

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 940 of 2004

- Bhainsa @ Nandlal, S/o Mitku @ Jigadiya, aged about 19 years.
- Pradeep Kumar, S/o Ramdhyan Yadav, aged about 25 years.

Both are resident of (At Present) Village Chitarpur, P.S. Dhaurpur,
Permanent resident of Village Khurdas, P.S. Ranka, District Gadhawa
(Jharkhand)

**---- Appellants/Accused
In Jail**

Versus

- The State Of Chhattisgarh,

---- Respondent

For Appellants	:	Shri Manoj Mishra & Shri A.N. Pandey, Advocates
For Respondent	:	Smt. Smita Ghai, Panel Laywer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

Per P. Diwaker, J

21/7/2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 28.8.2004 passed by the 4th Additional Sessions Judge (FTC), Ambikapur, District Surguja (CG) in S.T. No.412/03 convicting the accused/appellants under Sections 302/34 & 201/34 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo R.I. for Life and fine of Rs.500/- & RI for 7 years and fine of Rs.500/-, with usual default clause, respectively.

2. In the present case name of deceased is Umesh Chowdhry son of Gajadhar Chowdhary (PW-10).
3. The prosecution story, in brief, is that the deceased was running a grocery shop in a tenanted premises at Khaalpara, Chitarpur. He used to go to his shop in the morning and come back to his house between 7 & 8 p.m. in the night. On 1.10.2003 at about 12.00 in the noon the deceased left the house for his shop but he did not return to his house in the night. In the early hours of the morning, the wife of deceased, seeing that her husband had not returned home in the night, sent her elder son Vinay Kumar (PW-12) to the shop to find out where the deceased was. After some time, Vinay Kumar (PW-12) returned and informed her mother that body of the deceased is lying beside the road near bushes at Dhodki Nala having several injury marks on various part of his body. On the basis of suspicion, FIR (Ex.P-6) was lodged against accused/appellant No.1 by Gajadhar Chowdhary (PW-10) on 2.10.2003 at 8.30 a.m.. On the same day at 8.35, Merg Intimation (Ex.P-7) was recorded on 2.10.2003 at 8.35 a.m. Inquest was conducted over the body of deceased vide Ex.P-3. Body of the deceased was sent for post-mortem examination which was conducted by Dr. Kamlesh Kumar (PW-14) vide Ex.P-10 and he noticed following injuries on the body of deceased:-

- anti mortem multiple abrasions on the front of neck, right arm & forearm.
- anti mortem abrasions on the right side of abdomen.
- anti mortem abrasion on the right side of legs.
- Fracture of hyoid bone and trachea rings were congested.

The doctor has opined that cause of death was asphyxia due to throttling and the death was homicidal in nature. During investigation, on 3.10.2003 memorandum statement of accused/appellant No.2 was recorded vide

Ex.P-11 and based on which cash of Rs.300/- & key bunch, which he took out from the pocket of deceased while throwing his body beside the road, were seized vide seizure memo Ex.P-12. In the memorandum statement it has been stated by accused/appellant No.1 that there was business rivalry between them and for this reason, on 1.10.2003 at about 7.00 p.m. he along with co-accused Bhainsa followed the deceased, stopped him near Dhodki Nala and committed his murder by pressing his neck and thereafter threw his body beside Nursery road along with his bag & bicycle. Shop of the deceased was opened from the key seized at the instance of accused/appellant No.1. Mud stained shirt & lungi worn by the accused/appellant at the time of incident were seized vide seizure memo of Ex.P-16. Seized articles were sent for chemical examination and as per un-exhibited report of FSL, shirt of accused/appellant No.1 (Article-2) and Gamchha of the deceased seized from the spot were found to be stained with blood.

In the course of investigation, diary statements of PW-1 & PW-7 were recorded in which they have stated that accused/appellant No.2 made extra judicial confession before them about committing murder of the deceased. Police statements of PW-10 & PW-11 have also been recorded in which they have stated about the motive behind commission of crime.

4. On completion of investigation, charge sheet for the offence punishable under Sections 302/34 & 201/34 IPC was filed against the accused/appellants and accordingly the charges were framed against them by the trial Court. The prosecution in order to bring home the charges levelled against the accused/appellants examined 19 witnesses in all. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.

5. After hearing the parties, the Court below has convicted & sentenced the accused/appellants in the manner as described above.
6. Counsel for accused/appellant No.1 submits that the *prima facie* there is no direct or circumstantial or documentary evidence on record against the appellant No.1 connecting him with the crime in question except the confessional statement of accused/appellant No.2 which cannot be taken into consideration for holding him guilty because the same is inadmissible in evidence.
7. Counsel for accused/appellant No.2 argued that the extra judicial confession is a weak piece of evidence and the trial Court ought not to have relied on that weak piece of evidence to hold the appellant No.2 guilty for the offence like murder. He further submits that the prosecution has failed to prove that alleged confession made was true and voluntary. He further submits that recovery of key bunch & cash cannot be used against him as both these articles were belonging to appellant No.2 himself. He also submits that though un-exhibited report of FSL confirms presence of blood stains on shirt said to have been worn by the accused at the time of occurrence but the prosecution has failed to prove that the blood stains pertain to the group of the deceased as there is no serological report on record. Hence, the recovery effected at the alleged instance of appellant No.2 cannot be considered as an incriminating circumstance or evidence against him.
8. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. She further submits that at the instance of accused/appellant No.1, certain recoveries were effected vide seizure memo Ex.P-12 including key of shop of the deceased which was

subsequently opened by the said key, however, the appellants did not offer any explanation as to how he came into possession of said key or how the blood stains came on his shirt. There is no reason before this Court to disbelieve testimonies of PW-1 & PW-7 before whom the accused/appellant No.2 had confessed his guilt.

9. We have heard counsel for the parties and perused the evidence available on record.
10. Ramkripal Soni (PW-1) is the person before whom accused/appellant No.2 made confessional statement that he along with accused/appellant No.1 killed the deceased. Though this witness has been declared hostile by the prosecution but in the cross-examination by the Additional Public Prosecutor, he stuck to his version regarding extra judicial confession made by accused/appellant No.2.
11. Amar Sai (PW-2) is the person from whom accused/appellant No.2 had sought help for committing murder of deceased, but this witness refused to help him. This witness has further stated that being asked by Sukul, he disclosed the aforesaid fact to him also.
12. Atmaram (PW-3) is the witness of inquest (Ex.P-3). Sirodh (PW-6) is the person in whose house the deceased was running his grocery shop as tenant. He has stated that there was some tension between deceased and accused Pradeep.
13. Gopal Yadav (PW-7) is the another witness before whom accused/appellant No.2 made confessional statement. He has stated that on the date of incident accused/appellant No.2 came to his house, asked for water to drink which he gave to him and after drinking water when he was going back, he told him to have killed Umesh. Next morning he came to know that accused/appellant Pradeep had committed murder of the deceased.

14. Gajadhar Chowdhary (PW-10), father of deceased, is the lodger of FIR (Ex.P-6) and Merg Intimation (Ex.P-7). He has stated that he had suspicion that his son was killed by accused Pradeep as there was animosity between them.
15. Manorama Devi (PW-11) is the wife of the deceased and she has stated that about 8 days prior to the incident, accused Pradeep had threatened her husband by saying that he will not allow her husband to run the shop and therefore she had suspicion that her husband was killed by him.
16. Vinay Kumar (PW-12), minor son of the deceased, is the person who first saw the body of the deceased. Radhika Bai (PW-13) did not support the prosecution case and turned hostile.
17. Dr. Kamlesh Kumar (PW-14) is the person who had conducted post-mortem examination over the body of the deceased and noticed the injuries as described above. This witness has opined that cause of death was asphyxia due to throttling and the death was homicidal in nature.
18. Virodh Ram (PW-15) is the witness of inquest (Ex.P-3) and memorandum (Ex.P-11) of accused/appellant No.2 and seizure memo Ex.P-12 by which key bunch and cash was recovered at the instance of accused/appellant No.2. This witness has duly supported the prosecution case.
19. Arvind Singh (PW-16) is the Patwari who prepared the spot map (Ex.P-9). Sipahi Chowdhary (PW-17) is the witness of memorandum (Ex.P-11) and seizure memo Ex.P-12, P-13, P-14 & P-15. Sajjan Ram (PW-18) is the witness of seizure memo Ex.P-4, however, this witness did not support the prosecution and as such, declared hostile.
20. I. Tirkey (PW-19) is the investigating officer who has duly supported the prosecution case.
21. Admittedly, there is no direct evidence available on record so as to attribute the commission of crime to accused/appellants but it is only on

the basis of an extra judicial confession. There is no doubt that conviction can be based on extra judicial confession if it is made voluntarily in a fit state of mind to a person who has no reason to depose falsely against the accused and is corroborated by the other circumstance, but it is also well settled that in the very nature of things, it is a weak type of evidence.

22. In the present case, accused/appellant No.2- Pradeep made confessional statement before two witnesses namely Ramkripal Soni (PW-1) & Gopal Yadav (PW-7), who are residents of same village where accused/appellant No.2 was residing, and were known to him. Out of these two witnesses, though Ramkripal (PW-1) did not support the prosecution case in totality and therefore declared hostile by the prosecution, but in the cross-examination he stuck to his version that accused/appellant No.2 made confession before him that he had killed the deceased. This witness has further stated that during investigation, the police had recorded his statement in which also he disclosed the aforesaid fact to the police. According to Gopal Yadav (PW-7), on the date of incident accused/appellant No.2 Pradeep came to his house and being asked by him, he gave him water to drink and while going back after drinking water, accused/ appellant Pradeep informed him to have killed Umesh (deceased). Version of these two witnesses finds support from the medical evidence also, according to which, the death of the deceased was homicidal in nature. These witnesses are independent & disinterested witnesses and had no reason to manufacture false evidence to implicate accused/appellant No.2. In the cross-examination of both these witnesses before whom appellant Pradeep made extra-judicial confession of having committed murder of the deceased, nothing was elicited so as to disbelieve their testimonies. The defence has also not been able to show that the extra-judicial confession made by accused/appellant No.2 before

the aforesaid witnesses was not voluntary or was made on account of any coercion, inducement or promise or favour. Thus, there is no reason whatsoever to disbelieve the evidence of PW-1 & PW-7 regarding extra-judicial confession made by accused/appellant No.2 before them of having committed murder of the deceased.

That apart, on the basis of disclosure statement (Ex.P-11) made by accused/appellant No.2, one key bunch belonging to the deceased was seized from his possession and there is no explanation from him as to how he came into possession of it. Furthermore, unexhibited report of FSL confirms the presence of blood on the shirt of accused/appellant No.2 which he was wearing at the time of incident but he had no explanation to offer except the bald denial. PW-15 & PW-17, who are witnesses of memorandum (Ex.P-11) of accused/appellant No.2, have though been declared hostile by the prosecution but they have duly supported the prosecution case so far as it relates to recoveries effected at the instance of accused/appellant No.2 and there is no material contradiction in their statements.

For the foregoing reasons, we are of the opinion that extra-judicial confession made by accused/appellant No.2 was true & voluntary and before the persons who have no reason to depose falsely against him and the same gets corroboration from the medical evidence and the seizure of his bloodstained shirt and key bunch of the deceased as well. Thus, there is no scope for any doubt regarding complicity of appellant No.2-Pradeep in the crime in question.

23. As regards the complicity of accused/appellant No.1 Bainsa @ Nandlal in the crime in question, the only piece of evidence against him is the confession made by accused/appellant No.2 that he along with

accused/appellant No.1 had committed murder of the deceased. Apart from this, there is nothing with the prosecution to show the involvement of accused/appellant No.1 in crime in question. In **Hari Charan Kurmi v. State of Bihar** reported in **AIR 1964 SC 1184** the Supreme Court while dealing with almost similar issue has held thus:-

“.....As we have already indicated, it, has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to 'accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible, from the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt. That is precisely what has happened in these appeals.”

In the present case also, nothing is there showing involvement of accused/appellant No.1 in the crime in question, but save and except the confession made by accused/appellant No.2, which is inadequate to connect him with the offence in question, and being so, his conviction of cannot be allowed to stand and he is definitely entitled to the benefit of

doubt.

24. In the result;-

- conviction and sentence of accused/appellant No.1 under Sections 302/34 & 201/34 IPC are hereby set aside and he is acquitted of those charges by extending him benefit of doubt. He is already on bail, therefore, no direction regarding his release etc. is needed.
- conviction and sentence of accused/appellant No.2 under Sections 302/34 & 201/34 IPC are hereby affirmed. He is reported to be on bail. His bail bonds stand cancelled. He is directed to surrender forthwith to serve-out the remaining period of jail sentence.

25. The appeal is allowed to the extent indicated above.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.P. Sharma)
Judge

roshan/-