

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 111 of 2010**

- Lekhu Prasad @ Lekhram, S/o Yajendra Prasad Tiwari, R/o Village Chhoe Kapisda, PS Sarangarh, District Raigarh CG

---- Appellant**Versus**

- State Of Chhattisgarh, through police station Sarangarh, District Raigarh (CGO)

---- Respondent

For Appellant	: Shri Ravindra Sharma, Advocate
For Respondent /State	: Shri Subash Yadav, Dy.GA

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey
Judgment On Board By Manindra Mohan Shrivastava, J.

25/03/2019

This appeal is directed against the impugned judgment of conviction and order of sentence dated 29.01.2010, passed in ST No. 10/2009 by the Additional Sessions Judge Saramgarh, whereby and whereunder, the appellant has been held guilty for commission of the offence on the allegation against him of murdering one Yogesh Kumar and sentenced him as described below:

Conviction	Sentence
Under Section 302 IPC	Imprisonment for life with fine of Rs. 5,000/- plus default stipulation

2. Prosecution story, as is unfolded from the records of the case, is that Gitaram PW-2, lodged a report in the police station on 29.11.2007 informing that Yogesh Kumar is his nephew and son of his brother Sitaram, was found dead in the open field. He had sustained certain injury. A mereg intimation Ex.P-2, was also recorded and inquest over the dead body was prepared. It was sent for postmortem examination and Dr. B.P.Sai PW-22, conducted postmortem prepared in Ex.P-28. Having found certain injury and also bruises around the neck, including internal examination, it was opined that cause of death was strangulation, leading to asphyxia. The police continued with the investigation but no clue was found for long and the case was closed.

3. Long after, one Baramlal PW-15, is said to have come to the police station and given statement that the appellant had murdered one Ram Kumar by poisoning in presence of Baramlal and at that time, he disclosed to Baram Lal that he murdered Yogesh also. Baram Lal was, thereafter, produced before the Magistrate and his statement under section 164 Cr.P.C was recorded. The bullock cart by which Yogesh is said to have sustained certain injuries was also seized and finally, the charge sheet was also filed against the appellant alleging commission of the offence. Appellant, having abjured guilt, was put to trial.

4. Learned trial court arrived at a conclusion of guilt of the appellant on the basis of the extra judicial confession given by appellant before PW-8 Kamlesh Chandra and PW-12 Harihar Prasad Vaishnav and recovery of parts of bullock cart made.

5. Assailing legality and validity of the impugned judgment of conviction and sentence, counsel for the appellant would argue that present is a case where the conviction is founded on suspicion and suspicion only. He would argue that the so called extra judicial confession said to be given by the appellant before PW-8 and PW-12 are not admissible because their evidence shows that by that time, appellant was already taken into custody by the police on account of another criminal case therefore, the same is not admissible in evidence. It is next submitted that as far as the reliance placed on the statement of Baramlal, recorded under Section 164 Cr.P.C. is concerned, same is not reliable but can only be used for the purpose of corroboration however, Baramlal has completely turned hostile and had not supported the case of the appellant, having given any extra judicial confession before him or he having given any such statement before the Magistrate. Since Baramlal was one of the co-accused in another case and not in the present case, his statement would not even be relevant under Section 30 of the Evidence Act. The deceased having sustained injury from the bullock cart, does not lead to anywhere and does not establish any live link between the alleged commission of murder of Yogesh with the present appellant therefore, the conviction may be set aside.

6. State counsel would argue that though there is no eyewitness to the incident, the prosecution came out with the case that when the appellant was taken into custody in connection with murder of one Ram Kumar in which Baramlal was also one of the co-accused, he

made extra judicial confession before Baramlal but before PW-8 and 12. He would highlight that Baram Lal had given statement under Section 164 Cr.P.C. before the Magistrate in which he clearly stated regarding appellant having informed him regarding commission of murder of Yogesh. This is corroborated from the evidence of PW-8 and 12. Recovery of bullock cart and the reply to query report made by the police render probable that Yogesh sustained some of the injuries from the bullock cart. Therefore, chain of circumstances are complete and conviction does not warrant any interference.

7. From the material on record, it is not disputed that FIR was lodged in Ex.P-1, by Gita ram PW-2, that dead body of Yogesh was found in the open field.

8. Evidence of the doctor PW-22, who has proved its postmortem report in Ex.P-28 stating that Yogesh died homicidal death. He was found having sustained certain injuries but the cause of death according to the doctor's opinion and evidence is that Yogesh died because of asphyxia due to strangulation. The evidence of the doctor on this aspect, could not be impeached, therefore, homicidal death of Yogesh is also proved.

The question, however, which arises for consideration in this appeal is as to whether the prosecution has succeeded in proving beyond reasonable doubt that it is the appellant and the appellant alone who must have murdered Yogesh.

9. As we see from the records of the case, after lodging of the FIR, police carried out investigation but having failed to get any clue

with regard to involvement of the appellant in the commission of murder, the case was closed. Later on, the case was reopened on the statement given by Baramlal PW-15, before the police followed by his 164 Cr.P.C. statement before the Magistrate.

Baramlal PW-15 however, does not support the case of prosecution and has completely turned hostile. He has denied having given any statement before the Magistrate as has been claimed by the prosecution. It is trite law that statement under Section 164 Cr.P.C. by itself, is not substantive piece of evidence, except in exceptional circumstances exhaustibly elaborated in 164 Cr.P.C. as amended. It can be used for corroboration. But when Baramlal has not supported the prosecution story and has denied any statement given before the Magistrate, 164 Cr.P.C. statement by itself, cannot be used as a substantive piece of evidence.

10. It is relevant to note that in the present case, Baramlal is one of the prosecution witnesses, whereas, in another criminal case of murder of Ram Kumar, present appellant and Baramlal were tried together though for different offences. Appellant was tried for commission of offence under Section 302 IPC but Baramlal was tried for commission of offence under Section 201 IPC only. This Court vide judgment dated 20th March 2019, passed in two Criminal appeals, has acquitted the appellant Baramlal and set aside the judgment of conviction.

As far as the present case is concerned, Baramlal being not a co-accused, his statement recorded under Section 164 Cr.P.C. is not relevant and admissible as against the present appellant as Section

30 of the Evidence Act, would not be attracted because in the present case, Baramlal has not been tried as co-accused. Learned trial court has placed heavy reliance on the extra judicial confession evidence as contained in the testimony of Kamlesh Chandra PW-8 and Harihar Prasad PW-12. But then, from their evidence, it is very clear that the so called extra judicial confession is said to have been given by the appellant when the appellant had already been taken into custody by the police in connection with allegation of murder of one Ram Kumar. When appellant was being taken to the spot where the dead body of Ram Kumar was found, it is said that while he was taken in the jeep by the appellant along with Harihar Prasad PW-8 and 12, he gave this extra judicial confession. Apparently, the appellant, being in police custody, the so called extra judicial confession would not be admissible in evidence in view of the provisions contained in Section 25 of the evidence Act.

11. It would thus be found that neither 164 Cr.P.C. statement nor the evidence of extra judicial confession is admissible in evidence against the appellant.

What is then left is the seizure of a bullock cart. The cause of death is strangulation leading to asphyxia. Some of the injuries were found on the body of the deceased, itself, sought to be linked with injury that could be caused by cross-bar used in the bullock cart. There is no evidence on record that the part of the bullock cart said to be seized from the possession of the appellant was stained with blood of the deceased Yogesh.

12. We, therefore, have no hesitation to hold that the prosecution case could not travel beyond suspicion. It could translate into truth only by leading clinching, reliable and admissible evidence. The prosecution has utterly failed to bring home the guilt by leading cogent evidence.

13. In the result, impugned judgment of conviction and order of sentence is not sustainable under the law and is set aside. Appeal is allowed. Appellant is acquitted of the charges levelled against him. He be released and set free forthwith.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge