'). In the circumstances, the appellants were legally obliged to explain as to the place from where it was picked up and the use thereof in the crime. Ample opportunity was granted to all the appellants while the Court interacted with them in recording their statement(s) under Section 313 of the Code but none of them, particularly, appellant Shambhu Kahar used this solemn occasion to explain the circumstances which strongly incriminate him as well as other appellants in the crime.



(10) Mr. Thakur placed reliance to support his contention on **Kartar Singh vs. State of Punjab (1994) 3 SCC 569; para 383** wherein it has been held that such confession cannot form the basis of conviction. It was a case where the accused had made a confession before the Magistrate under Section 164 of the Code. As the Magistrate had not undertaken to comply with the procedure of recording such statement no reliance was placed. He also referred to and relied on **Aghnoo Nagesia vs. State of Bihar since reported in AIR 1966 SC 119; para 14** wherein their Lordship of the Hon'ble Supreme Court while explaining the legal position observed that the law completely forbids confession to be considered as a legal evidence unless there is recovery/discovery of certain incriminating fact consequent upon such disclosure it shall be relevant to that extent only.

(11). In the case of **Vijender vs. State of Delhi** since reported in **(1997) 6 SCC 171 ; para 26** on which reliance has been placed by him, it was held that confession made before the police shall only confined to that part which leads to recovery/discovery pursuant to such disclosure made in the confession. In this connection, Mr. Thakur also relied on **State of Delhi (NCT Delhi) v. Navjot Sandhu @ Afsan Guru since reported in (2005) 11 SCC 600** which lays down the same legal principle which is also covered by the substantive provisions of law. Some more decisions on this point have been referred to by Mr. Thakur but we do not find it desirable to notice



them as those decisions of the Supreme Court lay down the legal principle on which there is not much dispute.

(12). Learned counsel(s) for the prosecution, in contra, relied on para 317 of **Kartar Singh (supra)** wherein the Hon'ble Supreme Court observed as under:-

“317. Though we holding that this section is constitutionally valid, we, in order to remove the apprehension expressed by the learned counsel that the Executive Magistrate and the special Executive Magistrates who are under the control of the State may not be having judicial integrity and independence as arrested by the Judicial Magistrates and the recording of confessions and statements by those Executive Magistrates may not be free from any possible oblique motive, are of the opinion that it would be always desirable and appreciable that a confession or statement of a person is recorded by the Judicial Magistrate whenever the Magistrate is available in preference to the Executive Magistrates unless there is compelling and justifiable reason to get the confession or statement, recorded by the Executive or special Executive Magistrates.”

(13). Mr. Pandey quite vehemently argued that the appellant Shambhu Kahar was only taken for interrogation at the police station and after recording his confession which led to recovery of weapon of assault (iron 'katta') as well as the recovery of the stolen parts of ornaments from the shop of PW-7, his formal arrest was effected. That apart, there is extra judicial confession made by appellant Shambhu Kahar, immediately after the incident, to his brother Sarovar Kahar (PW-23) incriminating himself as well as the



other appellants in the pre planned murder. PW-23 was then produced before the learned Judicial Magistrate for recording his statement under Section 164 of the Code wherein he reproduced the confession made to him by his full brother appellant Shambhu Kahar which inculcates the appellant and other co-accused(s) of the present set of appeals. Although the prosecution relying on him produced him as PW-23 wherein he resiled from his statement made by him before the police but quite candidly accepted his endorsement made in his own hand and pen on the said statement declaring the same having been made voluntarily without any duress. His endorsement and signature made in English on the statement made under Section 164 of the Code has, however, been not denied by him (refer para 4 of his deposition). The endorsement part made by him on the statement in his own pen and handwriting has been marked as Ext. 7. His such statement was recorded on 21.10.2008. Suffice it to mention here that the confession made by appellant Shambhu Kahar to his brother which he reproduced in his statement under Section 164 of the Code (Ext. 20) details the entire sequence of events that preceded the occurrence. It discloses how the conspiracy was hatched, one of the appellants was hired for money by a co-accused to do away with the life of the couple whereafter appellant Shambhu Kahar conspired with other co-accuseds and picked up the day of 'Krishna Janmastami' when celebrations were all around in the village to execute the well chalked



out crime. The motive for the commission of the crime also surfaced distinctly.

(14). Before considering further it is apt to notice the relevant provisions of the Evidence Act on which strong reliance has been placed by both sides. It has been submitted, and rightly so, that if the circumstances proved at the trial are covered by these provisions of law then conviction of the appellant(s) would be sustainable in law. Sections 27, 30 and 106 of the Evidence Act read thus:-

“27. How much of information received from accused may be proved.-
Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

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.

106. Burden of proving fact especially within knowledge.-
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

(15). As much emphasis has been placed on Sections 30 and 106 of the Evidence Act (for short ‘the Act’), we perused and find



from the relevant provision in Section 30 of the Act that 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. Needless to emphasize that under Section 106 of the Act the burden is on the accused to prove the fact especially within his knowledge. What appears from the evidence of the I.O. is that on 12.10.2008 on getting an information about the involvement of the appellant Shambhu Kahar in the crime he goes to the house of the appellant Shambhu Kahar and brings him, his brother (PW23) and mother to the police station where, firstly, the exculpatory statement of PW-23 was recorded followed by the recording of the confessional statement of appellant Shambhu Kahar (Ext. 15). The I.O. then carries him and other witness to the place disclosed by him where appellant Shambhu Kahar retrieved the 'katta' (dabiya) himself from near the ridge of a field and handed over to the I.O. in presence of the PWs 21 and 15 which was seized under seizure memo Ext. 16 which was not only signed by the two witnesses but also by the appellant Shambhu Kahar. Thereafter, as the sequence of events are unraveled by the I.O.(PW-25), in the same evening on the basis of disclosure made by Shambhu Kahar he was taken to the shop of PW-7 wherefrom 9 pieces of 'nugs' separated from the ring and some gold ornaments were recovered and seized in



presence of the appellant, the shopkeeper Kamlesh Thakur (PW-9) and Shyam Chandra Thakur (PW11). In the statement of the shopkeeper recorded by the I.O. and also in Court it was stated that on 26.8.2008, the appellant Shambhu Kahar had come to the shop to sell some gold ornaments including ring studded with 'nugs' on the plea that he required money for treatment of his wife. PW-7 paid the settled amount Rs. 6550/- to the appellant Shambhu Kahar and thereafter he separated the 'nugs' from the ring and melted the rest part and made the gold chain which was seized. Considering the importance of the evidence of the shopkeeper providing a link in the chain of the circumstances, the prosecution got the statement of PW-7 recorded by the learned Judicial Magistrate (PW27) on 15.10.2008. His signature on the said statement is available as Ext. 1/7. We now turn to the evidence of PW-7 where he has accepted of having made such statement before the learned Judicial Magistrate on 15.10.2008. Looking to the material Exts. I, II, III and IV, he has stated that these are the articles/ part of jewellery which were seized by the police from his shop on 12.10.2008 under a seizure memo. He identified the appellant Shambhu Kahar in the dock as the person who had come to sell the ornaments to him on that day. There is another relevant evidence to support the said factum. PW-9 is full brother of PW-7 who also runs a jewellery shop and a frequent visitor to PW-7. He deposed that on 25.8.2008 when he was at the shop of his brother (PW7) in his presence appellant Shambhu Kahar had visited



the shop to sell the ornaments carried by him which was purchased by his brother PW-7. He also identified the appellant Shambhu Kahar in dock. PW-11, is a co-villager and a witness to the seizure from the shop of PW-7. He has also fully supported the factum of recovery of those articles from the shop of PW-7.

(16). PW-17 is the son of the two deceased(s). His evidence magnifies two aspects of the prosecution case. On getting information about the incident on 25.08.2008 from his maternal uncle PW 21 he reached the village on the same night at about 11 pm and on a cursory look of the place of occurrence found the culprits had taken away Nokia and LG mobile, sim of LG mobile set and also the ornaments of his mother which includes gold chain, nose pin and gold ring etc. He also found the personal diary titled 'Hari Om' was missing from the Almirah kept in the room. He further stated that the informant PW 22 and his son Prabhash Jha (facing another trial) used to frequently visit his parents. He also spoke about how the life of Prabhash Jha had transformed after establishing a brick kiln for which his father had helped monetarily by loaning him a substantial amount. His mother used to maintain account in the 'Hari Om' diary of the loans/advancements made by her husband. Only few weeks prior to the occurrence he was with his parents when his father had disclosed to him that the informant (PW-22) and his son Prabhash Jha was not willing to repay the amount given by him. He also stated about his



participation in the T.I.P. on getting a notice dated 13.11.2008 from the Officer-in-charge of the police station. He identified his signature on the T.I.P. chart (Ext.4). He also claimed to have seen the appellants on few occasions visiting the house of co-accused Prabhash Jha. PW-22 the informant (father of co-accused Prabhash Jha) had disclosed in the '*fardbeyan*' that on the first look of the place of occurrence (bedroom of the deceased) it was apparent that the assailants were looking for a particular thing in the house and in doing so, a tussle had taken place between the deceased(s) and the assailants.

(17). It has been argued by Mr. Thakur that merely on the basis of confessional statement in absence of corroboration by substantive evidence the guilt cannot be fastened on the accused-appellants, as the provisions under Section 25 of the Act and the interpretation thereto given by the Hon'ble Supreme Court in several cases forbid the Court from doing so. It is because confession before police cannot be treated as a substantive evidence under Section 3 of the Act which defines evidence.

(18). In **Sidharth etc. v. State of Bihar AIR 2005 SC 4352** their Lordship of the Hon'ble Supreme Court have held that the confession so made will not be admissible under Section 10 of the Evidence Act and further that on the basis of such confession one cannot be convicted. However, it was observed that a confession made before the Judicial Magistrate which is considered as voluntary would



be admissible under Section 27 of the Evidence Act and same can be acted against its maker.

(19). In **State of Gujarat v. Mohammed Atik & Ors.**

AIR 1998 SC 1686; following was observed in para 16 & 17 :-

“16. A three judge bench of this Court has also said in Sardul Singh Caveeshar v. State of Bombay, AIR 1957 SC 747.

“The principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in Section 10 Evidence Act, confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were “ in reference to their common intention” that is to say, things said, done or written, while the conspiracy was on foot and in carrying out the conspiracy. It would seem to follow that where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence. “

(Emphasis supplied)

17. Thus, the principle is no longer res integra that any statement made by an accused after his arrest, whether as confession or otherwise, cannot fall within the ambit of Section 10 of the Evidence Act. The corollary of it is that the confessional statement of 4th respondent (Abdul Latif Abdul Wahab Sheikh) who is no more alive now thus vanishes from the ken of evidentiary use.”

(20). Relying in the aforesaid principle of law it has been argued by the defence that Section 10 of the Evidence Act can not be applied in the case as the confession of the accused- appellant was outside the period of conspiracy and is not receivable in evidence.



(21). It has been pointed out to us by the prosecution that the formal arrest of appellant Shambhu Kahar was made only after recording his confession and recovery of the 'katta' and thereafter the stolen ornaments in quick succession from the field and the shop of the PW-7 respectively on disclosure made by the appellant Shambhu Kahar. He made disclosure to his brother PW 23 of his involvement in the crime. PW23 was produced before the learned Magistrate for recording his statement.

(22). The prosecution has emphasized that provisions contained in Sections 30 and 106 of the Act would be attracted in the case. Before debating further on this point, the Court would once again highlight the relevant facts which have clearly established by the evidence at the trial. The death of the couple was homicidal in nature. Both of whom had received several ante mortem incised wounds on their person(s). The following injuries were found on the person of Ravindra Nath Jha @ Sita Ram Jha:-

“Incised wounds

1. 5”x ½” x upto bone deep over side of left eye
2. 2”x1/4” x upto bone deep over left eyebrow
3. 4”x1/4” x upto bone deep over mid frontal region
4. 2”x1/4” x upto bone deep over mid parietal region
5. 4”x1/4” x upto bone deep over left mid parietal bone
6. 2”x1/4” x upto bone deep over left parietal region
7. 3”x ¼” x upto bone deep over left parietal



region.

8. 3"x ½" x upto bone deep in right of occipital region.

9. 3"x1/4" x upto bone deep in mid of occipital region.

10. 3"x ½"x mussel deep over top of right shoulder.

11. 4"x ½"x mussel deep over interior of right shoulder 1" below injury No.-10

12. Incised wound 6"x ½" x mussel deep over scrotum with excision of ½ of right testes.

Fracture of left side of frontal, temporal, parietal and occipital bone was found. Extradural and subdural haemorrhages were found. Both the lungs were found, both sides of heart were found empty. All abdominal viscera were found pale. Bladder was found empty. Stomach was full about 300 ml undigested food matters."

On the person of his wife Kalpna Jha, the doctor found the following ante mortem injuries:-

"Incised wounds

1. 4" x ½" x upto bone deep over right side of frontal region

2. 2"x ¼" x upto bone deep over mid frontal region.

3. 2"x ¼" x upto bone deep over mid parietal region right side

4. 4"x ¼" x upto bone deep over left frontal parietal region

5. 4"x ¼"x upto bone deep in mid occipital region.

Underlying scalp tissues were bruised and infiltrated with blood and clots. Fracture of left temporal, parietal and occipital bones was found. There was sutural fracture of lambdoid suture. Extradural and subdural haemorrhages were found. Both the lungs were found, both sides of heart were found empty. All abdominal viscera were found pale. Bladder was found full. Uterus was normal. Stomach contained about 300 ml pasty food matter with normal mucosa. There was piece of cloth tied around the neck soaked with blood. Horizontal



ligature mark was found around the neck which was continuous . All the above noted injuries were ante mortem and caused by heavy sharp cutting weapon. cause of death haemorrhage and shock.”

(23). The I.O., in his evidence has stated that he immediately reached the place of occurrence and found the two victims lying in a pool of blood having received several incised wounds. The ‘*Punchnama*’ prepared over their bodies by him at the place of occurrence also supports the said factum. It is not, thus, much in dispute that the two deceased(s) were inflicted several incised wounds on different parts of their body caused by heavy sharp cutting weapon which resulted in their death. No serious challenge was made to this by the defence also.

The I.O. also noticed after entering the bedroom that the bodies of the two deceased(s) were tied with the help of white cloth. In the process of committing offence a broken piece of gold chain got scattered and seized by him. The deceased Rabindra Nath Jha was then posted as the District Sub Registrar in the adjoining District, namely, Muzaffarpur. He was living alone with his wife deceased Kalpna Jha at the village house. Their two sons (PWs 8 and 17) were residing at Bangalore and Pune respectively. Co accused Prabhash Jha and his father PW-22 (informant) were close agnate(s) of the deceased couple who were residing only two houses apart from the house of the deceased couple. From the evidence of (PW-17) Sudhanshu Shekhar (



son of the deceased couple) and (PW21) Sunil Kumar Choudhary (maternal uncle of PW-17) the motive for commission of crime has distinctly appeared. The deceased had lent heavy amount to the son of the PW-22 (informant) (one of the co-accused(s) of the present case) for setting up a brick kiln business which was not being repaid by him. Whatever amount the deceased couple used to lend were entered in a diary titled "Hari Om". We would immediately revert to the '*Fardbeyan*' of PW-22 wherein he had also hinted that the miscreants had seemingly made hectic search to retrieve some valuable document/article from the possession of the deceased couple. PW-21 as well as PW17 have also spoken about the entries usually made by the deceased Ravindra Nath Jha or his wife in the said diary about such advancements of money. The motive for the occurrence was retrieval of the diary and in course whereof, when resistance was offered, both of them were assaulted with heavy sharp cutting weapon as found by the Doctor in the autopsy report which resulted in their death.

(24). Another important fact proved at the trial is the appearance of the two dead bodies. When the I.O. first entered into the room he found the legs of both the bodies tied with plain/white cloth (Dhoti). Appellant Shambhu Kahar while making disclosure (Ext. 15) recorded on 12.10.2008 spoke clearly about tying the legs of the two deceased(s) with the help of cloth. It has further come in the confessional statement that co-accused Prabhash Jha had called one of



the appellants and hatched up the conspiracy to kill the deceased couple and some money was also advanced. Later the present appellants met and prepared the plan for execution. In furtherance of their common intention they chose the date of 'Janamastami' for execution and committed the crime.

(25). Learned counsel for the defence argued that the confession made by accused(s) cannot be the foundation of the conviction. On the other hand, the prosecution has contended that a statement made before the Judicial Officer under Section 164 of the Code can be relied upon by the Court as there is very remote chance of the same being the product of coercion or duress. In Kartar Singh (Supra) the Hon'ble Apex Court appropriately explained the legal position on the point. In a case like this the confession made by appellant Shambhu Kahar and the extra judicial confession made by him to his brother (PW23) should be considered in the light of Section 30 of the Act.

(26). So far as the confessional statement of appellant Shambhu Kahar is concerned, it has been argued by the prosecution that he was merely called at Thana which was permissible under Section 160 of the Code where his confessional statement was recorded along with the statement of his brother Sarovar Kahar and on the basis of the disclosure made by appellant Shambhu Kahar recoveries of 'Katta' (weapon of assault material Ext. VII) from the



paddy field of Ram Sevak Kahar and the stolen pieces of jewellery were recovered from the shop of PW-7 (material Exts. II, III and IV). Although Sarovar Kahar while deposing in Court resiled from his statement made under Section 164 of the Code but he clearly testified his endorsement made thereon to the effect that the same was made out of his own free will and without coercion. He also testified his signature and endorsement (Ext.7) made to this effect by him. The statement made by Sarovar Kahar would be treated as an extra judicial confession of Shambhu Kahar made before his brother immediately after the occurrence which was reproduced by Sarovar Kahar (PW23) in his statement (Ext. 20) made before the learned Judicial Magistrate (PW27). Importantly that such disclosure or confession was made by appellant Shambhu Kahar before his brother (PW23) immediately after the occurrence when he returned home with the weapon of assault after committing the crime. At the time of recording statement under Section 313 Cr. P.C. the attention of appellant Shambhu Kahar was drawn that the weapon (katta) and stolen nugs, piece of chain were recovered and seized by the police on his confession from the place indicated by him. This fact has been denied by appellant but it is not denied by him that no confessional statement was recorded or the confessional statement was recorded by the police under duress. The Hon'ble Apex Court in **State of Maharashtra vs. Suresh (2000) 1 SCC 471** has held as under:

“.... When the attention of the accused is drawn



to such circumstances that inculcate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances”.

(27). True it is that the Investigating agency even after obtaining permission of the Court did not send the weapon for forensic examination but the laxity on the part of the Investigating agency would not frustrate the prosecution case if there is reliable evidence to prove the guilt of the accused. Law in this regard is settled beyond cavil. In the case reported in **(2014) 12 SCC 490 Sukhwinder Singh vs. State of Punjab** the Hon’ble Apex Court at para 18 has observed as under:

“.... If such mistakes or lapses are given undue importance every criminal case will end in acquittal . While it is true that the police should not involve innocent persons, fabricate evidence and obtain convictions, it is equally true that cases in which substratum of the prosecution case is strong and substantiated by reliable evidence, lapses in investigation should not persuade the court to reject the prosecution case. The Court with its vast experience should be quick to notice mischief if there is any. Incompetent prosecuting agencies or prosecuting agencies which are driven by extraneous considerations should not be allowed to take the Court for a ride.”

We are conscious of the settled principle that in all criminal cases burden of proof is on the prosecution to prove the guilt of the accused beyond doubt. However, it should not be taken a fossilised doctrine as though it admits no process of intelligent



reasoning. We cannot do better than to quote the observations of the Apex Court at para 31 in the case of **State of W.B. vs. Mir Mohammad Omar & Ors** since reported in (2000)8 SCC 382:-

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.”

(28). Mr. Thakur has raised some objection with regard to the recovery of the Katta from the paddy field. It was submitted that a seizure witness has stated that the police on disclosure made by appellant Shambhu Kahar went to the field and picked up the ‘katta’ whereas some witness has said that when the co-appellant Shambhu Kahar was brought to the said place he went ahead and picked up the ‘katta’ wrapped in a cloth and handed over to the I.O.. This discrepancy in the evidence, in our view, are minor in nature. In this regard it is apt to cite para 24 of (2013) 14 SCC 434 (**Rohtash Kumar vs. State of Haryana**) wherein the Hon’ble Apex Court has observed that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution, must not prompt the Court to reject the evidence in its



entirety. The Court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. The Court must read the evidence of a witness as a whole, and consider the case in light of the entirety of the circumstances, ignoring the minor discrepancies with respect to trivial matters, which do not affect the core of the case of the prosecution.

(29). The prosecution has been firmly able to prove the recovery of 'Katta' from the field pursuant to disclosure made by appellant Shambhu Kahar. We further find in the evidence of Sarovar Kahar (PW23) about the extra judicial confession made by the appellant Shambhu Kahar to him which PW-23 reproduced in his statement under Section 164 of the Code. It is clearly established that these appellants were hired for money to commit the crime whereafter they had entered into a criminal conspiracy in consequence whereof the crime was committed. Section 30 of the Evidence Act enables the Court to take into consideration such confession as against such other person/accused(s) as well as against the person/accused who made such confession. These broken pieces of evidence if culled out and connected the guilt of the appellants in the crime becomes explicit.

(30). In **Prithipal Singh & Ors vs. State of Punjab & Anr. since report in (2012) 1 SCC 10**, the Hon'ble Apex Court in para 50 observed as under:-

“50. Extraordinary situations



demand extraordinary remedies. While dealing with an unprecedented case, the Court has to innovate the law and may also pass an unconventional order keeping in mind that an extraordinary fact situation requires extraordinary measures. In B.P. Achala Anand v. S. Appi Reddy this Court observed (SCC p. 318, para 1).

“1 Unusual fact satiation posing issues for resolution is an opportunity for innovation. Law, as administered by Courts, transforms into justice.”

Thus, it is evident that while deciding the case, the court has to bear in mind the peculiar facts, if so exist, in a given case.”

(31). It is a case where the deceased(s) were fairly aged persons and were living alone. A conspiracy was hatched and the accused(s)/ appellant(s) were hired to execute the crime. The day chosen for the commission of crime was Krishna Janmastmi night when several religious public functions were organized. The deceased(s) had come home from the place of work. The informant of the case was later suspected as an accused of this case. His son subsequently figured as an accused and is facing separate trial in the Court below. The motive for doing away with the lives of the couple has been clearly established from the evidence of the I.O.(PW25). The purpose of crime was not to commit dacoity as none of the rooms on the first floor was even touched /searched. The son of the deceased couple (PW17) has thrown sufficient light on this aspect.

(32). Another link in the chain of the circumstances is the evidence of PW-7 and his brother PW-9 who have clearly stated



about the appellant Shambhu Kahar going to the shop of PW7 to sell gold ring, broken gold chain etc. on the following day of the occurrence. This part of the confessional statement of Shambhu Kahar gets support from the substantive evidence of these two witnesses and the evidence of the I.O. who seized a broken part of the gold chain from the place of occurrence. Confessional statement of the accused alone would not form basis of conviction but when other substantial and reliable evidence demonstrate the guilt of the accused(s), the Court can always look to and take into account such confessional statements to assure itself on the guilt of the accused/appellant(s).

(33). In the light of the discussions made above, it is found and held that the charges leveled against the appellants have been proved beyond reasonable doubt and the judgment of conviction and order of sentence passed by the learned Trial Judge do not warrant any interference.

(34). All the appeals fail. Dismissed.

(Kishore Kumar Mandal, J)

I agree.

(Sanjay Kumar, J)

Shyam/-

AFR/NAFR	NAFR
CAV DATE	23.05.2017
Uploading Date	22.07.2017
Transmission Date	22.07.2017

