

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (SJ) No.571 of 2016

Arising Out of PS. Case No.-204 Year-2012 Thana- PAKARIBARAW District- Nawada

FAKIRA PAL @ FAKIR PAL S/o Gajadhar Bhagat, R/o, Bartara, P.S.-
Pakribarawan, Distt.- Nawada.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Amresh Kumar Sinha

For the Respondent/s : Mr.Sri Zeyaul Hoda

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

13-09-2019

The appellant Fakira Pal @ Fakir Pal has been found guilty of an offence, punishable under Section 376(2) of the IPC and sentenced to undergo R.I. for 10 years, as well as to pay a fine of Rs. 10,000/- and in default thereof, to undergo R.I. for two months, vide judgment of conviction and order of sentence 08.06.2016, passed by the Additional District and Sessions Judge, 1st, Nawada in S.Tr. No. 14/13/24/14/06/16, arising out of Pakribarawan P.S. Case No. 204/2012.

Nawal Yadav (P.W.9), filed a written report on 22.10.2012 having an allegation that on the same day while he was sitting at his house, his daughter (name withheld/not examined), aged about 3 ½ years was sleeping on a cot at Veranda. After taking meal at about 8.00 P.M. when they were about to sleep, he found



the victim missing from the place whereupon, they began to search, but could not succeed. During course thereof, his co-villager Bali Yadav (P.W.3) disclosed that he has seen one Fakira Pal of village Bartara passing through his house, whereupon they began to search about aforesaid Fakira Pal and following him, reached his at house at village Bartara. On query, his father disclosed that he was sleeping on the roof. Then thereafter, all of them went over the roof. Seeing them, he (Fakira Pal) wanted to flee, but was apprehended. On that very moment, they saw blood spot over the T-shirt. Seeing the blood spot/bloodstains, they perceived some misfortune to the extent of killing of the victim, whereupon, they interrogated the accused/appellant. Firstly, he (Fakira Pal) tried to avoid, but when they pressurized, then he disclosed that he has thrown the victim in a field of Phuldhari. Then they all along with aforesaid Fakira Pal came to the field where they found the victim in unconscious state. She was lying in a pool of blood. There was injury over her face. Blood was oozing out from her genital. Then thereafter, they inquired from Fakira Pal how this happened. Fakira Pal volunteered that he has committed rape over her and perceiving the victim to be dead, after throwing the dead-body, he rushed to his house, thereby no one could suspect him.



After registration of Pakribarawan P.S. Case No. 204/2012, investigation followed and after concluding the same, charge-sheet was submitted. Thereafter cognizance of the offence was taken under Sections 376 and 307 of the IPC., followed with trial, made with ultimate result, subject-matter of instant appeal.

Defence case, as is evident from the mode of cross-examination as well as the statement recorded under Section 313 of the Cr. P.C is that of complete denial. However, nothing has been adduced on behalf of the defence. It has also been pleaded that story of inculpatory extra-judicial confession is afterthought only to justify apprehension of the appellant.

In order to substantiate its case, altogether 12 PWs have been examined on behalf of the prosecution, who are Bhushan Yadav (PW 1), Ganauri Yadav (PW 2), Bali Yadav (PW 3), Radhe Yadav (PW 4), Satyanarayan Kumar (PW 5), Suresh Yadav (PW 6), Sadhusharan Yadav (PW 7), Dr. Madhu Sinha (PW 8), who examined the victim, Nawal Yadav, informant of the case (PW 9), Amrendra Kumar, I.O. of the case (PW 10), Pritee Bala (PW 11) and Himjay Kumar (PW 12). Side by side has also exhibited Ext. 1, the injury report, Ext.2 Fardbayan, Ext. 3 handwriting and signature over seizure list, Ext.4,



endorsement of constable, Ext. 5, FSL report and Ext.6, signature over FSL report. As stated above, nothing has been adduced on behalf of the prosecution.

Manifold arguments have been made at the end of the learned counsel for the appellant, while challenging the finding recorded by the learned lower court. It has been submitted that none is eye-witness to the occurrence and so, the case rests upon circumstantial evidence.

The basic principle of circumstantial evidence is that there could not be any missing link attracting interference otherwise than in its conclusiveness with regard to the guilt of the accused which, in the facts and circumstance of the case, is found lacking. Furthermore, it has also been submitted that the sole basis for conviction is inculpatory extra-judicial confessional statement, without any corroboration. Being weak nature of evidence and further, so many sprain have been prescribed by the Apex Court over admissibility of the inculpatory extra-judicial confessional statement under the guise of aforesaid principles if the so-called extra-judicial confessional statement is taken for consideration, then in that circumstance, the same would not be admissible in the eye of law.



Apart from this, it has also been submitted that the doctor has not substantiated the factum of rape, rather has ruled out the same and so did not come within any of the caluses prescribed under Section 375 of the IPC. So on that very score also the finding of the learned lower court is contrary to law and thus, is fit to be dismissed.

On the other hand, learned APP, while supporting the finding, has submitted that perusal of the judgment impugned, it is evident that the lower court had considered all the relevant factors so invoked before coming to finding of guilt and so does not require interference.

After going through the evidence available on record, it is apparent that none is the eye-witness to the occurrence and so, is based upon circumstantial evidence.

So far proper identification of the ingredients with regard to a case based upon circumstantial evidence is concerned in the case of **Kiriti Pal Vs. State of West Bengal** with **Durga Sutradhar Vs. State of West Bengal** and **Siddique Mia and another Vs. State of West Bengal**, reported in (2015) 11 SCC page 178, it has been held under paragraph 9 as follows:-

“Referring to several earlier decisions of this Court in *Geejaganda Somaiah v. State of Karnataka* *Geejaganda Somaiah v.*



State of Karnataka, 2007 9 SCC 315 para 15 it was held as follows: (SCC pp. 321-22)

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

(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

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

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

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

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

So the basic principle while appreciating the circumstantial evidence is that the circumstances, having so



placed would give the only one hypothesis and that is with regard to connectivity of the accused with the crime and nothing else. In the aforesaid background, now the event has to be visualized.

After going through the evidence, it is evident that none of them has claimed to have seen the accused/appellant in the company of the victim. None has seen the accused/appellant committing rape. None has seen the accused/appellant throwing the victim in the field, wherefrom she was recovered. The evidence, which has been brought up at the end of the prosecution through the mouth of PW 1, PW 2, PW 4, PW 5, PW 6, PW 7 and PW 9 is that it is PW 3 who has seen the accused/appellant near the house of the informant (PW (9) on the alleged date and approximately same time, whose presence has also been acknowledged by PW 4 while PW 3 substantiated the same claiming to have seen half an hour before the manner about disappearance of the victim from her house, had seen the appellant/accused near about the house of the informant Nawal Yadav and perceiving some suspicion over his conduct, all of them, including others, have gone to the place of the appellant, where he was apprehended at his roof, interrogated and then being accompanied by these witnesses, reached at the P.O.



wherefrom at his pointing out, the victim was recovered from the paddy field lying in a pool of blood even at very time blood was coming out from her genital, having injuries over her face. Then thereafter, the victim was taken to Bakribarawan primary hospital and from there, she was referred to Nawada Sadar Hospital, leaving the accused/appellant under custody of the villagers, the parents along with other rushed. A written report was filed, while the informant was at Pakribarawan primary health centre and then, as is evident, after referring to Sadar Hospital Nawada, the I.O. came to the village and took control of the accused/appellant. The doctor (PW 8) had examined the victim at Sadar Hospital, Nawada along with two other doctors on account of constitution of a Medical Board. It has further been evident that the I.O. had taken control of Lungi, Ganghia and T-shirt of the accused/appellant and after seizing, the same were transmitted to the FSL, where it was examined and the reports are on record. So basically it happens to be the inculpatory extra-judicial confessional statement, leading to recovery of the victim before the public and the major issue involved in this appeal is over reliability, acceptability and authenticity of inculpatory extra-judicial confessional statement of the accused/appellant.



Before entering into debate over the same, certain other circumstances are also to be kept in mind and these are, the I.O. had not prayed for recording judicial confession in accordance with Section 164 Cr. P.C. In likewise manner, the so alleged inculpatory confessional statement has not been recorded in writing, whereupon, there happens to variance in exact wording of the inculpatory extra-judicial confessional statement witness to witness during course of evidence.

It is needless to say that Section 24 of the Indian Evidence Act deals with the issue and acknowledges the same having some sort of restriction that inculpatory extra-judicial confessional statement having procured under the banner of inducement, threat or promise will be irrelevant, inadmissible, in the eye of law.

In Lokeman Shah and another Vs. State of West Bengal with State of West Bengal Vs. Lokeman Shah, reported in **AIR 2001 SC** page 1760, it has been held under paragraph 13 as follows:

“Learned counsel contended that the confession without corroboration cannot be acted on for the purpose of entering a conviction. We are unable to agree with the said submission as a legal proposition. Way back in 1957, the Supreme Court has laid down the law in explicit terms that



confession if true and reliable can form the basis of conviction. [vide Balbir Singh Vs. State of Punjab, AIR 1957 SC 216 Cri LJ 481) Pyare Lal Bhargava vs. State of Rajasthan, AIR 1963 SC 1094”1963 Supple (1) SCR 689: (1963 (2) Cri LJ 178) and Ram Chandra Prasad Sharma vs. State of Bihar, Air 1967 SC 349: (1966) 3 SCR 517: (1967 Cri LJ 409). Yet this Court said time and again that as a rule of prudence the court must seek other circumstances to corroborate a confession, particularly when the same is retracted. There also the delay involved in making the retraction was considered relevant for a court to judge regarding genuineness of the confession. Even about the extent of corroboration this Court has pointed out as early as in 1954, that if it is insisted that each and every circumstance mentioned in the confessional statement must be separately and independently corroborated then the rule would become meaningless inasmuch as the independent evidence itself would afford sufficient basis for conviction and hence it would be unnecessary to call the confession in aid. (vide Hemraj vs. The State of Ajmer (1954 SCR 1133) :(AIR 1954 SC 462:1954 Cri LJ 1313).This was reiterated by a three-Judge Bench of this Court in Balbir Singh vs. State of Punjab, (AIR 1957 SC 216 : 1957 Cri LJ 481) (supra).This is what the learned Judges observed then: (para 18):

It is necessary to emphasise here that the rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation



of the accused person in the crime must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made.”

In State of Rajasthan Vs. Raja Ram, reported in (2003)

8 SCC page 180, it has been held in paragraph 18,19 and 20 as under:-

“Confessions may be divided into two classes, i.e. judicial and extra-judicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when [Section 164](#) does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? And (ii) are they true? As the section enacts, a confession made by an



accused person is irrelevant in a criminal proceedings, 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, (2) proceeding from a person in authority, and (3) 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. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person, or (b) it does not proceed from a person in authority; or (c) it is not 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. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of [Section 24](#). The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding



whether the Court is satisfied that its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. [See R. v. Warwickshall. It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe Evidence, 9th Edn. Page 284). A promise is always attached to the



confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is 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, it is enough to exclude the confession. The words 'appear



to him' in the last part of the section refer to the mentality of the accused. 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 (2007) 12 SCC 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 for 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.

If the evidence relating to extra judicial confession is found credible after being tested on the touchstone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration as rightly submitted by learned counsel for the respondent-accused, is a matter of prudence and not an invariable rule of law. It is improbable, as rightly held by the High Court that the accused would repose confidence on a person who is enigmically disposed towards him, and confess his guilt. Similarly, PW- 3 is a close relative of PW- 4 and as records reveal, a person of doubtful antecedents being a history sheeter. Though that alone cannot be the ground to discard his evidence, the totality of circumstances cast an indelible shadow of doubt on his evidence. It is to be noted that accused examined himself as DW-1.



Though it was the prosecution version that there was also extra judicial confession before informant Sahi Ram (PW-6) that was disbelieved by both the Trial Court and the High Court in view of the fact that he stated differently from what was allegedly stated by him during investigation. He disowned that the accused made any confessional statement before him. Though the prosecution during cross-examination of the accused (DW-1) suggested that he had made extra judicial confession before PW-6, significantly not even such a suggestion was given in respect of PW-3 & 4.

In Ajay Singh Vs. State of Maharashtra, reported in **(2007) 12 SCC** page 341, in paragraph 8 and 10 observed as under:-

“8. We shall first deal with the question regarding claim of extra judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra judicial confession, Court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra judicial confession can



form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as



unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repeat exact words and there may be many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous. The evidence of PWs 1, 3 and 4 is not consistent as to where the accused is supposed to have made the statement. While PW-1 said that he was inside the house, interestingly PW-3 stated that accused did not come out of the house and thereafter he did not utter a statement which is taken to be the extra judicial confession. So far as PW-4 is concerned the trial Court had disbelieved his evidence, the High Court found the same to be credible. Significantly, he stated that the accused came near his courtyard and shouted "Kakaji Daudo Lata Jal Gayee". In contrast, PW-1 stated that "Kakaji Lata Mar Gaye mere hathse".



PW-3 in contrast said "Kakaji Mere hathse Lata Jal Gayee". It would, therefore, be not safe to place any reliance on the so called extra judicial confession.

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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 over-heard 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 U.P.](#) 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 (AIR p 42)”

In **Kulvinder Singh Vs State of Haryana**, reported in (2011) 5 SCC page 258, under paragraph 19 the Apex Court has held as follows:-

“19. In State of Rajasthan v. Raja Ram, reported in (2003) 8 SCC 180, this Court held as under:(SCC p.192, para 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."

It has been observed by the Apex Court that inculpatory extra-judicial confessional statement is a weak type of evidence and so, before putting reliance upon the same, the Court has to see the circumstance, that means to say, inter se relationship, animus if any, perceiving since before the inculpatory extra-judicial confessional statement, probability of making such



extra-judicial confession and if those extra-judicial confessional statement is found free from vires of aforesaid defects, then and then only, it would be relied upon and, would form the basis of conviction as has been held in the case of **State of Andhara Pradesh Vs. S.Swarnalatha and others**, reported in **(2009) 8 SCC 383**. In paragraph 16 it has been 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 confessions 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, (1985) 1 SCC p.517, para 15 and State of Rajasthan v. Kashi Ram, reported in (2006) 12 SCC p. 262, para 14).”

In **Kala @ Chandrakala Vs. State, through Inspector of Police**, reported in **(2016) 9 SCC 337**, it has been held under paragraph 8 as follows:-



“In Sahadevan v. State of Tamil Nadu , it has been observed that extra-judicial confession is weak piece of evidence. Before acting upon it the Court must ensure that the same inspires confidence and it is corroborated by other prosecution evidence. In Balwinder Singh v. State of Punjab, it has been observed that extra-judicial confession requires great deal of care and caution before acceptance. There should be no suspicious circumstances surrounding it. In Pakkirisamy v. State of T.N., it has been observed that there has to be independent corroboration for placing any reliance upon extra-judicial confession. In Kavita v. T.N., it has been observed that reliability of the same depends upon the veracity of the witnesses to whom it is made. Similar view has been expressed in State of Rajasthan v. Raja Ram, in which this Court has further observed that witness must be unbiased and not even remotely inimical to the accused. In Alope Nath Dutta v. State of W.B, it has been observed that the main features of confession are required to be verified. In Sansar Chand v. State of Rajasthan, it has been observed that



extra-judicial confession should be corroborated by some other material on record. In *Rameshbhai Chandubhai Rathod v. State of Gujarat*, it has been observed that in the case of retracted confession it is unsafe for the Court to rely on it. In *Vijay Shankar v. State of Haryana*, this Court has followed the decision in *Sahadevan (supra)*.”

In Baskaran and another Vs. State of Tamil Nadu,
reported in **(2014) 5 SCC 765**, it has been held under paragraph
17 and 18 as follows:-

“17. It is no doubt true that this Court time and again has held that an extra-judicial confession can be relied upon only if the same is voluntary and true and made in a fit state of mind. The value of the evidence as to the 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. But it is not open to any court to start with the presumption that extra-judicial confession is insufficient to convict the accused



even though it is supported by the other circumstantial evidence and corroborated by independent witness which is the position in the instant case. The Courts cannot be unmindful of the legal position that even if the evidence relating to extra-judicial confession is found credible after being tested on the touchstone of crebiility and acceptability, it can solely form the basis of conviction.

18. Having examined the instant case based on the aforesaid principle, we are not prepared to accept the plea that merely because one of the witnesses to the confessional statement did not support the confession in its entirety, the entire confession should be brushed aside as unreliable even though independent witness like the Village Administrative Officer had supported the recording of conviction. However, we have further taken note of the fact that the conviction of the appellants is not based merely on the confessional statement but also on other substantial evidence relied upon by the prosecution viz. recovery of the body, post-mortem report matching with



confessional statement, evidence of other independent witness who corroborated the recording of confessional statement in their presence and thus do not create doubt about the credibility of the prosecution case so as to discard the same.”

In the background of aforesaid settled legal principles, now the evidences are to be seen in order to appreciate the reliability, legality, authenticity and acceptability of the inculpatory extra-judicial confessional statement.

Before proceeding ahead, it is to be noted down that irrespective of reference of the said inculpatory extra-judicial confessional statement in the written report, the I.O has neither been asked at the end of the prosecution nor at the end of the appellant/accused, why not the appellant/accused was produced before the Magistrate for having statement under Section 164 of the Cr. P.C. (judicial confession). It is also evident that even having disclosure to the effect that the victim was raped by the appellant/accused as confessed, the appellant/accused has not been medically examined in accordance with Section 53A of the Cr. P.C.

PW 1 has stated that on the alleged date and time of



occurrence he was at the house. A rumour floated that the daughter of Nawal Yadav, aged about 3-4 years is missing. They had seen Fakira Pal near the house of Nawal Yadav about half an hour before whereupon, a suspicion arose, whereupon they had called Fakira Pal from his house. They had seen bloodstain over his cloth. They had inquired about the girl, whereupon, firstly he shown ignorance but after having been pressurized, he disclosed that the girl is in a paddy field. As pointed out by him, they have had found the girl in the paddy field. Fakira Pal has further disclosed that he had raped her. The victim was taken to hospital, identified the accused. During cross examination at paragraph 6, he has stated that his house and the house of the informant Nawal Yadav are intervened by the house of Upendra Yadav, Pyare Yadav, Bhola Yadav and Sadhu Yadav. In paragraph 7, he has stated that he had not seen Fakira Pal taking away the victim. His house lies at the distance of one km. When they had gone to the place of Fakira Pal, his mother was present. In paragraph 8, he has stated that they had found the victim in the paddy field. In paragraph 10 he has stated that the police had arrived after an hour of the occurrence. Nothing was seized by the police from the place of occurrence.

PW 2 has stated that on the alleged date and time of



occurrence, after hearing the murmuring, he had gone to the place of Nawal Yadav, where Bali Yadav had disclosed that he had seen Fakira. He also came to know about the missing of the daughter of Nawal Yadav. The victim was aged about 3 ½ years. Suspicion arose against Fakira might have committed the crime whereupon, so many persons have gone to the place of Fakira where they had asked from his father regarding him who disclosed that Fakira is on the roof. Thereafter, all of them gone over the roof, seeing whom Fakiraa tried to flee but was apprehended and then, on query, he disclosed that he will show the place where he has thrown the victim. All of them accompanied Fakira to the place wherefrom at his pointing out, they had taken out the victim from the paddy field. The victim was naked. She was bleeding from her genital. On further query Fakira disclosed that as he has committed rape on her so, blood was there. Some of them took the victim to the hospital while others took control of Fakira. The police came to the village and took away Fakira, identified the accused. In paragraph 9 of his cross-examination, he has stated that the house of Fakira Pal lies at 1 ½ km away from his house. He had not seen Fakira in the village, rather came to know from Bali Yadav that Fakira seen sometime earlier. The house of Bali Yadav is four km



away from the house of Nawal Yadav. In paragraph 11, he has stated that Fakira was on the roof of the house. He was caught hold of and then some people had also thrashed him. In paragraph 13 and 14 has stated that he had not found the blood in the paddy field as there was standing crop in the field and further, the field was waterlogged. Then denied that no such kind of occurrence had taken place.

PW 3 is Bali Yadav, who, during course of his examination-in-chief, has stated that on the alleged date and time of occurrence he was sitting at the shop of Lakhan Yadav. At that very time, he had seen Fakira Pal going towards northern direction. Then thereafter, he came back to his house. After half an hour, Nawal Yadav came to him and inquired about his daughter (victim). He remained at his house. Ganauri Yadav and Nawal Yadav had gone to the place of Fakira Yadav. They came with Fakira Yadav. There was blood spot over the cloth of Fakira Yadav. Fakira had disclosed that he had thrown the victim in the field. The victim was taken out from the field of Permeshwar Bhagat. He had not gone to the place of occurrence and so, had not seen the victim. Identified the accused. During cross-examination, he has stated that at the time when he was at the shop of Lakhan Yadav, Nawal Yadav and mother of Nawal



Yadav were also present at the shop. In paragraph 9, he has stated that he had not inquired from Fakira Pal where he was going. In paragraph 10, he has stated that Nawal Yadav had disclosed regarding missing of his daughter. Denied the suggestion that Fakira had not come to the village at the relevant date and time.

PW 4 has disclosed that on the alleged date and time of occurrence while he was at his house, he heard rumour with regard to missing of daughter of Nawal Yadav, aged about 3 and half years. Thereafter, Bali Yadav disclosed that Fakira Pal was loitering near the shop of Lakhan Yadav. Then I along with other co-villagers went to the place of Fakira Pal. Fakira Pal was on the roof of his house. They had seen blood spot over the cloth of Fakira Pal. Fakira Pal was inquired, who disclosed that the victim is in the field of Permeshwar Bhagat. Then they all returned back and came to the field of Permeshwar Bhagat, wherefrom the victim was recovered. The victim was in unconscious state and at that very time, was bleeding from her genital. Fakira, on query, further disclosed that he has raped her and on account thereof, there happens to be bleeding. Thereafter, the victim was taken to the hospital. After arrival of the police, they handed over Fakira Pal to the police. Identified the accused.



During cross-examination, at paragraph 7, he has stated that Bali Yadav had disclosed regarding presence of Fakira Pal in the village. In paragraph 9, he showed the distance in between his village as well as the village of the appellant/accused. In paragraph 10, he has stated that he is unable to disclose the boundary of the house of Fakira Pal. When they reached the house of Fakira Pal, at that very time, his (Fakira) brother and father were present. On query, his father had disclosed on query regarding the presence of Fakira in the house. Then in paragraph 12 he has stated that there was some blood in the field of Permeshwar Bhagat. Then has denied the suggestion that no such kind of occurrence had taken place.

PW 5 has stated that on the alleged date and time of occurrence while he was at his house, there was rumor in the village with regard to missing of minor girl of Nawal Yadav, aged about 3 ½ years. All the villagers were searching the girl. He also joined. In course thereof, Bali Yadav disclosed that he has seen Fakira Pal passing through the village whereupon, on mere suspicion, they have gone to the place of Fakira Pal where they met with the father of Fakira Pal, who on query, disclosed that Fakira is on the roof of the house. Then, they had gone over the roof and seen the blood over his cloth. They interrogated



him whereupon, he disclosed that after committing rape, he threw the victim in the field of Permeshwar Bhagat. Then all of them came to the field where they had seen the victim lying in unconscious condition. Blood was oozing out from her genital. Then she caught hold of Fakira Pal. The victim was rushed to the hospital. The police came and then Fakira was handed over to them. Identified. During cross-examination, in paragraph 9, he has stated that it was Jagarna (the day of Durga Puja). He had not seen Fakira Pal in the village. In paragraph 10 he has stated that Fakira Pal frequently visits his village. He had seen some red colour at the field of Permeshwar Bhagat. The police came around 12.00 at night. In paragraph 12, he has stated that Fakira Pal was assaulted by some of the villagers. Fakira Pal was loitering in the village prior to the occurrence. No information was given to the police regarding missing of the victim. First of all, all the villagers had gone in search and during course thereof, the whole situation was perceived.

PW 6 has stated that on the alleged date and time of occurrence, while they were in search of the victim, who was missing, Bali Yadav disclosed that he had seen fakira Pal in the lane sometime before whereupon, they have gone to the place of Fakira. On query, the father of Fakira disclosed his presence



over the roof. They came over the roof. Fakira tried to flee seeing them, but was apprehended. They have seen blood over his cloth. On query, he disclosed that he will show the field where the victim has been thrown by him. Thereafter at the instance of Fakira, victim was traced out from the paddy field. At that time she was unconscious. Blood was oozing out from her genital. The victim was taken away to the hospital while Fakira was kept apprehended. The police case. They handed over Fakira. Identified. During cross-examination at paragraph 8, he has stated that when he came from his house he had not found Fakira. On disclosure having been made by Bali Yadav, suspicion arose. In paragraph 10, he has stated that the field where the victim was lying, belonged to Permeshwar Bhagat. At paragraph 11 he has stated that he had seen blood in the field. In paragraph 13 he has stated that his statement was recorded by the police. He has stated that all the clothes of Fakira were seized by the police.

PW 7 has reiterated the same version. During his cross-examination, he has stated at paragraph 8 that he had not seen Fakira Pal in the village. Bali Yadav disclosed that Fakira had come to the village. In paragraph 12, he has stated that the field where the victim was found, belonged to Phuldhari Yadav. He



had seen some blood. In paragraph 13 he has stated that he had not seen Fakira taking away the victim.

PW 9 is the informant of this case. During his examination-in-chief, he has reiterated his initial version by stating that when his wife came out of the room she had not seen the victim whereupon, she raised alarm. He came out from his room. He also raised alarm on absence of the victim. On that day, there was 'Jagran' and so thought she might have gone to participate in Durga Puja. But he continued to search the victim and during course thereof, the co-villager Bali Yadav disclosed that just now he had seen Fakira Pal loitering near his house whereupon, they became suspicious and then along with the villagers, had gone to the place of Fakira. The father of Fakira was there, who on query disclosed presence of Fakira over the roof. They had gone over the roof. Fakira tried to flee but they apprehended him. Took him out. At that very time, they had seen blood over his T-shirt. Firstly he did not want to say anything but when they gave threat of assault, he disclosed that he has committed rape over the victim and then threw her in a paddy field of Permeshwar Bhagat. Then they all came back to the field of Permeshwar Bhagat where they saw the victim unconscious. Blood was oozing out from her genital. He



immediately took the victim to the hospital while the villagers kept Fakira apprehended. The police came at the hospital. He furnished the written report to the police. Then thereafter the victim was referred to Sadar Hospital Nawada where she was treated. Identified. During cross-examination, at paragraph 7 he has stated that it was moonlit night. It was Jagran and so majority of the villagers were awake. At paragraph 8 he has stated that at the time of occurrence they were inside the room. The room in which the victim was sleeping happens to be in front of the main gate. He has further stated that there happens to be no house in between his house and the field of Permashar Bhagat. Then has stated that when he came out from his house he met with Bali Yadav near the house of Lakhan Yadav. Bali Yadav has not disclosed that he has seen Fakira Pal taking away the victim. At paragraph 9 he has stated that within ten minutes they have arrived at the house of Fakira Pal. The blood spot cloth of Fakira Pal was handed over to the police. He has further stated that after thrashing of Fakira Pal he disclosed about the occurrence. In paragraph 10, he has stated that when he reached at the field of Permashwar Bhagat they had found paddy crop standing thereon. There was mud in the field. Then has denied the suggestion that Fakira has falsely been implicated



in the case.

Now the second part of the evidence is that of the doctor, who had found the following injuries over the person of the victim:-

“She is conscious, injured, facial injury found, eye-lid swollen, laceration found on face. No injury over abdomen and lower limb. On vaginal examination vaginal canal found lacerated, red, inflamed, painful, hymen intact. Dimpal on posterior vaginal wall. Vaginal swab sent for histopathological examination by Dr. Prabhakar Singh. Pathological report either dead or alive spermatozoa not seen. Her blood group o positive.”

During cross-examination she has stated that she had not found any spermatozoa dead or alive. She had not found any sign of penetration, but laceration and inflammation was found there and so according to her it was by way of handling and trying to penetrate. She had also not found any laceration over the face of the victim.



PW 10 is the I.O. Of the case. He during course of his evidence has stated that after registration of Pakribarawan P.S. Case No. 204/12 dated 22.10.2012 he was entrusted with the investigation. He had gone to the place of occurrence. There happens to be two P.Os. The first P.O. happens to be the house of Nawal Yadav (informant). Then has disclosed the inner status of the house and then the boundary. The second P.O. happens to be the field of Permeshwar Bhagat and then located northern corner where the victim was found. Then disclosed the boundary. He recorded further statement of the victim. He also recorded the statement of the witnesses. He had seized the cloths of the accused and prepared seizure list. He had seized the T-shirt, Janghiya and Lungi. Apprehended the accused and sent to judicial custody. Got the injury report of the victim. He had sent the clothes for FSL for examination. After completing the investigation submitted charge sheet. Exhibited the relevant documents. Identified the accused. During cross-examination he ha stated that he had not recorded statement of Lakhan Yadav, Lokeshwar Yadav and Upendraq Yadav. He had not recorded Khata number and khesra number of the concerned plot. He had not found blood in the field. In paragraph 8 he has stated that seized clothes were not produced in court. He had not



corresponded with the FSL for report. In paragraph 9 he has stated that he had not seized the cloth of the victim. He had not got the statement of the victim recorded under Section 164 of the Cr. P.C. Then he denied the suggestion that the investigation happens to be false.

PW 1 and PW 2 are two FSL employees who had exhibited the FSL report, which itself is admissible in accordance with Section 293 of the Cr. PC. From the report it is evident that semen has been found over B(Janghia), while blood has been found over the cloth, A-T-shirt, B-Janghiya. The aforesaid finding has not been subject to challenge during cross-examination. Also gone through statement of the appellant under Section 313 Cr. P.C. From perusal of the statement, it is evident that incriminating material have not been confronted to him. However, the situation is rebutted at the end of the Apex Court.

From perusal of the record, there happens to be two kinds of incriminating material. The first one is with regard to inculpatory extra judicial confessional statement having at the end of the appellant and second happens to be accompanying to the field of Permeshwar Bhagat where at his instance, the victim was taken out having blood oozing out from her genital,



followed with disclosure at the end of the appellant that after commission of rape he had thrown the victim in the field. With regard to acceptability of first part of inculpatory extra judicial confessional statement is concerned, it is apparent that the informant had accepted during cross-examination that he was thrashed. Then there was inculpatory extra judicial confessional statement. As such, the same happens to be contrary to spirit of Section 24 of the Evidence Act. However, coming in company of assembly and then showing the place where from the victim was traced out having the bleeding from her vaginal and, disclosure that he had raped her is the circumstance distinct to the first event and during midst thereof there happens to be no evidence that the appellant was put under fear, nor the aforesaid event has been denied by the appellant, even by way of suggestion. Furthermore, presence of injury over the genital of the victim is found duly supported by the doctor, who, however, ruled out possibility of penetration, rather suggested an attempt.

In the aforesaid background, coupled with the evidence of the doctor, who ruled out the rape locked the prosecution over the factum of penetration, sine qua non for attracting rape.

Hence, the punishment is converted under Section 376/511 of the IPC and that being so, the sentence is also reduced, as



the the period already undergone.

The appellant is in custody. Hence, he is directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	Nil
Uploading Date	09.2019
Transmission Date	09.2019

