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HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 52 of 2012**

1. Lekhu Prasad @ Lekhram Tiwari S/o Yajendra Prasad Tiwari, aged about 28 years, R/o. Village – Chhote Kapisda (B), Police Station & Tahsil – Sarangarh, District – Raigarh (CG)
2. Smt. Gulab Bai W/o Ram Kumar Sharma R/o Village – Kosir, Police Station – Kosir, District – Raigarh (CG)

---- Appellants**Versus**

- State Of Chhattisgarh through Police Station – Arakshi Kendra, Baramkela, District – Raigarh (CG)

---- Respondent**&****CRA No. 15 of 2012**

- Baramlal Bareth S/o. Ramlal Bareth, aged about 32 years, R/o. Village – Nandeli, Police Station – Sarangarh, District - Raigarh

---- Appellant**Versus**

- State Of Chhattisgarh through Police Station – Baramkela, District – Raigarh (CG)

---- Respondent

For respective appellants : Shri Abhishek Saraf and Ms. Pragya Pandey,
Advocates

For State : Shri Subhash Yadav, Dy.G.A.

**D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey**

Judgment On Board**20/03/2019****Per Manindra Mohan Shrivastava, J.-**

This order shall govern disposal of Cr.A.No.52/2012 filed by **Lekhu Prasad**

@ **Lekhram Tiwari** and **Gulab Bai** as also Cr.A.No.15/2012 filed by **Baramlal Bareth**.

The aforesaid two appeals are directed against impugned judgment of conviction and order of sentence dated 12.12.2011 passed by the Additional Sessions Judge, Sarangarh, District-Raigarh (CG) in Sessions Trial No.13/09 by which, the learned Trial Court held the appellants guilty of commission of offence and sentenced as described below -

	<u>Conviction</u>	<u>Sentence</u>
1	U/s 302 of IPC	Imprisonment for life with fine of Rs.1000/- (for appellant - Lekhu Prasad) in default of payment of fine, 3 months simple imprisonment)
2	U/s 302/34 of IPC	Imprisonment for life with fine of Rs.1000/- (for appellant – Gulab Bai) in default of payment of fine, 3 months simple imprisonment)
3	U/s 109 of IPC	Imprisonment for life with fine of Rs.1000/- (for appellant - Gulab Bai) in default of payment of fine, 3 months simple imprisonment)
4	U/s 201 of IPC	R.I. for 3 years and fine of Rs.200/- (for appellant – Lekhu Prasad) in default of payment of fine, 1 month simple imprisonment
5	U/s 201 of IPC	R.I. for 3 years and fine of Rs.200/- (for appellant – Baramlal) in default of payment of fine, 1 month simple imprisonment

3. Ramkumar Sharma, husband of appellant – Gulab Bai went missing since around 25/12/2008. It is the case of the prosecution that Gulab Bai had gone to police station – Dabhra and gave an information regarding her husband having gone missing, in respect of which, information was recorded in Rojnamcha Sanha (Ex.P/30) at police station – Dabhra on 06/01/2009. While Ramkumar was being searched, information was received in police station – Baramkela by Sahni Sidar (PW13) that he had seen a dead body in Hadakhancha forest area. On receipt of that information, a morgue in Ex.P/16 was recorded. Police reached at the spot

where a dead body was found which was sent for post mortem. Dr. S.Toppo (PW17) conducted post mortem and found that the dead body was highly decomposed. His opinion was that as the dead body was highly decomposed, it was not possible to clearly state the cause of death and he advised chemical analysis of viscera preserved. According to him, death was caused approximately 3-4 days before the date on which the post mortem was conducted. The dead body was thereafter buried as not claimed by anybody.

4. Later on, it came to the light that Ramkumar Sharma had gone missing and was not traceable and therefore, on information received by Sub-Divisional Magistrate, Executive Magistrate was directed to get the body exhumed and identified by the family members of missing Ramkumar Sharma and in this background, the dead body, which was earlier buried was exhumed. It is the case of the prosecution that Surajbai (PW3) – mother of Ramkumar and Sheshnath (PW6)- brother of Ramkumar, identified the dead body as that of Ramkumar Sharma.

5. On 02/02/2009, Sheshnath (PW6) – brother of the deceased submitted his written report in Ex.P/8 on the basis of which, FIR in Ex.P/24 was registered. The facts disclosed in the written report and the FIR were that the dead body was found on 16/01/2009 which was buried but later on, it was identified by informant as that of his brother – Ramkumar Sharma, on the basis of clothes, watch and diary found near the dead body. On the suspicion as to how the dead body of his brother reached the forest, he kept on making enquiry and then, Baramlal came to his house and informed him in presence of Harihar Prasad, Kamlesh Chandra and others that on 30/12/2008, appellant – Lekhu Prasad had come with Ramkumar in a motor cycle and he had taken him along with Ramkumar to nearby hills saying that they would be getting some treasure. There, Lekhu Prasad gave a medicine contained in a bottle to Ramkumar which was consumed by Ramkumar and

thereafter, Ramkumar died. When he asked Lekhu Prasad as to what medicine was given, then he was informed that it was cough syrup which was not believed and then Lekhu Prasad told him that he was telling lie but he has given poison to Ramkumar. At this stage, Lekhu Prasad requested not to give this information to the police on the assurance of giving him Rs.10,000/-. What is stated in the FIR, when he asked, as to why he killed Ramkumar, then he disclosed that Ramkumar had kept concubine with him and the entire earning was given to that lady and he was also subjecting his wife to cruelty. by assaulting and therefore, Gulab Bai had given him Rs.50,000/- to eliminate her husband. On such contract of killing given to him by Gulab Bai, he murdered Ramkumar. FIR stated that all this was told to the informant by Baramlal. Thereafter, when he had come to Sarangarh in connection with some work, he came to know, Lekhu Prasad was produced in Sarangarh police station and he met with Lekhu Prasad in the bus stand and in presence of Harihar Prasad, Kamlesh, Lekhu Prasad upon being enquired, stated that appellant - Gulab Bai was being harassed by her husband Ramkumar, therefore, on the abetment of Gulab Bai, he killed Ramkumar by poisoning. The bottle containing poison was thrown at the spot.

6. On such allegations, offence was registered against all the three appellants, investigation was carried out and later on, the police officer filed a charge sheet not only against Lekhu Prasad and Gulab Bai but also against Baramlal Bareth on the allegations that appellant – Lekhu Prasad murdered Ramkumar Sharma by poisoning and Gulab Bai abetted and shared common intention towards commission of offence of murder of Ramkumar. Baramlal was accused of committing offence of causing disappearance of the evidence, punishable under Section 201 IPC.

7. While learned Trial Court framed charges against the appellant - Lekhu Prasad that he murdered Ramkumar Sharma by poisoning and caused

disappearance of evidence, Gulab Bai was charged on the allegations that she had given a contract for killing Ramkumar and paid Rs.50,000/- to Lekhu Prasad and thereby abetted commission of offence punishable under Section 109 IPC. She was also charged of commission of offence under Section 302 IPC on the basis that she shared common intention towards commission of offence of murder of Ramkumar Sharma. Appellant – Baramlal Bareth was charged of commission of offence under Section 201 IPC on the allegations that he caused disappearance of evidence of offence of murder. All the appellants abjured guilt and were put to trial.

8. Prosecution, in order to prove its case, examined as many as 18 witnesses. The prosecution case was based mainly on recovery of bottle said to be containing poison from the place of incident on the basis of memorandum of appellant – Lekhu Prasad, extra judicial confession of appellant – Lekhu Prasad and Baramlal before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) as also confessional statement recorded under Section 164 CrPC of appellant – Baramlal Bareth by the Magistrate, upon he being produced by police of Police Station – Sarangarh in connection with another criminal case in which Lekhu Prasad was alleged to have committed murder of one Yogesh Shrivastava, at an earlier point of time. The appellants denied all the incriminating circumstances appearing against them in their respective statement recorded under Section 313 CrPC. No defence witness was examined.

9. Learned Trial Court, relying upon the prosecution evidence of recovery, extra judicial confession and confessional statement of Baramlal and also taking into consideration that the appellant – Lekhu Prasad had purchased jewellery of Rs.10,000/- and that some cash was also found in his possession and that the offence of payment of that money for contract killing was given by Gulab Bai, convicted both of them as described above. Baramlal Bareth was held guilty of

commission of offence under Section 201 IPC and accordingly sentenced as described above.

10. Assailing legality and validity of impugned judgment of conviction and order of sentence, learned counsel appearing for the appellants – Lekhu Prasad and Gulab Bai would argue that the prosecution has failed to prove its case beyond reasonable doubt. It is contended that the allegation of appellant–Lekhu Prasad having murdered Ramkumar is based on extremely weak circumstantial evidence of recovery of poison bottle from the spot at the instance of the appellant – Lekhu Prasad which too, is concocted because according to evidence of prosecution witness – Sahni Sidar (PW13), who lodged morgue intimation, the bottle, said to be containing poison, was not only found at the spot but was also seized. Therefore, recording of memorandum of appellant – Lekhu Prasad and again showing recovery of the bottle from the same spot on 03/02/2009 is not at all reliable. Next submission is that the confessional statement of co-accused Baramlal, contained in his statement under Section 164 CrPC made before the Magistrate in connection with another case or before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9), could not be used against Lekhu Prasad as a substantive piece of evidence but only a relevant material upon proof of guilt from other evidence on record. The so called extra judicial confession of the appellant – Lekhu Prasad, said to be made before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) is an afterthought because many of these witnesses have stated that they met with Lekhu Prasad for the first time in police station – Sarangarh and therefore, it is wholly improbable that the appellant – Lekhu Prasad would confess commission of offence before these witnesses. It is further argued that the so called extra judicial confession given by appellants – Lekhu Prasad before Surajbai (PW3) is an afterthought because if that was so, there is no explanation why no report was lodged in the police station either at the instance of prosecution

witnesses till 02/02/2009. Learned counsel for these appellants, relying upon judgment of the Supreme Court in the case of **Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence, AIR 2018 SC 3574** would further argue that the confessional statement of co-accused is an extremely weak circumstance against Lekhu Prasad and the same has to be excluded from consideration while assessing other evidence and could be used only to lend assurance to otherwise prove case of commission of offence by Lekhu Prasad. Learned counsel for the appellants would further argue that the prosecution evidence, even with regard to identification of the dead body, is highly doubtful because number of witnesses of the prosecution including the doctor, has clearly stated that the dead body was decomposed so much so that it was not identifiable. Therefore, the statement of the mother and brother of the deceased that they could identify the deceased on the basis of his name imprinted in his hand and a picture of God, is not at all reliable. According to learned counsel for the appellants, the case of the prosecution must fall only on the ground that the prosecution has failed to prove as to what was the cause of death and there is no medical evidence or any other evidence to prove that Ramkumar died of poisoning. Moreover, the standard of proof required to establish a case of poisoning has not been met with by the prosecution. Recovery of a bottle from the spot itself becoming doubtful and there being no FSL report of viscera of the dead body or the contents of the bottle that it contained poison and there being no evidence as to wherefrom Ramkumar procured poison, conviction of the appellants is unsustainable in law.

11. As far as alleged involvement of appellant - Gulab Bai is concerned, it is argued that it is a case of no evidence. There is no evidence of abetment. There is no evidence of she being present at the spot or committing any overt act. The prosecution has not brought any evidence of Gulab Bai entering into contract of killing and paying Rs.50,000/- to Lekhu Prasad and it has not been able to travel beyond allegations. Seizure of gold ornaments worth Rs.10,000/- from appellant –

Lekhu Prasad, in the absence of any evidence as to when and from where it was purchased and whether it was purchased after giving Rs.50,000/- to Lekhu Prasad by Gulab Bai, completely belies the prosecution case of Gulab Bai involved in the alleged commission of offence as the person who had given contract for killing her own husband – Ramkumar. On the contrary, it has come in the evidence that Gulab Bai had gone to police station – Dabhra on 06/01/2009 to inform that her husband, after having sold immovable property, had suddenly eloped with huge cash and gold ornaments and was not traceable and this fact has been proved by none other than Surajbai (PW3) – mother of the deceased.

12. Learned counsel appearing for the appellant – Baramlal would contend that even if his confessional statement either before the Magistrate or before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) is taken as it is, there is no element of complicity in the commission of offence. It is next contended that the appellant - Baramlal, in his examination under Section 313 CrPC, has denied having given any such confessional statement either before the Magistrate or before other witnesses of the prosecution. The prosecution story itself shows that Baramlal was not knowing about what other accused was doing. In any case, it was argued that as there is no evidence of administration of poison nor doctor's report regarding cause of death due to poisoning, the appellant could not be convicted under Section 201 IPC.

13. On the other hand, learned State counsel would argue that even when there is no direct evidence to prove involvement of the appellant in the alleged commission of offence, there are clinching circumstantial evidence of incriminating nature which, taken together, cumulatively, form a complete chain, sufficient to draw a reasonable inference that in all probability, the appellant – Gulab Bai must have given contract for killing, appellant – Lekhu Prasad must have killed Ramkumar Sharma by poisoning and Baramlal helping them out to cause

disappearance of evidence of commission of offence. He would submit that as far as contract killing aspect is concerned, the extra judicial confession given by Baramlal before the Magistrate and what was confessed before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) clearly brings out evidence that Gulab Bai (wife of Ramkumar) was feeling harassed by her husband as he was in illicit relation with another woman and used to subject her to cruelty. Therefore, she wanted to eliminate her husband and for this purpose, she gave Rs.50,000/- to Lekhu Prasad to kill her husband. The prosecution has proved that Lekhu Prasad was found in possession of gold ornaments worth Rs.10,000/- and co-accused Baramlal who was paid Rs.10,000/- by Lekhu Prasad, purchased a mobile of Rs.5,000/- and was found in possession of cash of Rs.700/- and they failed to explain the source of fund (money). He would further argue that as far as Lekhu Prasad is concerned, there is evidence of he having made extra judicial confession before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) that upon being told by Gulab Bai, his cousin, he killed Ramkumar by administering an insecticide, a poisonous substance after taking him to a remote place in a forest. The bottle containing poison was recovered from the spot where dead body of Ramkumar was found on the basis of memorandum of the appellant-Lekhu Prasad, which is proved not only from the evidence of Amreshwar Singh - investigating officer (PW18) but also from the evidence of independent witness of memorandum and seizure i.e. Kamlesh Chandra (PW8) and Harihar Prasad (PW9). The bottle was found containing label, Zendo Hyper (an insecticide). It is further argued that though, the dead body was highly decomposed and therefore, the doctor could not specifically state regarding cause of death, the evidence in the form of observation of those who had seen the dead body is that looking to the condition of the body and that number of flies were found dead around the dead body, it clearly looked like a case of poisoning. He would further argue that the prosecution case, proved from recovery of poison bottle on the disclosure statement of the appellant –

Lekhu Prasad and his extra judicial confession before number of witnesses, which is corroborated from the confessional statement of co-accused Baramlal who has clearly involved Lekhu Prasad in the alleged commission of offence as to how the incident happened in his presence as also the criminal overt act of Lekhu Prasad in administering poison to Ramkumar. Therefore, the learned Trial Court has rightly convicted the appellants – Gulab Bai and Lekhu Prasad.

14. Responding to challenge made to the conviction of Baramlal, it is argued that Baramlal himself gave a confessional statement before the Magistrate recorded under Section 164 CrPC, though, having been produced by the police of another police station, that, after he came to know that Lekhu Prasad killed Ramkumar, he accepted Rs.10,000/- from Lekhu Prasad on the assurance of non-disclosure of the incident. He did not inform the incident to any body until information given belatedly to Surajbai (PW3) and Sheshnath (PW6), the mother and brother of the deceased respectively. The extra judicial confession of this accused made before Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) bring home his guilt and justifies his conviction.

15. We have heard learned counsel for the parties and perused the records.

16. As we see from the impugned judgment and material on record, the entire case of the prosecution is based only on circumstantial evidence and there is no direct evidence to prove involvement of the appellants in the alleged commission of offence. Therefore, we shall proceed to examine the evidence, oral and documentary on record, keeping in forefront the settled legal principles with regard to proof of guilt based on circumstantial evidence. It has been well settled legal position that all circumstances must form a complete chain to exclude every hypothesis of innocence except that it is compatible with the guilt of the accused to draw a reasonable inference that in all probability, the accused must have killed

the deceased.

17. The gist of the prosecution story is that Gulab Bai, one of the appellants, was married to Ramkumar Sharma (the deceased) and she was feeling harassed because of maltreatment as also because her husband – Ramkumar Sharma was having illicit relation. She, therefore, gave contract for killing of her husband to her cousin – Lekhu Prasad, the other appellant and paid him Rs.50,000/-. Thereafter, Lekhu Prasad took along with him, Ramkumar up to the hills in Hadakhancha forest and there, he administered poison due to which, Ramkumar died. According to the prosecution case, while going up the hills, the appellant – Lekhu Prasad also took along with him the co-accused – Baramlal Bareth.

18. As far as involvement of Gulab Bai is concerned, it has been alleged that she abetted commission of offence by giving Rs.50,000/- to Lekhu Prasad and requesting him to kill her own husband – Ramkumar Sharma. She has been convicted with the aid of Section 34 IPC also that by making such payment, she intended to eliminate her husband through co-accused Lekhu Prasad and shared common intention.

So as to involve Gulab Bai in the alleged commission of offence, the prosecution has come out with the evidence of appellant – Lekhu Prasad found in possession of gold ornament which is said to be worth Rs.10,000/-. However, when it was purchased, wherefrom it was purchased has not been proved by the prosecution. Possession of gold ornament by appellant – Lekhu Prasad by itself, without anything more, does not constitute an incriminating circumstance, unless it is proved that the gold ornaments were purchased out of money received by him from Gulab Bai. The prosecution has utterly failed to bring any evidence as to when was that gold ornament purchased, even assuming that its value was Rs.10,000/-. Unless there is a clear proof that purchase of gold ornament was subsequent to receipt of money by Gulab Bai, it would not constitute any

incriminating evidence either against Gulab Bai or against Lekhu Prasad.

19. Prosecution case that Gulab Bai paid Rs.50,000/- is said to be proved from the other set of evidence which forms part of the extra judicial confession given by the appellant by Lekhu Prasad to Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9). According to the prosecution, these witnesses have deposed in the Court that the appellant – Lekhu Prasad had confessed before Surajbai (PW3) – mother of Ramkumar (the deceased) that upon being asked by his cousin-Gulab Bai, he killed Ramkumar. Similar extra judicial confession is said to be given by the appellant – Lekhu Prasad to other witnesses.

20. Therefore, in order to come to the conclusion that Gulab Bai paid Rs.50,000/- to the appellant – Lekhu Prasad under a contract of killing her husband, the extra judicial confession itself is required to be proved beyond reasonable doubt.

21. In the present case, the dead body of Ramkumar was found in an open place in a forest on 16/01/2009 which was reported in the police station by Sahni Sidar (PW13) on which, morgue intimation in Ex.P/16 was recorded. This is what has been stated by this witness as also by the investigating officer (PW18). There is also an evidence that the dead body was sent for post mortem and after post mortem, it was buried and then again exhumed for the purpose of identification of dead body by Suraj Bai (PW3)- mother of the deceased and Sheshnath (PW6) – brother of the deceased on 17/01/2009. Even according to the prosecution, till that time, it was not known by anybody as to who had killed Ramkumar. According to Surajbai (PW3), after she returned to her own village -Kochi upon exhumation and identification of dead body of her son- Ramkumar, 4-5 days thereafter, Baramlal came and informed that her son was taken to Hadakhancha forest by

Lekhu Prasad and administered poison and murdered. That means, on and around 22nd and 23rd of January, 2009, involvement of appellant – Lekhu Prasad was disclosed to Surajbai (PW3).

It is relevant to note that this witness has not stated regarding any extra judicial confession given by the appellant – Lekhu Prasad to her but in her cross-examination, she comes out with such statement that Lekhu Prasad had requested her to save him as he killed his brother-in-law, for which, he was paid Rs.1 lakh by Gulab Bai. However, there is complete improvement upon her diary statement (Ex.D/1) as elicited in her Court statement. We find that no such statement of extra judicial confession given by appellant – Lekhu Prasad was mentioned in diary statement of this witness.

According to this witness, Gulab Bai had given Rs.1 lakh to Lekhu Prasad whereas the prosecution case is that Gulab Bai gave Rs.50,000/- to Lekhu Prasad. However, there is serious doubt cast on the statement of this witness that the appellant – Lekhu Prasad had given extra judicial confession before her of having committed murder of Ramkumar, on the abetment of Gulab Bai upon receipt of Rs.50,000/- or Rs.1 lakh because she never reported this matter to the police. The natural conduct of this witness would have been to immediately take steps and to inform the police regarding involvement of Lekhu Prasad. Moreover, so-called extra judicial confession made by Lekhu Prasad to her has been stated before the Court for the first time and there is complete omission of the fact in her diary statement. The other circumstance is that it is the mother of the deceased, who is claiming that the appellant – Lekhu Prasad had made extra judicial confession before her. Therefore, her evidence of extra judicial confession given by the appellant – Lekhu Prasad to her is highly doubtful.

22. Sheshnath (PW6)- brother of the deceased has deposed in his evidence that Baramlal had came to their house and informed them regarding involvement of the appellant–Lekhu Prasad in the alleged commission of offence of murder of

Ramkumar. According to him, Baramlal had come to his house more than once. According to him, after Baramlal disclosed the said incident, they had gone to police station but there is no evidence led by the prosecution that at the instance of Sheshnath, immediately after disclosure of the incident to him by Baramlal, report was lodged. According to the evidence of Surajbai (PW3), disclosure was given by Baramlal on and around 22nd and 23rd of January, 2009. According to Sheshnath (PW6), Baramlal had come to their house in village - Kosir, 2 – 3 days after exhumation of dead body i.e. on 18th, 19th or 20th . Therefore, according to this witness also, Baramlal had disclosed the incident immediately after 17th of January. Though, this witness states that his mother had lodged report in police station – Baramkela on the next day, the prosecution has not come out with any evidence of lodging of the said report on the next day i.e. around 25/01/2009. When both these witness i.e. the mother and brother of the deceased had come to know, according to them, when informed by Baramlal regarding involvement, why they did not report to the police immediately, raises serious doubt. Moreover, according to Sheshnath (PW6), he met with Lekhu Prasad in police station – Baramkela for the first time and there is no clear and specific evidence of this witness of appellant – Lekhu Prasad having given extra judicial confession before him. This witness had lodged FIR only on 02/02/2009 and on this day, for the first time, he disclosed regarding extra judicial confession given by the appellant – Lekhu Prasad to him. According to him, when he was going to lodge report, appellant – Lekhu Prasad met him in Sarangarh Bus Stand, where he confessed before this witness that he had killed his brother. This evidence is not at all reliable firstly because even according to this witness, involvement of Lekhu Prasad had come to his notice firstly upon disclosure given by Baramlal within three days of identification of dead body i.e. on or before 24/01/2009 but thereafter, he kept mum and did not report the matter to the police. It is not that he came to know about involvement of Lekhu Prasad only on the basis of extra judicial confession made before him by Lekhu Prasad when he met him in Sarangarh police station.

23. Kamlesh Chandra (PW8) and Harihar Prasad (PW9) who are said to have accompanied Sheshnath (PW6) up to police station and who also claim to be present in the house of Sheshnath when Baramlal had come to their house and disclosed involvement of Lekhu Prasad in the presence of Sheshnath and his mother Surajbai, have also stated that they came to know that Lekhu Prasad was arrested by police of police station – Baramkela and upon receiving the information, they had gone to Baramkela. Though these witnesses also state that when Sheshnath met with appellant – Lekhu Prasad in Sarangarh Bus Stand, Lekhu Prasad confessed commission of offence, their evidence clearly show that they met Lekhu Prasad in police station – Baramkela only and not before that and it is wholly improbable that the accused – Lekhu Prasad would meet them while Sheshnath was going to police station to confess before them regarding commission of offence. This evidence of extra judicial confession made by the appellant – Lekhu Prasad to these witnesses, therefore appears to be highly doubtful, particularly when all of them claimed to have known regarding involvement on the basis of extra judicial confession made by Baramlal long back and despite that, none of them approaching police to inform involvement of Lekhu Prasad.

24. It would thus be found that the entire prosecution evidence with regard to extra judicial confession given by Lekhu Prasad to Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) is highly unreliable and not worthy of credence and more appears to be an afterthought story. It has come on record that Baramlal was taken into custody to police station – Sarangarh and was produced before jurisdictional Magistrate where his confessional statement under Section 164 CrPC was recorded on 20/01/2019. It would thus appear that after recording of statement of Baramlal on 20/01/2019 before the Magistrate, it became open and when this fact in all probability came to the notice

of family members of the deceased – Ramkumar, his brother – Sheshnath (PW6) lodged report in the police station on 02/02/2009, with a story of extra judicial confession given by Baramlal and by appellant – Lekhu Prasad for the first time.

25. The prosecution case of Baramlal having made extra judicial confession before Lekhu Prasad to Surajbai (PW3), Sheshnath (PW6), Kamlesh Chandra (PW8) and Harihar Prasad (PW9) is also highly doubtful for the same reason that if Baramlal had already given extra judicial confession, soon after exhumation of dead body of Ramkumar Sharma, which according to Surajbai (PW3) and Sheshnath (PW6) was given within 4 -5 days of exhumation of the body i.e. on and around 22nd and 23rd January, 2009, even then, no report was lodged in the police station. Apparently, the evidence of extra judicial confession given by Baramlal also appears to be highly doubtful and what appears to be more probable is that when Baramlal gave confessional statement before the Magistrate upon being produced by Sarangarh Police Officers in connection with another incident of murder of a child Yogesh, allegedly by Lekhu Prasad, which, later on, came to the notice of family members of Ramkumar and police of Police Station – Baramkela that report was lodged in police station – Baramkela on 02/02/2009 by Sheshnath– brother of the deceased (Ramkumar) that his brother was murdered by appellant – Lekhu Prasad. Thus, viewed from any angle, the entire evidence of extra judicial confession is extremely doubtful.

26. It is well settled legal position that extra judicial confession is otherwise a weak circumstantial evidence and which must receive sufficient corroboration before it could be made a basis to bring home the guilt of the accused. In the case of **Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259**, it was held by Their Lordships in the Supreme Court that the 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. It was further observed that the courts generally look for independent reliable corroboration before placing any reliance upon an extra judicial confession.

27. As far as, recovery of bottle said to be containing poison from the spot where the dead body was found, on the disclosure statement of the appellant – Lekhu Prasad is concerned, we find that the prosecution case in this regard is completely concocted. In the mere intimation (Ex.P/16) lodged by Sahni Sidar (PW13), it has been clearly mentioned that Sahni Sidar (kotwar of village) disclosed that when he reached the spot, dead body of a male was seen and at a distance of about 15 ft., a coat, cotton shoes and a bottle of insecticide (Zendo Hyper) was found lying open and there were vomits seen on the spot on which, large number of flies were lying dead. This clearly shows that on 16/01/2009 itself, bottle said to be containing poison was seen at the spot where dead body was lying. Not only this, even according to the prosecution, bottle of insecticide namely Zendo Hyper was already seized from the spot on 16/01/2009 as would be clear from seizure memo (Ex.P/20) proved by investigating officer – Amreshwar Singh (PW18) and seizure witnesses - Sahni Sidar (PW13) and Jageshwar Sahu (PW14). It is thus more than clear that the alleged recovery of bottle of poison from the spot at the instance of the appellant – Lekhu Prasad on his disclosure statement, is completely false and concocted and it does not constitute an incriminating circumstance against the appellant – Lekhu Prasad.

28. Though, much insistence was given on statement under Section 164 CrPC, confessional statement of Baramlal before the Magistrate upon being produced before him by the police of police station – Sarangarh on 20/01/2009, in our opinion, the prosecution case does not get strengthened from the same. In order to ascertain legal position as to when confessional statement of the accused

could be used against other co-accused, to what extent and at which stage, is relevant to examine relevant provision of law contained in Section 30 of the Evidence Act, which is extracted as below -

“30. Consideration of proved confession affecting person making it and others jointly under trial for same offence -

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.”

Thus, in order to attract the provisions of Section 30 of the Evidence Act, what is necessary is that more than one person are tried jointly for the same offence. It would, thus, be seen that mere joint trial is not sufficient. Therefore, joint trial should be for the same offence. In the present case, while the appellant – Lekhu Prasad was tried for commission of offence under Section 302 IPC, 201 IPC and Gulab Bai was tried for commission of offence under Section 302/34 IPC as also under Section 109 IPC, appellant – Baramlal was tried only for commission of offence under Section 201 IPC and not under Section 302 IPC. Therefore, one of the essential requirement to attract application of Section 30 of the Evidence Act is that there should be a joint trial for the same offence, which is not fulfilled.

29. Further, we find that confessional statement of Baramlal is said to have been recorded upon he being produced by the police of police station – Sarangarh before the Magistrate. A copy of the same was produced during trial and was admitted in evidence as Ex.P/34. In the case of **Veera Ibrahim v. The State of Maharashtra, AIR 1976 SC 1167**, it was held that the statement in order to amount to a “confession” must either admit in terms, the offence or at any rate, substantially all the facts which constitute the offence.

“15. In the present case, facts (i), (iv) and (vi) have not been established. Firstly, the statement in question is not a

“confession” within the contemplation of Section 24. it is now well – settled that a statement in order to amount to a “confession” must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, howsoever grave, is not by itself a confession. A statement which contains an exculpatory assertion of some fact, which if true, would negative the offence alleged, cannot amount to a confession. (see *Pakala Narayana v. Emperor*, 66 Ind App 66 = (AIR 1939 PC 47 = 40 Cri LJ 364); *Palvinder Kaur v. State of Punjab*, 1953 SCR 94 = (AIR 1952 SC 354 = 1953 Cri LJ 154); *Om Parkash v. State of U.P.*, AIR 1960 SC 409 = (1960 Cri LJ 514).”

30. After going through the contents of statement under Section 164 CrPC given by appellant - Baramlal, a part of it is to the effect that even though he came to know the fact that Ramkumar was murdered, he did not disclose the incident immediately to anybody because Lekhu Prasad had assured him and paid Rs.10,000/- which was received by him. The facts stated in this part of the statement of Baramlal constitute an offence punishable under Section 201 IPC. Therefore, it could be treated as confessional statement only when it is recorded in the manner prescribed under Section 164 CrPC. Section 164 CrPC provides the manner in which the confessional statement shall be recorded. The relevant part of the aforesaid provision is extracted herein below -

“164. Recording of confessions and statements – (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

[Provided] that any confession or statement made under this subsection may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]

(2). The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

3. XXXXXXXXXXXX

4. Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate”.

31. A perusal of the aforesaid provision clearly shows that before recording any such confession, the Magistrate is required to explain to the person making it that he is not bound to make a confession and if he does so, it may be used as an evidence against him and further that the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to make believe that it is being made voluntarily.

Moreover, the law requires the confession to be recorded in the manner prescribed under Section 281 for recording the examination of an accused and

shall be signed by the person making the confession and further that the Magistrate shall make a memorandum at the foot of such record to the following effect -

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate”.

32. The statement of the appellant – Baramlal does not at all confirm to aforesaid mandatory requirement of law as stated therein. Therefore, the said statement cannot be used either as confession of Baramlal nor can be used against Gulab Bai and Lekhu Prasad as confessional statement of co-accused – Baramlal as provided under Section 30 of the Evidence Act.

It is also interesting to note that Baramlal in his examination under Section 313 CrPC has denied giving any confessional statement.

33. Lastly, even if for the sake of argument, it is accepted that Baramlal had given confessional statement under Section 164 CrPC, it cannot be treated as substantive piece of evidence and it can be used for the purpose of lending assurance to the Court itself, with regard to proof of guilt of the accused on the basis of other independent evidence led and proved by the prosecution. In this regard, it is relevant to refer to a recent judicial pronouncement of the Supreme Court in the case of **Surinder Kumar Khanna** (supra), wherein Their Lordships in the Supreme Court took into consideration well settled legal position and relied upon decision of the Privy Council and the Supreme Court to hold that such statement can be used for the limited purpose to lend assurance to other evidence

of co-accused. It was held -

11. In **Kashmira Singh v. State of Madhya Pradesh, (1952) SCR 526** this Court relied upon the decision of the Privy Council in **Bhuboni Sahu v. The King, (1949) 76 Indian Appeal 147 at 155** and laid down as under:

“Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in **Bhuboni Sahu v. The King** “It does not indeed come within the definition of" 'evidence' contained in section 3 of the Evidence Act., It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross- examination." Their Lordships also point out that it is "obviously evidence of a very weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the judge refuses to believe him except in so far as he is corroborated ?

In our opinion, the matter was put succinctly by Sir 'Lawrence Jenkins in **Emperor v. Lalit**

Mohan Chuckerbutty, [1911] I.L.R. 38 Cal. 559 at 588 where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused "or, to put it in another way, as Reilly J. did in **In re Periyaswami Moopan**, [1931] I.L.R. 54 Mad. 75 at 77

"the provision goes no further than this--where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence."

Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

12. The law laid down in **Kashmira Singh** (supra) was approved by a Constitution Bench of this Court in **Hari Charan Kurmi and Jogia Hajam v. State of Bihar**, (1964) 6 SCR 623 at 631-633 wherein it was observed:

"As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a

confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in **Emperor v. Lalit Mohan Chuckerburty** a confession can only be used to “lend assurance to other evidence against a co-accused”. In **re Periyaswami Moopan Reilly. J.**, observed that the provision of Section 30 goes not further than this: “where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Section 30 may be thrown into the scale as an additional reason for believing that evidence”. In **Bhuboni Sahu v. King** the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that “a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of “evidence” contained in Section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other

evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence". It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of [Section 30](#), the fact remains that it is not evidence as defined by [Section 3](#) of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in [Section 30](#). The same view has been expressed by this Court in *Kashmira Singh v. State of Madhya Pradesh* where the decision of the Privy Council in *Bhuboni Sahu* case has been cited with approval."

13. The law so laid down has always been followed by this Court except in cases where there is a specific provision in law making such confession of a co-accused admissible against another accused. For example : *State v. Nalini* (1999) 5 SCC 253, paras 424 and 704.

14. In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus

left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any other offence.”

34. In the result, we find that the entire case of the prosecution against the appellants could not bring home the guilt beyond reasonable doubt. All the appellants are therefore entitled to be given benefit of doubt. The appeals of appellants namely Lekhu Prasad, Smt. Gulab Bai and Baramlal Bareth are allowed and they are acquitted of the charges. They all be set free forthwith.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge