

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Reserved on : 19.11.2018

Date of decision : 15.12.2018

1. CRA-D No. 541-DB of 2016 (O&M)

Kuldeep and another	.. Appellants
versus	
State of Haryana	.. Respondent

Reserved on : 7.12.2018

Date of decision : 15.12.2018

2. CRM-A No. 1205-MA of 2016 (O&M)

Narender	.. Applicant
versus	
State of Haryana and another	.. Respondent

**Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Harinder Singh Sidhu**

Present Mr. Jangjit Singh Dahiya, Advocate, for the appellants
in CRA-D No. 541-DB of 2016.
Mr. Vikrant Pamboo, Deputy Advocate General, Haryana.
Mr. Bhupinder Ghai, Advocate, for the petitioner
in CRM-A No. 1205-MA of 2016.

Rajiv Sharma, J.

1. Though CRM No. 5905 of 2018 filed by appellant no.2 – Manjeet @ Chatru was listed for suspension of sentence, but learned counsel for the appellants requested to argue the main appeal on the basis of the evidence placed on record by him.
2. The Criminal Appeal No. 541-DB of 2016 is instituted against the judgment dated 30.4.2016 and order dated 2.5.2016, rendered by Additional Sessions Judge, Rohtak, in Session Case No. 20 of 2013/2016, whereby appellant Kuldeep and Manjeet @ Charu, besides one Ishwanti @ Kali were charged and tried for the offence under Sections 302/120-B/201/109/34 IPC.

3. Appellants Kuldeep and Manjeet @ Chatru were convicted and sentenced under Section 302 read with Section 34 IPC for life and to pay fine of ₹ 10,000/- each and in default of payment of fine, to further undergo simple imprisonment for a period of six months. They were also convicted and sentenced under Section 201 read with Section 34 IPC to undergo rigorous imprisonment for three years and to pay fine of ₹ 3,000/- each and in default of payment of fine, to further undergo simple imprisonment for a period of three months. Both the sentences were ordered to run concurrently. The appellants were also directed to compensate the parents of deceased Virender alias Bhuna to the tune of ₹ 50,000/- under Section 357 Cr.P.C.

4. Complainant Narender has filed CRM-A No. 1205-MA of 2016 for grant of leave to appeal against acquittal of Ishwanti @ Kali. The same was listed on 7.12.2018. The arguments addressed by learned counsel for the petitioner were heard and the judgment was reserved. Now the same is disposed of along with CRA-D No. 541-DB of 2016.

5. Accused Ishwanti @ Kali was acquitted.

6. The case of the prosecution in a nutshell is that PW8 Narender had moved an application, Ex.PN, to the effect that his nephew Virender alias Bhuna was staying with him since his childhood. On 21.9.2013 at about 11.00 A.M., Sonu picked Bhuna from the house. Virender alias Bhuna occasionally stayed with Sonu but in the evening he did not come to home. He made enquiries from Sonu on 22.9.2013 at about 7.15 A.M. Sonu told him that Bhuna left him in the night at about 10.00 P.M. On 22.9.2013 at about 7.30 A.M., he received information that dead-body of Virender alias Bhuna was lying in the field of Daya Nand at Chiri Sanghi Road. He along

with his brother Padam and other family members reached the spot. His nephew was killed with some sharp edged weapon. According to him, Sonu, Laxman @ Lachha and Chinna murdered him. FIR was registered. His statement under Section 161 Cr. P.C. was also recorded. The axe was provided by Ishwanti to Kuldeep and Manjeet for killing Virender alias Bhuna. T-Shirt, motorcycle and mobile phone were got recovered on the disclosure statements of Kuldeep and Manjeet.

7. Dead-body was sent for post-mortem examination. Post-mortem examination was conducted by PW16- Dr. Poonam.

8. During the course of investigation, Sonu, Laxman alias Lachha and Cheena, who were named in the FIR as offenders, were found innocent. Thereafter, names of appellants Kuldeep and Manjeet @ Charu along with Ishwanti @ Kali were included. Investigation was completed and the challan was put up after completion of all the codal formalities.

9. The prosecution examined a number of witnesses in support of its case. The statements of the accused were recorded under Section 313 Cr.P.C. They denied the case of the prosecution. Accused Ishwanti alias Kali was acquitted, while appellants were convicted and sentenced, as noticed above. Hence, this appeal as well as the application for leave to appeal.

10. Learned counsel appearing on behalf of the appellants has vehemently argued that the prosecution has failed to prove its case against his clients. Learned counsel appearing for the State has supported the judgment and order dated 30.4.2016/2.5.2016 of the learned trial Court. Learned counsel appearing for the applicant Narender sought conviction and sentence of Ishwanti alias Kali.

11. We have heard learned counsel for the parties and gone through the judgment and record very carefully.

12. PW2 Devender Kumar had prepared the site plan, Ex.PA.

13. PW3 Constable Sonu had deposited the case property with FSL Madhuban.

14. PW5 Constable Pardeep deposed that call details of mobile phone were taken out by him.

15. PW6 Randhir Singh deposed that he had sold the motorcycle to Kuldeep for a sale consideration of ₹ 16,000/-.

16. PW7 Bhoop Singh alias Chinna deposed that on 21.9.2013 he along with Virender alias Bhuna, Laxman, Sombir, Kuldeep and one relative were taking liquor in the house of Laxman. Virender alias Bhuna took his mobile phone. On next morning, he came to know about the murder of Virender @ Bhuna.

17. PW8 Narender testified that on 21.9.2013 at about 11.00 A.M. Sonu son of Ram Bhaj had taken away his nephew Virender alias Bhuna with him. Virender alias Bhuna did not come back. He made enquiries from Sonu. Sonu told him that Virender had left his company at about 10.00 P.M. He received a message at 7.30 A.M. next day that dead-body of his nephew was lying in the fields of Daya Nand. Police came to the spot. His statement was recorded. In his cross-examination, he admitted that he had got recorded his statement, Ex.PN, in which he has categorically stated that Virender alias Bhuna was murdered by Sonu, Laxman alias Lachha and Cheena.

18. PW9 Dharambir testified that on 22.9.2013 dead-body of Virender alias Bhuna was found in the fields of Daya Nand. He identified

the body. His statement was recorded, vide Ex.PQ. His supplementary statement was also recorded on 24.9.2013 to the effect that on 21.9.2013 at about 11.00/11.30 P.M., he was going to his house. When he reached near the house of Rohtash, he saw Kuldeep, Manjeet and Virender alias Bhuna standing there. He asked them about their presence. They told that they were gossiping. Thereafter, he went to his home. In his cross-examination, he categorically admitted that in his statement, Ex.DA, he had stated that Virender alias Bhuna was murdered by Sonu, Laxman alias Lachha and Cheena of village Chiri with their friends. He has not disclosed the names of the appellants to the police on 22.9.2013. He stated that he could not state the names of the accused on 22.9.2013 due to loss of memory.

19. PW10 Kapoor Singh deposed that on 26.9.2013 at about 6.00 P.M., he was sitting in his drawing room. Appellants Kuldeep and Manjeet alias Chatru and Ishwanti alias Kali came to his house. They disclosed that on the intervening night of 21/22.9.2013, they hatched conspiracy to murder Virender alias Bhuna. Ishwanti instigated Kuldeep and Manjeet and supplied the axe to them. In his cross-examination he admitted that he never remained as Sarpanch or Lambardar or Member Panchayat of village Chiri.

20. PW16 Dr. Poonam conducted the post-mortem examination along with Dr. Sushila. She proved post-mortem report, Ex.PV. According to the opinion, injuries no.1 to 11 could be caused by the axe produced before her. The probable time between injuries and death could possibly be between 2.00 P.M. to 4.00 P.M. on 21.10.2013. The possibility of use of more than one weapon for causing the injuries mentioned in the post-mortem report could not be ruled out.

21. The disclosure statements, Ex.PZ and Ex.PAA made by Kuldeep and Manjeet, respectively, were recorded by PW17 Rajbir. According to him, on the basis of these disclosure statements, the axe, motorcycle and T-shirt were recovered.

22. PW18 ASI Satbir Singh deposed that Ishwanti made the disclosure statement, Ex. PMM.

23. The motive attributed to the crime is that deceased Virender alias Bhuna had illicit relations with Ishwanti alias Kali. It is neither stated so in the application filed by PW8 Narender nor in the FIR. The names of appellants did not figure in the *ruqa* as well as in the FIR. The names of three persons, namely, Sonu, Laxman @ Lachha and Chinna, were mentioned initially, however, later on they were found innocent and their names were deleted. The names of the appellants and Ishwanti alias Kali were included.

24. PW9 Dharambir has been introduced as a witness of last seen together. His statement was recorded on 22.9.2013. He had not mentioned the names of the appellants. He had mentioned the names of the appellants for the first time when his supplementary statement was recorded on 24.9.2013. The explanation given by PW9 Dharambir is that it was due to memory loss, he could not disclose the same. However, it is beyond imagination that how he could not know the names of the appellants. It was unusual and unnatural conduct.

25. The prosecution has also relied upon the confessional statements made before PW10 Kapoor Singh. He was not Sarpanch or Lambardar or a member of the Panchayat. He was a retired teacher. There was no occasion for the appellants to go and make extra-judicial confession

before him on 26.9.2013. The extra-judicial confession is a weak piece of evidence. It is required to be corroborated by other evidence.

26. The case is based on circumstantial evidence. In order to prove the case based on circumstantial evidence, chain must be complete. All the circumstances must exclusively point towards the guilt of the accused. The motive is also very important in a case based on circumstantial evidence.

27. There is no murmur or whisper initially in the complaint or in the FIR about the illicit relations of deceased Virender alias Bhuna with Ishwanti alias Kali, rather the names of the appellants were not at all mentioned in the FIR. It was Sonu in whose company deceased Virender alias Bhuna had left at about 11.00 A.M. on 21.9.2013.

28. Their Lordships of Hon'ble the Supreme Court in the case of Sharad Birdhichand Sarda vs State of Maharashtra, AIR 1984 SC 1622 have held that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established: -

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

29. Their Lordships of Hon'ble the Supreme Court in Kishore Chand vs State of Himachal Pradesh, AIR 1990 SC 2140, have held that the Court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose, the Court must scrutinize all the relevant facts such as the person, to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally, the actual words used by the accused. Their Lordships have further held that an extrajudicial

confession made by the accused, while in police custody, could not be proved against the accused. Their Lordships have held as under:-

"7. The question that emerges, therefore, is whether the prosecution has established the three circumstantial evidences heavily banked upon by the prosecution in proof of the guilt of the appellant. The first circumstance is that the deceased and the appellant were last seen together by PW 7 and PW 8. From the evidence it is clear that there is no prior intimacy of the appellant and the deceased. They happened to meet perchance. Equally from the evidence it is clear that PW 7, the liquor shop owner and PW 8 who had liquor with the appellant and the deceased are also absolute strangers to the deceased and the appellant. Admittedly there is no identification parade conducted by the prosecution to identify the appellant by PW 7 or PW 8. The appellant was stated to have pointed out to PW 7 as the one that sold the liquor and PW 8 consumed it with him and the deceased. Therefore it is not reasonably possible to accept the testimony of PW 7 and PW 8 when they professed that they have seen the appellant and the deceased together consuming the liquor. It is highly artificial and appears on its face a make believe story. The next piece of evidence is the alleged extra-judicial confession made by the appellant to PW 10. An unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of its falsity. But in the process of the proof of the alleged confession the court has to be satisfied that it is a voluntary one and does not appear to be the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections

25 and 26 of the Evidence Act. Therefore, the court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose the court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally the actual words used by the accused. Extra-judicial confession if found to be voluntary, can be relied upon by the court along with other evidence on record. Therefore, even the extra-judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused. Sometimes it may not be possible to the witness to reproduce the actual words in which the confession was made. For that reason the law insists on recording the statement by a Judicial Magistrate after administering all necessary warnings to the accused that it would be used as evidence against him.

8. Admittedly PW 10 and the appellant do not belong to the same village. From the narrative of the prosecution story it is clear that PW 27, and PW 10 came together and apprehended the appellant from his village and was taken to Jassur for identification. After he was identified by PW 7 and PW 8 it was stated that he was brought back to Gaggal village of PW 10 and was kept in his company and PW 27 left for further investigation. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession

made by any person while he is under custody of the police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person. Therefore, the confession made by an accused person to a police officer is irrelevant by operation of Section 25 and it shall (sic not) be proved against the appellant. Likewise the confession made by the appellant while he is in the custody of the police shall not be proved against the appellant unless it is made in the immediate presence of the magistrate, by operation of Section 26 thereof. Admittedly the appellant did not make any confession in the presence of the magistrate. The question, therefore, is whether the appellant made the extra-judicial confession while he was in the police custody. It is incredible to believe that the police officer, PW 27, after having got identified the appellant by PW 7 and PW 8 as the one last seen in the company of the deceased would have left the appellant without taking him into custody. It is obvious, that with a view to avoid the rigour of Section 25 and 26, PW 27 created an artificial scenario of his leaving for further investigation and kept the appellant in the custody of PW 10, the Pradhan to make an extra-judicial confession. Nothing prevented PW 27 to take the appellant to a Judicial Magistrate and have his confession recorded as provided under Section 164 of the CrPC which possesses great probative value and affords an unerring assurance to the court. It is too incredulous to believe that for mere asking to tell the truth the appellant made voluntarily confession to PW 10 and that too sitting in a hotel. The other person in whose presence it was stated to have been made was not examined to provide any corroboration to the testimony of PW 10. Therefore, it would be legitimate to conclude that the appellant was taken into the police custody and while the accused was in the custody, the

extra-judicial confession was obtained through PW 10 who accommodated the prosecution (sic appellant). Thereby we can safely reach an irresistible conclusion that the alleged extra-judicial confession statement was made while the appellant was in the police custody. It is well settled law that Sections 25 and 26 shall be construed strictly. Therefore, by operation of Section 26 of the Evidence Act, the confession made by the appellant to PW 10 while he was in the custody of the police officer (PW 27) shall not be proved against the appellant. In this view it is unnecessary to go into the voluntary nature of the confession etc."

30. Their Lordships of Hon'ble the Supreme Court in Kahim Beg and another vs State of U.P., 1972 (3) SCC 759, have held that extrajudicial confession is a weak piece of evidence. Their Lordships have held as under:-

"18. We may now deal with the evidence regarding the extra-judicial confession of the two accused to Mohammad Nasim Khan (PW 4) and the recovery of ornaments belonging to the deceased from the two accused. It is primarily upon these two pieces of prosecution evidence that the conviction of the accused has been based. So far as the confession to Mohd. Nasim Khan is concerned, we find that, according to the said witness, the two accused came to him at his house in Sakunpur on August 4, 1969 and told him about their having raped and killed the daughter of Ramjas by strangulating her as well as regarding the removal of her ornaments. Mohammad Nasim Khan belongs to another village. There was no history of previous association between the witness and the two accused as may justify the inference that the accused could repose confidence in him. In the circumstances, it seems highly improbable

that the two accused would go to Mohammad Nasim Khan and blurt out a confession. It is also not clear as to why the two accused should try to run away on seeing the police party coming with Mohammad Nasim Khan if Mohammad Nasim Khan had gone to the police at the request of the accused. According to Mohammad Nasim Khan, Gur Sewak PW was with the police Sub-Inspector when the Sub-Inspector came with Mohammad Nasim Khan to his house and apprehended the accused. The evidence of Ramjas PW, however, shows that Gur Sewak PW went with Ramjas to the mortuary on the night between 3 and 4 August, 1969 and that on August 4, 1969 Gur Sewak remained with Ramjas throughout the day at Rae Bareilly. It was on August 5, 1969 that, according to Ramjas, he and Gur Sewak returned to their village after throwing the dead body of Kesh Kali in Sain river. It would thus appear that Ramjas PW who, being the father of the deceased, had no particular reason to damage the prosecution case and to support the accused has contradicted Mohammad Nasim Khan on the point that Gur Sewak PW was with the police Sub-Inspector on August 4, 1969. The fact that Mohammad Nasim Khan has deposed regarding the presence of Gur Sewak with the police Sub-Inspector with a view to support the prosecution case even though, according to Ramjas PW, Gur Sewak was not with the police Sub-Inspector shows that Mohammad Nasim Khan has scant regard for truth. The evidence of extra-judicial confession is a weak piece of evidence. The evidence in this respect adduced by the prosecution in the present case is not only of a frail nature, it is lacking in probability and does not inspire confidence."

31. Their Lordships of Hon'ble the Supreme Court in Pakkirisamy vs State of T. N., 1997 (8) SCC 158, have held that it is a rule of caution that

the Court would generally look for an independent reliable corroboration before placing any reliance upon an extra-judicial confession. Their Lordships have held as under:-

"8. Mr. Murlidhar, learned counsel then contended that it is well settled that the evidence of extra-judicial confession is a weak type of evidence and ordinarily the court would be slow to accept such type of evidence. He therefore, urged that Ex. P-8 be left out of consideration. We are unable to accept this broad proposition put forth on behalf of the appellant. It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession. It is no doubt true that extra-judicial confession by its very nature is rather a weak type of evidence and it is for this reason that a duty is cast upon the court to look for corroboration from other reliable evidence on record. Such evidence requires appreciation with a great deal of care and caution. If such an extra-judicial confession is surrounded by suspicious circumstances, needless to state that its credibility becomes doubtful and consequently it loses its importance. The same principle has been enunciated by this Court in *Balwinder Singh v. State of Punjab*. In the facts and circumstances of this case, we hold that the courts below committed no error in relying upon Ex. P-8 as the same is corroborated from several other proved circumstances."

32. Their Lordships of Hon'ble the Supreme Court in *State of Andhra Pradesh vs S. Swarnalatha and others*, 2009 (8) SCC 383, have held that extra-judicial confession is a weak piece of evidence, although in given situations reliance can be placed thereupon. Their Lordships have

held as under: -

"16. PW 6 admitted that prior to the making of confession to him, Accused 1 never talked to him. Why she, instead of her husband, would confide in PW 6, is beyond all comprehension. In the aforementioned situation, the extra-judicial confession purported to have been made by Accused 1 to PW 6 becomes doubtful. Extra-judicial confession as is well known is a weak piece of evidence, although in given situations reliance thereupon can be placed. (See State of U.P. v. M. K. Anthony, SCC p. 517, para 15 and State of Rajasthan v. Kashi Ram, SCC p. 262, para 14.)"

33. Their Lordships of Hon'ble the Supreme Court in Sahadevan and another vs State of Tamil Nadu, 2012 (6) SCC 403, have held that in a case of circumstantial evidence, onus lies upon prosecution to prove the complete chain of events which must undoubtedly point towards guilt of accused. When prosecution relies upon an extrajudicial confession, the Court has to examine the same with a greater degree of care and caution. Their Lordships have held as under: -

"13. There is no doubt that in the present case there is no eye- witness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution."

34. As far as the application filed by the complainant for grant of leave to appeal is concerned, there is no evidence led by the prosecution that the deceased was blackmailing Ishwanti @ Kali. There was no occasion to her to provide axe to Kuldeep and Manjeet for killing Virender alias Bhuna. She has rightly been acquitted by the trial court after correct appraisal of the evidence led by the prosecution. The application for grant of leave to appeal is declined.

35. The prosecution has failed to prove the case against the appellants beyond reasonable doubt. Accordingly, the appeal is allowed and the judgment and order dated 30.4.2016 and 2.5.2016, respectively are set aside. Registry is directed to prepare the release warrants forthwith.

(Rajiv Sharma)
Judge

15.12.2018
vs

(Harinder Singh Sidhu)
Judge

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No