

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.83 of 2014

Arising Out of PS. Case No.-381 Year-2012 Thana- SIKARPUR District- West Champaran

Prahlad Choudhary Son Of Late Gopal Choudhary Resident Of Mohalla-
Pokhra Chowk, Narkatiaganj, P.S.-Shikarpur, District-West Champaran
... .. Appellant/s

Versus

The State Of Bihar
... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Mukesh Kumar, Adv.
Mr. Shivji Singh, Adv.
For the Respondent/s : Mr.Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

02-08-2019

Appellant Prahlad Choudhary has been found guilty for an offence punishable under Section 376 IPC and sentenced to undergo RI for 10 years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo RI for six months, additionally, vide judgment of conviction dated 29.11.2013 and order of sentence dated 03.12.2013 passed by Adhoc Additional Sessions Judge, 3rd, Bettiah, West Champaran in connection with Sessions Trial No.142/2013 arising out of Shikarpur PS Case No. 381/2012.

2. Kishore Choudhary (PW 11) filed a written report on 20.11.2012 disclosing therein that his daughter (name withheld) (not examined) aged about three years went missing on 19.11.2012 at about 6:30 PM whereupon, all the family members indulged in searching her. During midst thereof, at about 8.30 PM, a female beggar namely, Usha Devi along with



two males, namely, Gopal Sharma (not examined) and another whom he did not identify, came and his daughter was handed over to him by Fida Hussain (PW 6) who disclosed that the girl has been found by the side of railway line near signal. His daughter was drenched with water and was weeping. He immediately took her to the doctor at Narkatiaganj Hospital and got her treated. He suspected with regard to rape having been committed upon her. Furthermore, it has also been disclosed that for better treatment, his daughter has been referred to Bettiah.

3. After registration of Shikarpur PS Case No. 181/2012 against unknown, investigation commenced and during course thereof, police had gone to the place of occurrence, east cabin of Narkatiaganj Railway Station and in between two railway tracks, near a pond, the IO had seized pyjama of a child, torn frock, one baby chappal, blood stained grass on 20.11.2012 at about 1.30 PM itself for which seizure list was prepared, witnesses were examined. It has further been collected that after a fortnight, appearance of the appellant facilitated who happens to be cousin brother of informant (Phuphera Bhai) and seeing whom, the victim adversely reacted and who, on query uttered pointing him out to be her assailant whereupon, inquired by the informant and in response, it has



been alleged that appellant made inculpatory extra-judicial confessional statement and asked for pardon and that happens to be the sole evidence arraying the appellant to be an accused followed with submission of charge-sheet, facilitating with the trial meeting with ultimate result, subject matter of instant appeal.

4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. Furthermore, it has also been pleaded that in order to grab the land prosecution party invented a novel method and got the appellant implicated. However, neither oral nor documentary evidence has been adduced in defence.

5. In order to substantiate its case, the prosecution has examined altogether twelve PWs who are PW-1, Janki Devi, PW-2, Phooli Devi, PW-3, Raktu Paswan, PW-4, Santosh Sah, PW-5, Parsuram Khatik, PW-6, Fida Hussain, PW-7, Usha Devi, PW-8, Ainul Hassan, PW-9, Dr. Manju Jaiswal, PW-10, Jitendra Kumar, PW-11, Kishore Choudhary and PW-12, Ashok Kumar. Side by side, has also exhibited Ext-1, Signature of witness over seizure list, Ext-2, Injury report, Ext-3, Signature of informant over written report, Ext-4, Endorsement over



written report, Ext-5, Formal FIR, Ext-6, Seizure list, Ext-7, inculpatory extra-judicial confessional statement. As stated above nothing has been adduced on behalf of defence.

6. PW-9 is the doctor who had examined the victim on 20.11.2012 at MJK Hospital, Bettiah and found the following:-

“ Height of the victim 2’4”, weight 10 Kg, number of teeth in upper jaw 10, lower jaw 10, secondary sex character not developing. On PV examination 3 degree perivision tear was present. Hymen was ruptured. Lacerated wound present at the vaginal orifice that was painful according to Pathologist MJK Hospital, Bettiah. No spermatozoa found in vaginal swab examination. According to Radiologist MJK Hospital, Bettiah. 3 Carpel bones are present on lower end of wrist. No epiphysis of palvis present.

The injury is simple caused by hard blunt substance, may be due to sexual assault. Age of injury more than 24 hours. There was no recent sign of sexual assault.”

7. During cross-examination, she had admitted that the nature of injuries have been found over genital of the victim could also be caused otherwise than sexual assault, even on fall but, as she has found only one injury on account thereof, rules out the probability of other theory.

8. PW-6, Fida Hussain, PW-7, Usha Devi have substantiated recovery of the victim by the side of railway line near signal in naked condition, shivering out of cold and during



course thereof, so many persons have assembled out of whom, some had given a clue whereupon, came to the place of informant Kishore Chaudhary and handed over the girl. They have further stated that later on, they came to know that she was raped. These two witnesses, as were not residing in the vicinity of the informant as well as appellant, on account thereof, did not locate and divulge the subsequent event relating to inculpatory extra-judicial confession, and so, their cross-examination were also conducted in similar fashion.

9. PW-1 is the grand-mother of the victim. She has stated that on the alleged date, it was Chhath and after returning from Chhath-Ghatt, the victim gone missing from her house whereupon, the family members began to search and during course thereof, the victim was brought by one Fida Hussain and a beggar, namely, Usha Devi. The victim was naked. Soon thereafter, she was taken to hospital for treatment. She has further stated that her grand-daughter was raped and Prahlad happens to be the rapist. During course of cross-examination, other paragraphs are irrelevant save and except at para-10, that she had not seen the occurrence. In para-11, she has disclosed that police had not interrogated her grand-daughter as she is unable to speak frequently. She is only saying "Maa-papa". In



para-12, she has also stated with regard to commission of rape which was based upon her expectation. She has further stated that none had seen the occurrence having been committed at the end of Prahlad.

10. PW-2 is mother of the victim. She during course of her examination-in-chief has stated that while she was arranging *Chhath Daura*, her daughter, who was playing at Darwaza became traceless whereupon, they all began to search and during course thereof, at about 8.30 PM, Fida came along with the child. The girl was naked. On query, Fida disclosed that he has found the girl naked lying by the side of railway track. She has also found her genital torn. Then thereafter, they took the victim to the Narkatiaganj hospital where doctor has disclosed that the victim has been raped. The Doctor further instructed them to go to police where they have gone. Her husband had filed written report. The doctor had referred the victim to Bettiah where she was treated for 15 days and then thereafter, they returned back. Then, it has been asserted that Prahlad had fled away from the village and returned back from Gorakhpur. The victim ran away seeing him. Prahlad disclosed that he has committed a mistake and asked for pardon whereupon, they had informed the police. Police came and took



him away. During cross-examination at para-4, she has stated that Prahlad happens to be son of her Phuphua Saas. At para-5, she has stated that he used to reside at the house of her younger father-in-law. He returned back from Gorakhpur after 16 days. On the date of occurrence, accused was present at the village. Accused had gone to Chhath-Ghatt along with them. In para-16, she has stated that all the family members including Chachia Sasur had gone to Ghatt and then thereafter, they returned including the accused. In para-7, she has stated that her daughter is not in a position to properly identify. She is just speaking “Maa-papa”. In para-9, she has stated that none had seen the occurrence. In para-10, she has stated that after seeing the accused, the victim ran away out of fear and then, she disclosed to her that this person has assaulted her. Then thereafter, at para-11-12, there happens to be contradiction on that very score found duly corroborated by the IO, PW-12 (Para-22). In para-14, she has stated that accused used to play with the victim. During course of search, they have also gone to the place of accused.

11. PW-3 is the co-villager. He has stated that after coming to know about the missing of the victim, they got the message announced through loudspeaker. 2-3 persons brought



the victim in critical condition from railway line whereupon, they have taken to hospital. Then has disclosed with regard to the incident that about 10-15 days after the occurrence while the victim was playing, Prahlad came there, whereupon the victim shouted and ran away to the lap of her mother where, she pointed out that her neck was pressed and slapped by him. Till then, people assembled there. People have interrogated Prahlad whereupon, he disclosed that he had lifted the victim and then committed sin with her. He be excused. Police came and took him away. Identified the accused. During cross-examination at para-7, he has stated that he had not seen anybody lifting the victim. At para-9, he has stated that accused is the cousin brother (phuphera bhai of the informant). At para-10, he has admitted that he had not made statement before the police that the victim had signalled towards the accused to have throttled her as well as slapped her.

12. PW-4 has stated that on the alleged date and time of occurrence, the victim had gone missing whereupon, they were engaged in searching her out and during course thereof, at 8.30 PM, Fida Hussain came carrying the girl and disclosed that the victim was drenched with water as well as was in injured condition. Then, they have taken the victim to the hospital,



Narkatiaganj wherefrom doctor had referred to Bettiah. Fida had disclosed that while he had gone towards railway line for easing himself, had seen the victim. At Bettiah Hospital, the doctor had disclosed that she was raped. Then he came to know that when Prahlad returned back from Gorakhpur after 15-16 days of the occurrence, the victim seeing him became afraid of and then pointed out that he had assaulted with fists. Villagers inquired from Prahlad whereupon, he confessed that he had committed a mistake and asked for an excuse. Prahlad has confessed his involvement during course of commission of the crime. Identified the accused. During cross-examination at para-5, he has stated that at the time when victim was recovered from railway line, no case was instituted. At the time of occurrence the victim was not capable to frequently speak on account of tender age of three years. At para-7, he has stated that save and except seeing the victim on the date of return, other evidences are based upon hearsay.

13. PW-5 has stated that on the alleged date and time of occurrence, after coming to know about the missing of the victim, they had gone in search of and, to facilitate the same, they had also made announcement through loudspeaker. At about 8:00-8:30 PM, one person, namely, Fida Hussain along



with a lady beggar came carrying the victim at the house of informant and then they have seen the victim who was naked, drenched with water. They took the victim to Shikarpur Hospital where the doctor had disclosed that she has been raped and then, they had gone to the police station. The police had also taken them to the railway track wherefrom articles were seized and for that, seizure list was prepared over which he had put his signature (identified). There was biscuit on the ground and blood stain over the clothe. Then thereafter, the victim was taken to Bettiah Hospital. Prahlad returned back from Gorakhpur after 15 days of the occurrence seeing whom the victim began to cry. Then thereafter, Prahlad was caught hold of and detained. Police was informed. Police came. At the police station, Prahlad confessed that after alluring the victim by offering biscuit, he had committed sin with her. Identified the accused. During cross-examination at para-5, he has stated that police had taken his statement whereunder he had stated with regard to recovery from the place of occurrence. In para-8, he has stated that informant is the Pattidar of accused. Accused is son of Phua of the informant. In para-9, he has stated that he had seen the accused in the night of the occurrence and then thereafter, he had not seen. In para-10, he has stated that in his



presence, the victim seeing the accused began to weep but, he is unable to disclose the exact date.

14. PW-8 has stated that about seven months ago, Prahlad was carrying a girl, daughter of Kishore aged about 2 ½ -3 years after offering biscuit to her towards railway line. Then thereafter, he committed rape. On the following morning after coming to know about the same, he came at Bettiah Hospital where he found the victim in critical condition. She was unconscious. Doctor was not ready to provide treatment whereupon, he informed Shikarpur Police and Shikarpur Police informed to Bettiah Police. Then O/C, Bettiah Police Station came and at his instance treatment began. Doctor had disclosed that her genital is torn. Then he stated that after return of Prahlad, there was rumour in the village that the victim seeing Prahlad got herself recondite by keeping her beneath the bed whereupon, police was informed, police came and took away Prahlad. The he has stated that Prahlad was not arrested in his presence but, he had gone to the police station where Prahlad was in lockup. When he made query, he confessed his guilt and disclosed that after offering biscuit to the victim, he had taken away her towards railway line where he committed rape and then, left the girl. Identified the accused. During cross-



examination at para-4, he has stated that informant and accused are relatives. He has not seen the occurrence. He has seen Prahlad in lockup but on which date, he is not remembering. He has not taken written permission over interrogation of Prahlad. In para-8, he has stated that no document was prepared with regard to interrogation of the accused. Then there happens to be contradiction and is found duly substantiated from the evidence of PW-12 (para 28). In para-14, he has stated that after apprehension of Prahlad, he had gone to meet with him but exact date he is not remembering.

15. PW-10 is the part IO who has simply sent the seized articles for FSL after taking permission from the court, received injury report of the victim and then he had submitted chargesheet. During cross-examination, nothing substantial has been found.

16. PW-11 is the informant who has stated that on the date of occurrence ie. on 19.11.2012 at about 6:00 PM, his daughter aged about three years (name withheld) gone missing whereupon, they all began to search. At about 8:30 PM, one beggar, namely, Usha Devi and others brought his daughter. His daughter was drenched with water and was shivering out of cold. People have disclosed that they have found the girl near



signal of the railway line. Then he took her to Narkatiaganj Hospital where doctor had disclosed that she has been raped. Doctor has also disclosed that as lady doctor is not here so, referred to Bettiah. He had gone to Narkatiaganj Police Station along with his daughter and submitted written report (identified). Police had gone to the railway line where there was recovery of Chappal, pyjama, frock, blood over ground, biscuit and for that, prepared seizure list. Then thereafter, they have taken the victim to Bettiah Hospital where also the doctor reaffirmed that she has been raped. About 14-15 days thereafter, Prahlad came, seeing whom, his daughter became afraid of and ran towards her mother. When she (mother) came along with the victim, she again began to shiver out of fear whereupon, he inquired from Prahlad as to why the victim is shivering seeing him whereupon, Prahlad confessed his guilt and disclosed that he has committed a mistake. He has given Rs. 2/-, biscuit to the victim and then taken her away towards railway line through *Machhli Hatta* where she was raped. Police was informed and took him away. Identified the accused. During cross-examination at para-5, he has stated that first of all, we had taken the victim to Narkatiaganj Hospital and then thereafter, the case was instituted. In para-7, he has stated that accused is a



relative but they are not residing in the same house. They have got separate house. The accused is married and is employed in a hotel at Gorakhpur . In para-9, he has stated that none had seen the accused taking away the victim. In para-10 he has stated that he is not recalling the exact date on which the accused had returned back from Gorakhpur. They have not assaulted the accused. Accused is an illiterate. They have not informed the Mukhiya. In para-10, he has stated that they have not recorded the statement of the accused. They have not disclosed before the people what the accused had disclosed. Police came and took him away. Police was informed by his younger brother, Kamlesh. Then has denied the suggestion that the accused had not made any statement and on account of land dispute, this case has been instituted.

17. PW-12 is the IO. He has deposed that on the basis of written report filed by the informant on 20.11.2012, substantial case was registered and investigation was taken up (exhibit of the relevant document). During course of investigation, he has gone to the place of occurrence wherefrom there happens to be recovery of Chappal, pajama, frock, blood stain over ground which were seized and for that seizure list was prepared. Recorded further statement of the informant,



statement of the witnesses. Apprehended the accused on 03.12.2012 and recorded his inculpatory extra-judicial confessional statement upon which he put his signature (exhibited). During cross-examination at para-10, he has stated that he had not sent the seized articles to the FSL. He had not prepared injury report relating to the injury of the victim. In para-14, he has stated that he has arrested the accused after 14 days. Accused was arrested from Pokhra Chowk, Narkatiaganj but he is unable to disclose the boundary of the place. He had not mentioned who had produced the victim. He had not seen injury over the person of accused. He had carried the accused to police station. In para-15, he has stated that the case diary is silent with regard to any information having given to the family members of the accused regarding his arrest. In para-16, he has stated that before the arrest of the accused, there was no allegation against him. In para-17, he has stated that he has arrested only on getting confidential information from a spy. At para-20, he has stated that during course of investigation, save and except inculpatory extra-judicial confessional statement of accused, he has not found anything against him. At paragraphs 20, 21, 22, 23, 24, 25, 26, 27 and 28 there happens to be contradiction and then at para-29, he has been suggested that



there happens to be faulty investigation.

18. Furthermore, the record also speaks that during course of recording of statement under Section 313 of the CrPC, there happens to be no disclosure with regard to inculpatory extra-judicial confessional statement having at his end and so, that part remained out of purview during course thereof. Now coming to the evidence as is evident that two kinds of narration have been made. The first one, victim after seeing the accused became afraid of and on query, the accused/appellant made inculpatory extra-judicial confessional statement and asked for pardon. The second kind of evidence is inculpatory extra-judicial confessional statement recorded by the police, an exhibit of the record. That being so, in the aforesaid facts and circumstances of the case, two sections of the Evidence Act are relevant which is bound to guide the issued, the first one, inculpatory extra-judicial confessional statement made before the public being admissible in accordance with Section 24 of the Evidence Act and the other, inculpatory extra-judicial confessional statement recorded by the police, inadmissible in the eye of law in accordance with Section 25 of the Evidence Act.

19. Before coming to deal with the sanctity of the



inculpatory extra-judicial confessional statement, it is evident from the record that both the parties are residents of Pokhra Chowk, Narkatiaganj, Shivganj. IO during course of cross-examination at para-14 has stated that he arrested the accused from Pokhra Chowk, Narkatiaganj. Address whatever given by the appellant during course of statement recorded under Section 313 of the CrPC is that of Pokhra Chowk, Narkatiaganj and so, he was arrested from his house. In order to properly appreciate legal status of inculpatory extra-judicial confessional statement, it looks appropriate to have a glance over Section 24 of the Evidence Act which reads as follows:-

“24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,¹ having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.— A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,² having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any



advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

20. From plain reading of Section, it is evident that more or less it happens to be a kind of admission being inculpatory in nature with regard to his involvement during commission of occurrence. Though the word 'confession' is not defined but, as Section 24 inspires, its a statement made by the accused admitting in terms of offence or at any rate substantial of the facts which constitute an offence. The only embargo so put over admissibility of a confession is that it should not be found influenced with inducement, threat or promise whereupon, the same would be inadmissible in the eye of law.

21. Furthermore, it is also evident that no condition has been imposed that it should be narrated during course of the trial in verbatim. In *Ajay Singh v. State of Maharashtra* reported in *(2007) 12 SCC 341* wherein it has been observed as follows:-

"10. The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statement. Communication to another is not



however an essential component to constitute a 'statement'. An accused might have been overheard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in *Sahoo v. State of Uttar Pradesh* [1966CriLJ68]. After referring to some passages written by well known authors on the "Law of Evidence" Subba Rao, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". In paragraph 5 of the judgment, this Court held as follows:

...Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession. as the case may be.... If, as we have said, statement is the genus and confession is only a sub-species of that genus, we do not see any reason why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt

11. So far as the prosecution case that kerosene was found on accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined under Section 313 of the Code.

12. The purpose of Section 313 of the



Code is set out in its opening words- 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' In *Hate Singh, Bhagat Singh v. State of Madhya Pradesh* [AIR1953SC468] it has been laid down by Bose, J that the statements of accused persons recorded under Section 313 of the Code 'are among the most important matters to be considered at the trial'. It was pointed out that

“8....The statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at the trial. This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

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

14. The word 'generally' in Sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair



and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

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

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

22. In *Balwinder Singh v. State of Punjab* reported in *1996 SCC (Cri) 59* wherein, it has been held as follows:-

“10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious circumstances its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before placing



any reliance upon an extra judicial confession.

23. In *Sivakumar v. State by Inspector of Police*

reported in (2006) 1 SCC (Cri) 470, it has been held as follows:-

"44. Extra-judicial confession may or may not be a weak evidence. Each case is required to be examined on its own fact. In Sidharth etc. etc. v. State of Bihar : [2005CriLJ4499] a Division Bench of this Court held:

"... He had also made extra-judicial confession to PW-8 Arko Pratim Banerjee. The confession made by appellant Amit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act..."

45. In Piara Singh and Ors. v. State of Punjab [1977CriLJ1941] , this Court observed:

"...The learned Sessions Judge regarded the extra judicial confession to be a very weak type of evidence and therefore refused to rely on the same. Here the learned Sessions Judge committed a clear error of law. Law does not require that the evidence of an extra judicial confession should in all cases be corroborated. In the instant case, the extra judicial confession was proved by an independent witness who was a responsible officer and who bore no animus against the appellants. There was hardly any justification for the Sessions Judge to disbelieve the evidence of Balbir Singh particularly when the extra judicial confession was corroborated by the recovery of an empty from the place of occurrence."

46. Yet again in State of Rajasthan v. Raja Ram [2003CriLJ3901] it was stated:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the



veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

24. Now coming to the facts in hand, it is evident that none is an eyewitness to the occurrence. That means to say, the case is based upon circumstantial evidence. The basic principle while adjudicating upon the cases based upon circumstantial evidence is to perceive the circumstance from which the conclusive of guilt is to be drawn should be foolproof and those circumstances must be conclusive in nature to connect the accused with the crime without having any opportunity of



deflection therefor. From the evidence available on the record, it is evident that none had seen the accused in company of the victim. None had claimed that accused had purchased biscuit from a shop. Even after arrest accused was not put to medical examination, that means to say, save and except, inculpatory extra-judicial confessional statement of the appellant, nothing more remains.

25. Now coming to the propriety of inculpatory extra-judicial confessional statement, though happens to be admissible in accordance with Section 24 of the Evidence Act but on that very score as is evident, PW-12, IO has negated the same by stating that on getting confidential information from the spy he had arrested the accused and till then, there was no allegation against him. He has not disclosed that accused was apprehended from the house of the informant. There happens to be no evidence on the record to suggest that the house of both the parties are adjacent to each other. So the presence of accused/appellant at the house of the informant at that very moment, none has stated including the informant and his wife. From the evidence of IO, it is evident that theme of inculpatory extra-judicial confessional statement is a subsequent event, that means to say, material exaggeration, and on that very score



attention of the witnesses in accordance with Section 157 of the Evidence Act has been drawn and duly substantiated by PW-12. That means to say, for the first time, it has been introduced during course of evidence.

26. It is needless to say that minor variation, exaggeration, contradiction is excusable but, affecting the root of the case would not and on that very score alone, apart from the fact that legal identity of the inculpatory extra-judicial confessional statement in terms of Section 24 of the Evidence Act happens to be fragile and in the facts and circumstances of the case, could not be relied upon and consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court could not survive. Accordingly, the same is set aside. Appeal is allowed.

27. Since appellant is under custody, he is directed to be released forthwith if not wanted in any other case.

(Aditya Kumar Trivedi, J)

perwez

AFR/NAFR	AFR
CAV DATE	N/A
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