

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.273 OF 2016

Kailash s/o. Shankar Navekar,
Age : 35 years, Occ. Labour,
r/o. Shahenshah Nagar, Beed ..Appellant

Vs.

The State of Maharashtra, ..Respondents

Mr.R.A.Jaiswal, Advocate for appellant

Mr.R.V.Dasalkar, APP for respondent

CORAM : S.S. SHINDE AND

R.G. AVACHAT, JJ.

RESERVED ON : FEBRUARY 05, 2019

PRONOUNCED ON : FEBRUARY 20, 2019

JUDGMENT (PER – R.G. AVACHAT, J.):

The challenge in this appeal is to the judgment and order dated 07.12.2012 passed by learned Additional Sessions Judge, Udgir in Sessions Case, being Case No. 6 of 2016. By the impugned judgment and order, the appellant herein has been convicted for the offences punishable under Sections 302 and 376 of the Indian Penal Code ("I.P.C.", for short). He has been

sentenced to suffer rigorous imprisonment for life with direction to pay fine of Rs.3,000/- each, in default of payment of fine, has been directed to undergo rigorous imprisonment for one year. The appellant has been acquitted of the offence punishable under Section 201 of the I.P.C.

One more accused was charged and tried together with the appellant. He has been acquitted of all the charges. The State has not preferred any appeal against acquittal.

2. This is a jail appeal. Learned Counsel Mr.R.A.Jaiswal was, therefore, appointed to represent the cause of the appellant herein.

3. We have heard learned Counsel appearing on behalf of the appellant and learned APP representing the State. The only issue canvassed before us is, whether conviction can be based on extra-judicial confession. In the present case, the alleged extra-judicial confession is in the nature of writings made

by the appellant in a note-book that was found at the scene of the offence. On arrest of the appellant, his specimen hand-writings were obtained. It also appears that there was one piece of paper containing the name of the appellant. It was said to be a natural hand-writing of the appellant. The Investigating Officer submitted the questioned hand-writings (extra-judicial confession Exh.128) and the natural hand-writings to the hand-writing expert for his examination and report. The hand-writing expert did his job and gave opinion to the effect that all the hand-writings are of one and the same person i.e. the appellant herein.

4. Mr.Jaiswal, learned Counsel for the appellant, would submit that the case was based on circumstantial evidence. The Trial Court has convicted the appellant on the basis of extra-judicial confession. According to learned Counsel, the opinion of the hand-writing expert alone cannot be made basis for convicting the appellant. It can

only be relied upon when supported by other items of internal and external evidence. Learned Counsel made submissions on the basis of the judgment of the Hon'ble Supreme Court in the case of **Alamgir Vs. State (NCT, Delhi), AIR 2003 SC 282**. Learned Counsel, therefore, urged for allowing the appeal.

5. Learned APP would, on the other hand, submit that the Trial Court has passed a well-reasoned judgment. It has also relied upon the *modus-operendi* in committing similar offences by the appellant. According to learned APP, interference with the impugned judgment and order, is unwarranted.

6. This case is based on circumstantial evidence. In the case of **Alamgir** (Supra), the Hon'ble Supreme Court observed thus :

"21. The word of caution introduced in the judgment of this Court about five decades ago in that direction however still stands as an acceptable guide. This Court in Hanumant Govind

Nargundkar & Anr. v. State of Madhya Pradesh (AIR 1952 SC 343) stated:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

7. To substantiate Charge, the prosecution examined fifteen witnesses and tendered in evidence number of documents. In this case, the victim was ten years old. On 09.05.2006, by 06.00 in the morning, the dead body of the victim Seema (name changed) was found in agricultural field situate in Malkapur Shivar of village Udgir. PW 1 – Bhimrao, Police Patil of village Malkapur, therefore, filed his report (Exh.84) in that regard, with Udgir Police Station. Based on the report, inquest panchnama (Exh.86) was drawn in the presence of PW 2 – Champat besides spot panchnama (Exh.87). The dead body of Seema was subjected to post-mortem (p.m.). The p.m. report (Exh.101) indicates that the victim died of neurological shock due to forcible and violent sexual assault. The defence admitted the p.m. report.

8. PW 4 – Ambadas, maternal uncle of the deceased, therefore, lodged the F.I.R. (Exh.94), alleging therein that some unknown person deflowered his niece and then committed her murder. PW 4 –

Ambadas gave his evidence on the lines of the allegations in the F.I.R. His evidence does not lead us anywhere. PW 5 – Ramu and PW 8 – Govindrao were examined so as to prove the deceased to have last seen in the company of the appellant. Both these witnesses did not stand by the prosecution.

9. It is the case of the prosecution that similar type of offences namely, rape and murder of minor girls took place at Ahmednagar, Beed, Nashik, Udgir and Parbhani. The appellant had been arrested in one of such cases by Police Officer, Beed Police Station. There was similar crime registered with Kotwali Police Station, Parbhani. It was C.R. No.82/2006. PW 9 – Shrirang (P.I., L.C.B.) was entrusted with the investigation of the said crime. It is in his evidence that during enquiry of accidental death (A.D.), A.P.I. Yashwant Jadhav prepared panchnama of the scene of offence on 16.07.2006. It was a case of rape and murder of a six years old girl. From the scene of offence of the

said crime, a school bag, school books, umbrella, one diary and note books, etc. were seized. On one of the pages of the note-book, the following matter was appearing :-

“(अंजली)

मय - 786 हु मैने बंबई बॉम फोडा

और परली मे 1 महीने मे थरमल

थरमल उडाउंगा - मैय आगा खान

हु मैने - उदगीर मे - उमा विकास कुलकर्णी का खुन कीया है

और - अहमदपुर मे एक लडकी मारी

बीड - मे हीना - का खुन कीया था

007 (फना) हम पुरे भारत को खत्म कर देगे”

“ अंजली को हमने मारा

बंबई मे जो लोकल ट्रेन मे

बम धमाके हुवे वो हमने करवा ये

और अब मराठवाड की बारी है

786 - सुभान अल्ला

हमारी ईच्चा पुरी हो ”

10. It appears from the Record and Proceedings that involvement of two persons, including the appellant, in the offence in question, surfaced. The sample hand-writings of the appellant were obtained.

There was one more paper allegedly containing natural hand-writing of the appellant. It was tendered before the Investigating Officer by PW 13 – Shivaji. It is further not known as to how the said paper came into being. Be that as it may, the written extra-judicial confession, the sample hand-writings, and the natural hand-writing of the appellant were examined by PW 15 – Sanjay, hand-writing expert. It is in his evidence that he was serving with Crime Investigation Department (C.I.D.) as Assistant State Examiner of Documents. On 04.09.2006, his office had received four sealed packets from the Superintendent of Police, Parbhani, with a request to examine the hand-writing and give opinion. It is further in his evidence that on 25.09.2006, he examined all these documents (Exhs.114 to 119 and 128) by use of magnifying devices and came to the conclusion that the questioned hand-writing (extra-judicial confession) was that of one, of which the sample hand-writing and natural hand-writing were. In short,

the hand-writing examined by PW 15 – Sanjay were found to be that of one and the same person. According to the prosecution, it was of none other than that of the appellant. PW 15 – Sanjay has also given his reasons for opinion (Exh.152). There is evidence to indicate that the note-book, which was containing extra-judicial confession, was bought by PW 13 – Shivaji at the instance of his employer (father of the victim). He was examined in this case. It is in his evidence that he had bought the note-book for Rs.5/-. The note-book had pink color border. The note-book was bought for the daughter of his employer (victim in C.R.82 of 2006). Two days after the death of Anita (name changed), police had come to him with the note-book (Exh.128). He identified the note-book as one he had bought. This piece of evidence undoubtedly indicates that the Investigating Officer had not sealed the note-book soon after it was seized.

11. It is reiterated that the question is, whether the conviction is sustainable on the extra-judicial confession.

CONFESSION :

The word 'confession' is not defined in the Indian Evidence Act. Whether statements amount to confession depends upon facts related to them and not upon opinion of men making statements. It includes both oral and written statement. Communication to another is not an essential component to constitute a statement. Confession is statement made by accused admitting in terms an offence or almost all the facts that constitute an offence. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.

Let us analyze the statement to ascertain, whether it constitutes confession. On the cover page of the note-book containing the alleged extra-

judicial confession, it has been mentioned as under :-

भारत मुरदा बाद	786 आगा खान
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12. The alleged confessional statements suggest that the person making the statements confessed to have murdered Anita (victim in C.R. No.82 of 2016). He also owns responsibility of the bomb-blasts that took place in local trains in Mumbai. The further statements suggest that Marathwada would be their next target after Bombay blasts. The author of the statements appears to have made the statements in representative capacity of some group. The relevant matter for us is "..... मैंने उदगीर में सीमा का खून किया है".

The author claimed to have murdered Seema, at Udgir. He also claimed to have murdered one girl at Ahmedpur and one in Beed.

13. If we peruse the entire confessional statement, the same is silent as to commission of the offence of rape. It, therefore, cannot be said that the confessor confessed to commission of offence of rape. As already stated above, Seema died of forcible and violent sexual assault. This rules out intentional act of homicide. The Trial Court attributed the aspect of knowledge to the appellant. In view of the Trial Court, the act was committed in such a way that the appellant had knowledge that by doing so, the victim would no longer survive. In our view, it would be a far fetched inference. Be that as it may, the question is whether the impugned order of conviction is sustainable based on this piece of evidence.

14. True, in the case of **Kavita Vs. State of Tamil Nadu, AIR 1998 SC 2473**, the Hon'ble Supreme Court has observed that conviction can be based on extra-judicial confession but it is well settled that

in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the witness to whom it is made. It may not be necessary that the actual words used by the accused must be given by the witness but it is for the Court to decide on the acceptability of the evidence having regard to the credibility of the witnesses.

15. The appellant/person making statement did not disclose his identity in the aforesaid confessional statement. He made statements in the capacity as representative of some organisation. The statements do not contain confession as to commission of rape and even murder as well. On arrest of the appellant and co-accused, their blood samples were obtained. Undergarments and Midi (skirt) of the victim were also seized. These two articles borne some stains. Blood samples of the appellant, co-accused and those two articles had been examined by

the expert for obtaining DNA profile. The Examiner did not get DNA profiling. The report (Exh.153) in that regards reads thus :-

" No DNA profile is obtained from stains on Exhibits 3 and 4.

Exhibits 1 and 2 are control blood samples."

16. Admittedly, the appellant has not made extra-judicial confession orally. He has also not disclosed his identity in writing in the nature of extra-judicial confession. The prosecution and the Trial Court has connected the appellant with the authorship of the said confessional statements only on the basis of hand-writing expert's opinion.

17. In **Magan Bihari Lal Vs. The State of Punjab, 1977 AIR 1091**, the Apex Court observed – it would be extremely hazardous to condemn the appellant/accused merely on the strength of opinion evidence of a handwriting expert. It is

unsafe to base a conviction solely on expert's opinion without substantial corroboration. This rule has been universally accepted and also became the rule of law. It may be relied upon when supported by other items of internal and external evidence. In the case of **Alamgir** (Supra), the Hon'ble Supreme Court observed thus :-

“ This Court again pointed out in *Ishwari Prasad Mishra v. Mohammad Isa*, (AIR 1963 SC 1728), that expert evidence of handwriting can never be conclusive because it is, after all, opinion evidence, and this view was reiterated in *Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee* (AIR 1964 SC 529), where it was pointed out by this court that expert evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence and before acting on such evidence, it would be desirable to consider whether it is corroborated either by clear direct evidence or by circumstantial evidence. This Court had again occasion to consider the evidentiary value of expert opinion in

regard to handwriting in *Fakhruddin v. State of M.P.* (AIR 1967 SC 1326) and it uttered a note of caution pointing out that it would be risky to found a conviction solely on the evidence of a handwriting expert and before acting upon such evidence, the court must always try to see whether it is corroborated by other evidence, direct or circumstantial. It is interesting to note that the same view is also echoed in the judgments of English and American courts. Vide *Gurney v. Langlands* (1822, 5 B and Ald 330) and *Matter of Alfred Foster's Will* (34 Mich 21). The Supreme Court of Michigan pointed out in the last mentioned case :

Every one knows how very unsafe it is to rely upon any one's opinion considering the niceties of penmanship opinions are necessarily received, and may be valuable, but at best this kind of evidence is a necessary evil.

We need not subscribe to the extreme view expressed by the Supreme Court of Michigan, but there can be no doubt that this type of evidence, being opinion evidence is by its very nature, weak and

infirm and cannot of itself form the basis for a conviction. We must, therefore, try to see whether, in the present case, there is, apart from the evidence of the handwriting expert B. Lal, any other evidence connecting the appellant with the offence.

18. In paragraph 16 of the judgment in the case of Alamgir (supra), it is further observed that :-

16. Significantly, this Court in 1980 CriLJ 396 (SC) in no uncertain terms observed that the hazard in acceptance of opinion of an expert is not because it is unreliable evidence, but because human judgment is fallible. Needless to record that the signs of identification of handwriting have attained more or less a state of perfection and the risk of an incorrect opinion is practically non-existent. This Court went on further to record that doubting the opinion of a handwriting expert ought to be a far cry and insistence upon further corroboration as an invariable rule does not seem to be a justifiable conclusion. In continuation of the above noted principle,

this Court went on to further examine as regards judicial precedence and in that vein stated in paragraph 7 of the Report as below:

"7. Apart from principle, let us examine if precedent justify invariable insistence on corroboration. We have referred to Phipson on Evidence, Cross on Evidence, Roscoe on Criminal Evidence, Archibald on Criminal Pleadings, Evidence and Practice and Halsbury's Laws of England but we were unable to find a single sentence hinting at such a rule. We may now refer to some of the decisions of this Court. In Ram Chandra and another v. State of Uttar Pradesh, Jagannadhadas, J. observed : "It may be that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for conviction" (emphasis ours). "May" and "normally" make our point about the absence of an inflexible rule. In Ishwari Prasad Misra v. Mohammad Isa (AIR 1963 SC 1728) Gajendragadkar, J. observed :

"Evidence given by experts can never be conclusive, because after all it is opinion-evidence", a statement which carries us nowhere on the question now under consideration.

19. The facts in the case of **Murari Lal** referred in the case of **Alamgir** (supra), undoubtedly indicate that there were other circumstances against the appellant therein. The other important circumstance against the appellant therein was recovery of deceased's watch at the appellant's instance.

20. In the present case, there is no any other circumstance (corroborative in nature) to lend assurance as to authorship of extra-judicial confession and truthfulness thereof.

21. The Trial Court has also relied upon the judgments in Sessions Cases wherein the appellant has been convicted, which are as under :-

Sessions Case No.	Sections	Decided by
8 of 2007 (old): 11 of 2011	302, 376 and 201 of I.P.C.	Addl. Sessions Judge, Ahmednagar
100 of 2006	376, 363 and 506 of I.P.C.	Addl. Sessions Judge, Beed
04 of 2007	302, 363, 364, 376 and 201 of I.P.C.	Sessions Judge, Parbhani

Admittedly, those judgments had not attained finality when came to be relied upon. In one of the similar cases, the appellant has been acquitted by the Court of learned Additional Sessions Judge, Nashik. In two such cases, there were two different co-accused with the appellant. The Trial Court relied upon the judgment in those cases on the strength of Section 14 of the Indian Evidence Act. Section 14 of the Indian Evidence Act, reads thus :-

“14. Facts showing existence of state of mind, or of body or bodily feeling.—

Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or

good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

[Explanation 1.— A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.— But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.]”

22. Appeals against conviction of the appellant in other cases are pending before this Court and the Hon'ble Supreme Court.

23. The extra-judicial confession is a weak piece of evidence. It is doubtful whether the alleged statement is in fact confessional in nature. Moreover, even if the same assumed to be confessional, the same has been proved only on the

basis of hand-writing expert's opinion. There is no any other evidence pointing towards guilt of the appellant. It would, therefore, not be in the fitness of things to rely the same to hold the appellant guilty of the offence of rape and murder. The record indicates that one person had been arrested on suspicion. He remained behind the bars for 90 days. Since no charge-sheet was filed against him, he was granted bail. That person was not an accused in this case. In this factual background, we are of the view that the Trial Court has erred in convicting the appellant. Since we are not in agreement with the findings recorded by the Trial Court, the appeal deserves to be allowed.

24. Hence, the following order :-

- (i) The Criminal Appeal is allowed.
- (ii) The impugned order dated 07.12.2012 passed by learned Addl. Sessions Judge, Udgir, in Sessions Case No.6 of 2007, convicting the appellant for the offences punishable under

Sections 376(f) and 302 of the Indian Penal Code, is set aside.

- (iii) The appellant is acquitted of the offences punishable under Sections 376(f) and 302 of the Indian Penal Code.
- (iv) Amount of fine, if paid, be refunded to the appellant.
- (v) The appellant be set at liberty, if not required in any other case.
- (vi) Fees of Mr.R.A.Jaiswal, learned Counsel, who was appointed to represent the appellant in this appeal, is quantified at Rs.8,000/- (Rs.Eight Thousand).

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]