

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 25/11/2019****Judgment delivered on : 28/01/2020****CRA No. 749 of 2013**

1. Topsingh S/o Bihari Lal Aged About 22 Years R/o. Village Devarbija, P.S. Bemetara, Distt. Bemetara C.G.
2. Ashok Kumar S/o Sonsay Nirmalkar Aged About 23 Years R/o. Village Kechhawai, P.S. Bemetara, Distt. Bemetara C.G.
3. Lalu Patel S/o Kumhala Aged About 22 Years Village Hadgaon, P.S. Bemetara, Distt. Bemetara C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through P.S. Bemetara, Distt. Bemetara C.G.

---- Respondent**ACQA No. 31 of 2014**

- State Of Chhattisgarh Through SHO, PS Bemetara, Distt. Bemetara C.G.

---- Appellant**Versus**

1. Top Sing S/o Bihari Lal Aged About 22 Years R/o Village Devarbija, PS Bemetara, Distt. Bemetara C.G.
2. Ashok Kumar S/o Sonsai Nirmalkar Aged About 23 Years R/o Village Kechvai, PS Bemetara, Distt. Bemetara C.G.
3. Lalu Patel S/o Kumhla Patel Aged About 22 Years
4. Kumhla Patel S/o Manaram Patel Aged About 57 Years

Both R/o Village Hadgaon, PS Bemetara, Distt. Bemetara C.G.

---- Respondents

For Accused/Appellants	:	Shri B.P. Singh, Advocate
For Respondent/State	:	Smt. Madhunisha Singh, P.L.

Hon'ble Shri Prashant Kumar Mishra, &

Hon'ble Shri Gautam Chourdiya, JJ

C A V JUDGMENT

Per Gautam Chourdiya, J

01. Since both these appeals arise out of the judgment dated 25.7.2013 passed by Additional Sessions Judge, Bemetara in ST No.62/2011, they are being disposed of by this common judgment.

02. Cr.A.No.749/2013 has been preferred by the accused/appellants-Topsingh, Ashok Kumar & Lalu Patel challenging the legality and validity of the judgment of the trial Court convicting each of them under Section 302/34 of IPC and sentencing to undergo life imprisonment and fine of Rs.1000/- with default stipulation.

03. Acq. A. No.31/2014 has been filed by the State challenging the judgment of the trial Court to the extent it records acquittal of the respondents/accused persons of the charge under Section 120B/34 of IPC.

04. Facts, in brief, of the prosecution case are that accused Kumhala Patel & Lalu Patel had an old land dispute with Gulab Patel (since deceased) for which a civil suit was going on in the Court at Bemetara. As per FIR (Ex.P/1) lodged by PW-1 Someshwar Patel, younger brother of the deceased, on 25.7.2011 at about 15:30 hours on the same day at around 2 pm his brother Gulab Patel was returning from the Court at Bemetara on his red coloured motorcycle Pulsar bearing registration No.CG 07 LN 4058. At that time accused Lalu Patel along

with accused Ashok Niramalkar having hired vehicle Mahindra Max bearing registration No. CG 04B/4404 which was being driven by accused Top Singh, followed Gulab Patel and at the instance of accused Lalu Patel and Ashok Nirmalkar to kill Gulab Patel by running the vehicle over him, accused Top Singh dashed the motorcycle of Gulab Patel near Village-Kanteli, cremation ground and thereby with common intention committed murder of Gulab Patel. Based on this report, offence under Section 302/34 of IPC was registered against accused Lalu Patel, Ashok Nirmalkar and Top Singh.

05. During investigation, spot map Ex.P/2 was prepared by the Investigating Officer (PW-21 NK Sahu) and vide Ex.P/3 site plan was prepared by the Patwari (PW-10 Kamlesh Sharma). As per inquest report Ex.P/5 prepared in presence of witnesses, apart from other injuries on the person of the deceased, his neck was found cut. Thereafter, the dead body was sent for postmortem examination which was conducted on 25.7.2011 by PW-11 Dr. SK Sharma vide Ex.P/26 wherein he noticed following symptoms/injuries:

“Tongue protruded & caught hold between teeth, lacerated wound underneath upper limb 1” x ½” clotted blood present. Left eye medial angle dry clotted blood present. Cut throat wound nape of front of neck. Below the one ear lobule to other margins even. 8” x 4” wind pipe cut through below the hyoid cartilage. Cut wind pipe filled with clotted blood. All internal structures severed along with major vessels. Part of cervical vertebral column intact.

(2) *Abrasion – Back of right wrist 2” x ½” x 1” reddish superficial*

(3) *Abrasion – Back of left hand at base of index, middle & ring fingers (knuckles) each ½" x ½" dust present, base of thumb ½" x ½" & back of left hand wrist 1 ½" x ½".*

(4) *Multiple small pressure abrasions back of right forearm with no grazes.*

(5) *Abrasion left knee 1" x 1" reddish.*

(6) *Abrasion right cheek ¼" x ¼"*

(7) *Abrasion left shoulder back – 4" x ½" reddish*

(8) *Left eye closed, sub-conjunctival hemorrhage around cornea.*

In his opinion, the cause of death was cut throat injury and injury to vital structures with severe blood loss and shock, and that the death was homicidal in nature which occurred approximately 6 to 8 hours prior to postmortem.

06. From the place of incident, one red coloured Bajaj Pulsar motorcycle bearing No. CG 07 LN 4058 in damaged condition was seized vide Ex.P/7 Likewise, from the place of incident, one white coloured vehicle Mahendra Max bearing No. CG 04-B-4404 in damaged condition having blood stains and number plate smeared with mud, one knife kept in the said vehicle and two pieces of knife cover which were stained with blood were seized vide Ex.P/8. Plain and bloodstained soil were also seized under Ex.P/9. On being produced by accused Top Singh, his clothes worn at the time of incident i.e. one half shirt and one full pant stained with blood were

seized vide Ex.P/10 and one black coloured motorcycle Hero Honda bearing No. CG 07 LN 8464 stained with blood was seized vide Ex.P/11.

Pursuant to the memorandum of accused Lalu Patel vide Ex.P/13, one knife stained with blood was seized vide Ex.P/14 from the indicated place i.e. bridge near Sandi river. On being produced by accused Lalu Patel, one full T-shirt and one jeans, both stained with blood, which were worn by him at the time of incident, were seized vide Ex.P/15 and one Mobile Reliance L.G. bearing SIM No.9303810893 was seized vide Ex.P/16.

On being produced by accused Ashok Nirmalkar, one half shirt, one pant, both stained with blood, and one Mobile SigmaTel bearing double SIMs No.7869180280 and 7869168817 were seized vide Ex.P/17. Similarly, on being produced by accused Kumhala Patel, one full shirt worn at the time of incident stained with blood, one motorcycle Hero Honda CG Delux bearing No. CG 07 LY 9335 and one Mobile Nokia 1203 bearing SIM No.9977352267 were seized vide Ex.P/18. During investigation, call details of accused Kumhala Patel were also obtained vide Ex.P/42.

07. The seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur. As per FSL report Ex.P/47 blood was found on the Articles A, B, C, D, E1, E2, F1, F2, G, H1, H2, I1 & J i.e. plain & bloodstained soil, knife and its cover seized from spot, full pant & shirt of accused Top Singh, shirt & *gamchha* (towel) of deceased Gulab Patel; knife recovered from accused Lalu Patel; pant

& shirt seized from accused Lalu Patel; pant seized from accused Ashok Nirmalkar and shirt seized from accused Kumhala Patel. However, there is no serologist report confirming the origin of blood so found on the seized articles. During investigation, statements of the witnesses were recorded and it was found that PW-2 Krishna Sahu & PW-5 Purnanand Patel had last seen all the three accused Top Singh, Lalu Patel and Ashok Nirmalkar at the place of occurrence where Gulab Singh was lying in injured condition apart from both the vehicles Mahendra Max & motorcycle of the deceased lying there in damaged condition. Further, accused Top Singh is said to have made extrajudicial confession before PW-1 Someshwar Patel, PW-3 Chhatrapal Patel & PW-6 Manoj Saluja. After completion of usual investigation, charge sheet was filed against the accused persons under Sections 302, 120B read with 34 of IPC and Sections 39/192, 66/192 & 56/192 of the Motor Vehicles Act.

08. The trial Court framed charges under Sections 302/34 & 120B/34 of IPC against accused Top Singh, Lalu Patel & Ashok Kumar Nirmalkar whereas accused Kumhala Patel was charged only under Section 120B/34 of IPC for hatching criminal conspiracy with the above accused persons for committing murder of deceased Gulab Patel. The accused persons denied the charges and prayed for trial.

09. In order to prove its case, the prosecution examined as many as 22 witnesses. Statements of the accused persons were recorded under Section 313 of CrPC in which they denied the incriminating circumstances appearing against them in the prosecution case,

pleaded innocence and false implication. However, in their defence they examined Sevaram and Raghunath Netam as DW-1 and DW-2 respectively.

10. The trial Court after hearing counsel for the respective parties, considering the overall material available on record, by the impugned judgment while acquitting all the accused persons of the charge under Section 120B/34 of IPC, convicted and sentenced accused/appellants Top Singh, Lalu Patel & Ashok Nirmalkar under Section 302/34 of IPC as mentioned in para-2 of this judgment.

11. Learned counsel for the appellants submits as under:

- that no extrajudicial confession was made by accused Top Singh before PW-1 Someshwar Patel, PW-3 Chhatrapal Patel & PW-6 Manoj Saluja as alleged by the prosecution. Even if any such confessional statement is made by accused Top Singh, the same is not admissible in evidence for the reason that it was made in presence of police and as such, is hit by Sections 25 & 26 of the Evidence Act.
- that after the accident, accused Top Singh reached police station on 25.7.2011 and he was sent for medical examination vide Ex.D/10 which was on the same day conducted at 2 pm but by overwriting, the said time of 2 pm has been changed to 3 pm by the concerned doctor or any other person. At that time, accused Top Singh was in police custody as he was taken for medical examination by Head Constable No.177 Mandas Sahu (PW-12).

- that the so-called confessional statement is also not beyond reasonable doubt as the statements of PW-1 Someshwar Patel, PW-3 Chhatrapal Patel & PW-6 Manoj Saluja are contradictory to each other.
- that the evidence of PW-2 Krishna Sahu & PW-5 Purnanand Patel regarding appellants Top Singh, Lalu Patel and Ashok Nirmalkar being last seen with deceased Gulab Patel is not conclusive in nature because they have not stated that these appellants were last seen with Gulab Patel when he was alive. According to them, these appellants were seen at the spot where Gulab Patel was lying in injured condition and the vehicle were lying there in damaged condition.
- that PW-2 Krishna Sahu & PW-5 Purnanand Patel are chance witnesses. PW-2 Krishna Sahu was working as driver of deceased Gulab Patel prior to the incident and PW-5 Purnanand Patel is relative of the deceased. Presence of these witnesses at the spot is very doubtful. Further, their conduct after the incident is also doubtful and abnormal. If they had seen accused Top Singh, Lalu Patel and Ashok Nirmalkar at the place of occurrence, why they did not stop their vehicle while passing by the place of occurrence particularly when the deceased was well known to them and they also did not subsequently disclose the same to any of the villagers. They have also not stated the exact time of their arrival at the spot. Thus, considering the fact that they are interested witnesses, their conduct during the

occurrence and subsequent thereto, their evidence is not worth reliance.

- that the witnesses to the memorandum and seizure have not supported the prosecution case and further, though as per FSL report blood was found on the seized articles but there is no serologist report confirming origin of the blood, thereby connecting the seizure so made with the crime in question.
- that it is very doubtful as to who removed the dead body of Gulab Patel from the place of occurrence. The investigating officer has denied the fact that Top Singh was sent for medical examination by him. Therefore, fair and impartial investigation has not been done in this case.
- that admittedly there is 20 years old land dispute between the deceased and accused Kumhala & his son Lalu Patel but merely on that count, the accused persons cannot be held guilty for the reason that firstly during this long period no complaint was ever lodged by the deceased family against these accused persons regarding criminal intimation or assault etc. and secondly, the possibility of false implication of the accused persons by the family members of the deceased cannot be ruled out for grabbing the entire property. It has come in the evidence of wife of deceased namely PW-17 Tulsi Bai Patel in para-13 that after death of Gulab Patel, her brother-in-law (*Devar*) Someshwar Patel (PW-1) with her consent had filed an application before the

Tehsildar for mutation of land of Gulab Patel in his name. She has also stated in para-7 of her deposition that Someshwar Patel (PW-1) had also engaged a counsel in this case of his own.

- that accused Top Singh and Ashok had nothing to do with deceased Gulab Patel or accused Kumhala Patel. No evidence is adduced by the prosecution against accused Kumhala regarding hatching of criminal conspiracy for committing murder of Gulab Patel with the other accused persons. Thus the main ingredient for bringing home the charge under Section 120B of IPC is missing in this case. There was no pre-meeting of mind or pre-planning amongst the accused persons to commit murder of Gulab Patel. Therefore, the learned trial Court has rightly acquitted all the accused persons of the charge under Section 120B/34 of IPC, and wrongly held Top Singh, Lalu Patel & Ashok Nirmalkar guilty under Section 302/34 of IPC for want of any cogent and clinching evidence.
- that offence under Section 302 of IPC is a heinous offence and therefore, heavy burden lies upon the prosecution to prove its case beyond all reasonable doubt but the prosecution has utterly failed to discharge the said burden by adducing cogent and reliance evidence. From the overall evidence adduced by the prosecution, two views are possible and it is a well settled principle of criminal jurisprudence that in such an eventuality, the view favouring the accused has to be adopted.

Reliance has been placed on the decisions in the matters of

Navaneethakrishnan Vs. The State by Inspector of Police, 2018 SAR (Criminal) 1012, Badam Singh Vs. State of MP, AIR 2004 SC 26; State of Goa Vs. Sanjay Thakran and another, (2007) 3 SCC 755; Tipparam Prabhakar Vs. The State of Andhra Pradesh, (2009) 13 SCC 534; Jaharlal Das Vs. State of Orissa, (1991) 3 SCC 27; Parasa Koteswararo Vs. Ende Sree Hari and others; (2017) 11 SCC 52; Haricharan Kurmi Vs. State of Bihar; 1964 Supreme (SC) 26; Indra Dalal Vs. State of Haryana, (2015) 11 SCC 31; State of Haryana Vs. Ram Singh, 2002 AIR (SC) 620; Sunil Rai @ Paua and others Vs. Union Territory, Chandigarh, 2011 (4) Supreme 727; Digamber Vaishnav and another Vs. State of Chhattisgarh, AIR 2009 SC 1367; Niranjan Panja Vs. State of West Bengal, (2010) 6 SCC 525; State of Goa Vs. Pandurang Mohite, AIR 2009 SC 1066; Haram Singh and others Vs. State of Punjab, 1993 AIR (SC) 319; Lakshmi Singh and others Vs. State of Bihar, 1976 AIR (SC) 2263; Santa Singh Vs. State of Punjab, 1956 AIR (SC) 526; Smt. Gargi Vs. State of Haryana in Cr.A.No.1046/2010 decided on 19.9.2019 by Apex Court; State of Punjab Vs. Bhajan Singh and others, 1974 STPL 2194 SC; Meghna Singh Vs. State of Haryana, 1995 STPL 1936 SC; Bashir Shah and others Vs. State of Rajasthan, 1994 Cri.L.J. 2526 and Chirku Vs. State of MP, 2010 (I) MPWN 38.

12. On the other hand, learned counsel for the State supporting the impugned judgment to the extent it records conviction of the appellants Top Singh, Lalu Patel & Ashok Nirmalkar under Section 302/34 of IPC, submits that in view of the evidence of the PW-1 Someshwar Patel, PW-2 Krshna Sahu, PW-3 Chhatrapal Patel, PW-5 Purnanand Patel,

PW-6 Manoj Saluja, PW-17 Tulsibai Patel, PW-21 NK Sahu (IO) and other attending circumstances i.e. recovery of bloodstained articles at the instance of the accused persons coupled with the strong motive available with the accused persons, the trial Court ought to have convicted all the accused persons under Section 120B/34 of IPC also.

13. Heard learned counsel for the parties and perused the material available on record.

14. In this case, the deceased died due to cut throat injury as per postmortem report Ex.P/26 which has been duly proved by PW-11 Dr. SK Sharma, autopsy surgeon. According to the autopsy surgeon, apart from the above cut injury on neck, multiple abrasions were also found on the body of the deceased as mentioned above. The cause of death was cut throat injury and injury to vital structures with severe blood loss and shock, and that the death was homicidal in nature which occurred approximately 6 to 8 hours prior to postmortem.

As per Ex.P/5 i.e. inquest report, the above fact is also proved by PW-1 Someshwar Patel and other witnesses. There is no reason to disbelieve the postmortem report Ex.P/26 and inquest report Ex.P/5. Thus, homicidal death of Gulab Patel has been duly proved by the prosecution from oral as well as documentary evidence.

15. It has also been proved by the prosecution that on the date of incident i.e. 25.7.2011 deceased Gulab Patel was present in the Court of Shri P.K. Pradhan, Civil Judge, Class-I, Bemetara vide certified copy of the order sheet dated 25.7.2011.

16. As per order dated 17.2.2009 passed in Civil Suit No.02-A/2009, Kumbhla Vs. Gulab Singh and another, by Civil Judge, Class-I, Bemetara (Ex.P/31), it is evident that there was old land dispute between accused Kumhala and deceased Gulab Patel and that by the said order, application under Order 39 Rules 1 & 2 read with Section 151 of CPC filed by the plaintiff-accused Kumhala was rejected. The prosecution witnesses have also admitted that there was long standing land dispute between the deceased and accused Kumhala. Thus, the prosecution has also successfully proved availability of strong motive with the accused for commission of the crime in question.

17. It has been proved by the prosecution that on the date of incident the deceased had attended the Court at Bemetara. As per Ex.P/7, from the place of incident i.e. near cremation ground at Village-Kanteli, one red coloured Bajaj Pulsar motorcycle bearing No. CG 07 LN 4058 in damaged condition was seized and as per Ex.P/8 from the place of incident, one white coloured vehicle Mahendra Max bearing No. CG 04-B-4404 in damaged condition having blood stains and number plate smeared with mud, one knife kept in the said vehicle and two pieces of knife cover which were stained with blood, were seized. The said seizure has been duly proved by PW-3 Chhatrapal Patel and PW-6 Manoj Saluja.

PW-4 Mahavir Dewangan has proved this fact that on the date of incident the offending vehicle Mahendra Max was taken by accused Lalu from him saying that he has to take his ill mother for treatment to Bemetara and thereafter, his driver Top Singh went for Hadgaon at

about 10-11 am. He states that in the evening of the same day at around 5 pm he came to know that his vehicle has met with an accident and that his driver Top Singh did not inform him about the accident. Similarly, PW-17 Tulsi Bai Patel, wife of the deceased, has stated that on the date of incident her husband Gulab Patel had gone to Bemetara for attending the Court on his motorcycle. Evidence of these witnesses remained uncontroverted in the cross-examination. Thus, it stands proved that on the date of incident, the offending vehicle was being driven by accused Top Singh and deceased Gulab Patel after attending the Court proceedings at Bemetara was returning on his motorcycle.

18. As regards the place of incident, as per inquest report Ex.P/5 the spot is inspected by the inquest witnesses and they found that at the place of occurrence there were marks of dragging of motorcycle. From the spot, the motorcycle of the deceased and the offending vehicle were seized in damaged conditions with broken headlight and other parts of the vehicles. Spot map Ex.P/2 has been duly proved by the investigating officer PW-21 NK Sahu and PW-1 Someshwar Patel. Further, site plan Ex.P/3 has also been proved by Patwari PW-10 Kamlesh Sharma and PW-1 Someshwar Patel. This apart, as per FSL report Ex.P/47, the soil seized from the place of incident was also found to be stained with blood. Thus, the prosecution has duly proved the place of occurrence as near cremation ground at Village-Kanteli.

19. Now we shall proceed to examine the evidence of last seen of the accused persons with the deceased at the spot, extrajudicial

confession made by accused Top Singh, the memorandum and seizure of incriminating articles at the instance of the accused persons.

20. So far as last seen evidence is concerned, as per PW-2 Krishna Sahu who is an independent witness and PW-5 Purnanand Patel, both of them were returning from Bhoramdeo, Kawardha towards Village – Hadgaon. They reached at 1-2 pm near Kanteli cremation ground by vehicle *Chhota Hathi* (Pickup Van). PW-5 Purnanand Patel was sitting in the vehicle whereas it was being driven by PW-2 Krishna Sahu. When they reached near the place of occurrence they saw accused Lalu Patel, Ashok Nirmalkar and Top Singh standing near Mahendra Max and one motorcycle was lying at the place of incident. Next day they heard that Gulab Patel was murdered at the place of occurrence due to land dispute between Kumhala and Gulab. Both these witnesses are saying that they were returning from Bhoaramdeo. PW-2 Krishna Sahu belongs to Devarbeeja and PW-5 Purnanand Patel belongs to Hadgaon. Both of them saw the accused persons at the place of occurrence trying to pull back the offending vehicle and one person lying at the spot. However, at that time they could not identify the person so lying there. There is no reason to disbelieve the statements of these witnesses.

21. Learned counsel for the appellants has argued that prior to the incident, Krishna was working as driver of the deceased. This fact is also not disputed by the prosecution and it is admitted by wife of the deceased Tulsibai PW-17 that in the past Krishna PW-2 was driver of the deceased but only on that count, the statement of Krishna PW-2

cannot be discarded particularly when his version is fully supported by PW-5 Purnanand Patel. PW-5 also identified accused Lalu Patel who belongs to his village and Top Singh who used to visit his village. Therefore, there is no reason to disbelieve the evidence of these witnesses.

22. Statements of PW-2 & PW-5 are also supported by the statement of PW-19 Horam who has stated that near about 2.30 pm he was going by his motorcycle bearing No. CG 07 LN 8464 from Bemetara to Devarbeeja and on the way accused Lalu Patel, Top Singh and Ashok Nirmalkar were running on the road, face and clothes of Lalu Patel and Top Singh were stained with blood. He states that Top Singh requested him to give his motorcycle for going to hospital and he gave his motorcycle to Top Singh. Thereafter, all the three persons Lalu Patel, Top Singh and Ashok Nirmalkar went away towards hospital at Bemetara.

In cross-examination also he admitted in para-3 that when he gave his motorcycle to Top Singh, at that time name of other two persons who were accompanying Top Singh was not known to him (PW-19). However, he subsequently stated that Lalu, Top Singh and Ashok Nirmalkar were running on the road and Top Singh requested for his motorcycle which was given by him to Top Singh. Therefore, the statements of PW-2 Krishna Sahu & PW-5 Purnanand Patel are also supported by the statement of PW-19 Horam. Vehicle of this witness (PW-19) bearing No.CG 07 LN 8464 was also seized from the possession of accused Top Singh vide Ex.P/11 and this fact has been

duly proved by PW-3 Chhatrapal and investigating officer NK Sahu (PW-21).

The aforesaid evidence proves the fact that at the place of occurrence, all the three accused namely Top Singh, Lalu Patel & Ashok Nirmalkar were present where the offending vehicle Mahendra Max and motorcycle of the deceased were lying in damaged condition and these accused persons were seen by PW-2 Krishna Sahu and PW-5 Purnanand Patel at the spot and thereafter they were seen running on the road with bloodstains on their face and clothes by PW-19 Horam from whom Top Singh took his motorcycle for going to hospital for treatment.

23. So far as the argument of learned counsel for the appellants that PW-19 Horam has not identified the accused Lalu Patel and Ashok Nirmalkar, it is true that at the time of incident he was not aware of their names when Top Singh along with these two accused met him on the road. In his diary statement Ex.D/7 he specifically mentioned this fact that on 25.7.2011 when he (Horam) reached Kanteli cremation ground, Top Singh along with two other persons came there from Hathmudi area and informed that accident has taken place and requested to him for giving his motorcycle for going to hospital. He also stated that names of those two persons were not known to him at the time of recording his diary statement. Therefore, from the evidence of this witness, it is clear that when Top Singh asked for his motorcycle, he (Top Singh) was accompanied by two other persons. In para-1 of his Court statement he has specifically stated that he identifies all the

accused persons and stated that when Top Singh was running on the road, accused Ashok and Lalu Patel were also with Top Singh and he found bloodstains on face and clothes of Top Singh and Lalu Patel. This witness has duly identified Lalu Patel and Ashok Nirmalkar in the Court. Therefore, considering the statements of PW-2 Krishna Sahu and PW-5 Purnanand Patel which are duly corroborated by the evidence of PW-19 Horem and seizure of his motorcycle from accused Top Singh vide Ex.P/11, it stands proved that two persons who were accompanying accused Top Singh at the time of incident were accused Lalu Patel and Ashok Nirmalkar. Thus, presence of all these three accused persons at the place of occurrence has been successfully proved by the prosecution and it cannot be said that these witnesses were subsequently planted by the prosecution.

24. As per postmortem report Ex.P/26 death of Gulab Patel took place 6 to 8 hours prior to the time of examination which was conducted at 4.30 pm on 25.7.2011 and accordingly, the incident would have taken place at about 1-2 pm. Therefore, there is no long time gap between the last seen of the accused persons with the deceased at the place of occurrence.

25. Learned counsel for the appellants submits that there is no evidence that at the place where the offending vehicle and the motorcycle of the deceased were found, one body lying there was of deceased Gulab Patel. It is not in dispute that two vehicles, one hired by accused Lalu Patel and the motorcycle of the deceased, were found at the place of incident and at the spot dragging marks were also found

and the body found there was sent for postmortem. As per inquest report Ex.P/5, the dead body was duly identified by PW-1 Someshwar Patel, brother of the deceased and as per inquest report, the place of incident was also examined by the witnesses and they found the dragging marks of the motorcycle by the offending vehicle. Therefore, this Court finds no substance in the above argument.

26. Learned counsel for the appellants submits that damaged motorcycle and the offending vehicle were examined by the mechanical expert but the said report is not produced before the trial Court. When these vehicles were seized, their condition was specifically mentioned in Ex.P/7 & P/8 which have been duly proved by the prosecution. Therefore, non-production of mechanical expert report of the vehicles is of no consequence.

27. From the evidence of PW-2 Krishna Sahu and PW-5 Purnanand Patel it is clear that while passing by the place of occurrence, they were in a hurry, though they saw the accused Lalu Patel, Top Singh and Ashok Nirmalkar at the spot where both the vehicles were also lying but they were not aware of death of any person there, therefore, merely on account of these witnesses not stopping their vehicle at the spot would not be sufficient to render their evidence or presence doubtful.

28. As per Ex.P/13, memorandum of accused Lalu Patel, he states that he along with Ashok Nirmalkar and Top Singh were going by vehicle bearing No. CG 04B/4404 and dashed the motorcycle of the deceased. Thereafter, he (Lalu Patel) committed murder of Gulab Patel

by cutting his throat and the said knife was hidden near *Babul* shrubs beside *Sandi* river by him and Ashok. The weapon of offence knife was seized from the indicated place vide Ex.P/14 on the disclosure statement of accused Lalu Patel. This fact was within the special knowledge of Lalu Patel.

Though PW-7 Gopi Patel has turned hostile but has admitted in para-1 that he signed memorandum Ex.P/13 and seizure Ex.P/14 to P/18. He also admitted in para-3 that accused Lalu Patel, Ashok Nirmalkar and Kumhala were arrested by the police and interrogated in his presence. He admits that Lalu Patel confessed before the police that even after running the vehicle over Gulab when he did not die, he was killed with knife. He also states that from accused Lalu Patel, his clothes and mobile phone were seized vide Ex.P/16 and that from accused Ashok, shirt, pant and mobile phone were seized vide Ex.P/17. In cross-examination he states that since the incident took place long back, he could not state earlier as to who effected seizure and whose statement was recorded. Therefore, this witness has partly supported the memorandum and seizure.

29. PW-18 Manoj Patel also admits in para-2 that when he reached near Sandi river, police asked the accused Lalu Patel as to where he had thrown the knife and on the information given by Lalu Patel, the knife was seized from the *Babul* shrubs. He admits his signature on memorandum and seizure i.e. Ex.P/13, P/14, P/15, P/17 and P/18. Looking to the statements of these witnesses (PW-7 Gopi Patel and PW-18 Manoj Patel), though there is some omission or contradiction,

but that is not material. As per evidence of NK Sahu (PW-21), investigating officer, he has proved this fact that during investigation he registered the FIR lodged by PW-1 Someshwar Patel, gave notice Ex.P/4 to witnesses for inquest, prepared the inquest report Ex.P/5 where he noticed cut injury on the throat of the deceased and injuries on other parts of the body. The body was sent for postmortem as per Ex.P/33 through constable Roshan Dewangan. Spot map Ex.P/2 was prepared in presence of witnesses Manoj and Someshwar, the place of incident is Durg-Bemetara main road, near Kanteli cremation ground and he found dragging marks of tyre and motorcycle on the road. He also found a lot of blood on the spot and the vehicle Bajaj Pulsar bearing No. CG 07 LN 4058 lying in damaged condition there with broken plate light and cover of the backside and broken silencer which were seized vide Ex.P/7. From the spot, plain and bloodstained soil were seized vide Ex.P/9. Likewise, from the place of occurrence, one white coloured Mahendra Max bearing No. CG 04 B/4404 with broken front glass, broken headlight, broken mudguard, broken backside number plate, one knife, two knife covers were seized vide Ex.P/8. As per Ex.P/13 memorandum of the accused Lalu Patel was recorded by the investigating officer and on his information, the knife was recovered vide Ex.P/14.

30. It cannot be stated as a rule of law that a police officer can or cannot be a sole eyewitness in a criminal case which will always depend upon facts of a given case. If testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then statement of such witness cannot be

discarded only on ground that he is a police officer and may have some interest in success of the case. Only when his interest in success of case is motivated by overzealousness to an extent of his involving innocent people, then, no credibility can be attached to his statement. Presumption that a person acts honestly applies as much in favour of a police officer as in respect of other persons and it is not proper to distrust and suspect him without there being good grounds therefor.

Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trust worthy, the Court can definitely act upon the same. If, in the course of scrutinizing the evidence, the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence. [**AIR 2013 Supreme Court 3344, [Pramod Kumar v. State \(GNCT\) of Delhi.](#)**]

31. Therefore, looking to the statements of PW-7 Gopi Patel, PW-18 Manoj Patel and the statement of PW-21 NK Sahu, IO, memorandum and seizure effected from the accused persons stand proved.

32. Learned counsel for the appellants submits that the prosecution witnesses are interested witnesses due to relationship with the deceased but no any reason has been shown by the defence as to how they are interested witnesses for conviction of the appellants. They have proved the prosecution case based on the documents

available on record and further, the investigating officer has also duly supported the prosecution case. The defence could not bring on record anything to show that the IO was having any ill will or animosity with the accused persons. Therefore, this Court does not find any substance in the above argument of the appellants.

33. The seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur. As per FSL report Ex.P/47 blood was found on the Articles A, B, C, D, E1, E2, F1, F2, G, H1, H2, I1 & J i.e. plain & bloodstained soil, knife and its cover seized from spot, full pant & shirt of accused Top Singh, shirt & *gamchha* (towel) of deceased Gulab Patel; knife recovered from accused Lalu Patel; pant & shirt seized from accused Lalu Patel; pant seized from accused Ashok Nirmalkar and shirt seized from accused Kumhala Patel. PW-11 Dr. SK Sharma also examined the knife seized from accused Lalu Patel as per Ex.P/38 and opined that the injury found on the throat of the deceased could be caused by the said knife. At the time of examination of knife he also found blood stains on the knife.

True it is that there is no serologist report confirming the origin of blood so found on the seized articles, however, in the given facts and circumstances of the case where presence of accused Top Singh, Lalu Patel & Ashok Nirmalkar at the spot has been duly proved, they had strong motive with them for commission of the crime, the offending vehicle and vehicle of the deceased were seized from the spot, soon after the incident these accused were seen running on the road by PW-19 Horam from whom Top Singh borrowed his motorcycle, he saw

bloodstains on the clothes and face of Lalu and Top Singh; there is no explanation on the part of these accused persons as to how blood was found on the articles seized at their instance, non-production of serologist report is of no consequence in this matter.

34. In their statements under Section 313 of CrPC accused Lalu Patel, Top Singh and Ashok Nirmalkar have made bald denial of all the incriminating circumstances appearing against them in the prosecution case which have been duly proved by the prosecution. Accused Top Singh in his defence has stated that he has been falsely implicated and that police did not lodge his report. However, no any enmity with Top Singh of the police has been proved by any witness of the prosecution or the defence. Thus, denial of the established incriminating circumstances also goes against the appellants.

35. In this case, the trial Court has also considered the extrajudicial confession of accused Top Singh made before PW-1 Someshwar Patel, PW-3 Chhatrapal Patel and PW-6 Manoj Saluja. As per PW-6 Manoj Saluja, in para-2 he states that when he reached hospital, Top Singh was there and told him about the accident. As per Ex.D/10 which is produced by the prosecution along with the medical report of Top Singh, his medical examination was conducted on 25.7.2011 at 3 pm. Top Singh was brought by Constable No.177 Madal Sahu. This fact is disclosed by Top Singh on 25.7.2011 prior to 3 pm. But the investigating officer PW-21 NK Sahu had denied this fact that he had sent Top Singh for medical examination. As per Rojnamchasanha Ex.D/11, on 27.7.2011 accused Top Singh was sent for medical

examination and returned on the same day. As per arrest memo Ex.P/35 accused Top Singh was arrested on 26.7.2011 at 18:30 hours and thereafter he was sent for medical examination as per Ex.D/11. According to PW-1 Someshwar Patel, he lodged FIR (Ex.P/1) on 25.7.2011 at 15:30 hours. Before lodging of FIR, Top Singh was not an accused in any case nor arrested by the police. He was arrested on 26.7.2011.

36. PW-1 Someshwar Patel states that he reached hospital on information given by the police that Gulab Patel has been sent to government hospital and he found his brother Gulab Patel in the hospital with cut injury on his throat. At that time, accused Top Singh was also there and Manoj Saluja (PW-6) asked Top Singh, on which Top Singh disclosed that at the instance of Lalu Patel, he dashed the motorcycle of the deceased by Mahendra Max. Thereafter, the police reached the hospital and took Top Singh to police station.

37. PW-3 Chhatrapal Patel is also said to be a witness to extrajudicial confession but he states in para-2 that when Manoj Saluja and he (Chhatrapal) reached the hospital, accused Top Singh was also there and that Top Singh confessed before the police in police station in his presence and others regarding murder of Gulab Patel. Top Singh stated that he was driving the offending vehicle at the instance of Lalu Patel and that all the three accused Lalu Patel, Top Singh and Ashok Nirmalkar consumed liquor. Thus, as per PW-3 Chhatrapal Patel, no confessional statement was made by accused Top Singh in the hospital before him and only in presence of police in the police station, Top

Singh stated about commission of the offence along with other accused persons. He specifically states that he had no talk with Top Singh in the hospital. PW-6 Manoj Saluja has also admitted this fact that Top Singh was lying on the table in the hospital and when he asked, Top Singh informed about the accident and thereafter, he alongwith Chhatrapal returned to police station.

38. One document Ex.D/10 along with medical report is also proved by the defence whereby accused Top Singh was medically examined on 25.7.2011 on being brought to hospital by Constable No.177. Ex.D/10 is application for medical examination of Top Singh prepared by the police and along with the said document, MLC of Top Singh is attached. Both these documents are produced by the prosecution as its documents. Therefore, looking to the facts and circumstances of the case, statement of accused Top Singh that he reached police station after the accident and was sent for medical examination, though accused Top Singh was not arrested on 25th July, 2011 but he was in custody of the police in view of his medical report and statement of PW-1 Someshwar Patel and PW-3 Chhatrapal Patel.

39. Custody and arrest both have a distinction. Custody does not mean custody after formal arrest but includes any sort of surveillance or restriction or restraint by police when a person is called to police station for interrogation as an accused in connection with investigation of a crime. He may be deemed to be in custody of police where he is so interrogated and no formal arrest is necessary. In this case, accused Top Singh was not arrested on 25.7.2011 nor accused of any case

registered against him or brought for interrogation of a crime, and he was only taken by a police constable for his medical examination.

40. Learned counsel for the appellants has relied upon the decision of the Hon'ble Supreme Court in the matter of *Indra Dalal* (supra) for challenging the admissibility of the extra-judicial confession made by accused Top Singh on the ground of it being made in presence of police while he was in custody. In the said cited judgment, the Hon'ble Apex Court held as under:

“16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countless by this Court as well as the High Courts.

17. The word 'confession' has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or

conclusive. [Section 26](#) of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is other than a police officer, shall also become inadmissible.”

41. Keeping in view the aforesaid principles of law, looking to the statements of PW-1 Someshwar Patel, PW-3 Chhatrapal Patel and PW-6 Manoj Saluja, the document of Ex.D/10 & D/11 it is clearly proved that in presence of police, accused Top Singh narrated the entire story regarding commission of murder of Gulab Patel. Therefore, in view of Section 26 of the Evidence act, such extrajudicial confession made by accused Top Singh before the police is not admissible.

42. Learned counsel for the appellants has submitted that after death of Gulab Patel, PW-1 Someshwar Patel wanted to grab the entire property by mutation in his name with the consent of wife of the deceased Tulsi Bai Patel (PW-17) and he had moved an application before the Tehsildar for mutation of property of the deceased in his name. Further, it is contended that PW-20 Deepak Patel also used to have quarrel with his father Gulab Patel for property as after death of his mother, his father Gulab Patel had married Tulsi Bai and he had apprehension of getting less share in the property. Therefore, it may be Someshwar Patel or Deepak Patel who would have murdered Gulab Patel and falsely implicated the appellants just to grab the property of Gulab Patel.

However, there is no evidence on record to establish the presence of PW-1 Someshwar Patel or PW-20 Deepak Patel at the place of occurrence. No such type of dispute between PW-20 Deepak Patel and the deceased has been proved by the defence or prosecution which could raise suspicion against him. Therefore, for want of any evidence in support of the above defence, the argument of learned counsel for the appellants in this regard is rejected.

43. Having gone through the judgments relied upon by learned counsel for the appellants, we find that they being distinguishable on facts are of no help to the appellants. In the present case considering the circumstantial evidence against the accused Lalu Patel, Top Singh & Ashok Nirmalkar i.e. homicidal death of Gulab Patel, availability of strong motive on account of there being old land dispute between deceased Gulab Patel & Kumhala Patel (father of accused Lalu Patel), the offending vehicle hired by Lalu Patel being found on the spot in damaged condition; presence of these three accused at the spot with bloodstains on the face and clothes of Lalu Patel & Top Singh; seizure of incriminating articles at their instance stained with blood as per FSL report Ex.P/47; their bald denial to the proved circumstances and non-explanation to the same, even if the extrajudicial confession by accused Top Singh is ignored, the aforesaid circumstantial evidence is sufficient to bring home the charge under Section 302/34 of IPC against these accused/appellants. As such, the trial Court has not committed any illegality in convicting and sentencing them under Section 302/34 of IPC.

44. As regards the acquittal appeal preferred by the State, there is nothing on record to show that accused Kumhala Patel was also seen on the place of occurrence, no element of conspiracy was proved by the prosecution against him, only bloodstained clothes were seized from him but those clothes were produced by Kumhala Patel himself in the police station. Though there is evidence to the effect that there was long standing land dispute between the deceased and accused Kumhala Patel, but merely on that ground he cannot be held guilty of any offence. The prosecution has to prove its case beyond all reasonable doubt. Even otherwise, it is a settled legal position that if on the basis of record two conclusions can be arrived at, the one favouring the accused has to be preferred. Furthermore, in case of appeal against the acquittal the scope is very limited and interference can only be made if finding recorded by the trial Court is highly perverse or arrived at by ignoring the relevant material and considering the irrelevant ones. In the present case, no such circumstance is there warranting interference by this Court. Therefore, on the basis of discussions made above in respect of conviction of the appellants Top Singh, Lalu Patel & Ashok Nirmalkar and the quality and nature of evidence available on record in relation to accused Kumhala Patel, this Court finds no substance in the appeal i.e. Acq. A.No.31/2014 preferred by the State and dismiss the same.

45. In the result, both the appeals (Cr.A.No.749/2013 & Acq. A.No.31/2014) being without any substance are hereby dismissed. Impugned judgment of the trial Court convicting & sentencing accused Top Singh, Lalu Patel & Ashok Nirmalkar u/s 302/34 of IPC and

acquitting the accused persons including accused Kumhala Patel of the charge u/s 120B/34 of IPC is hereby affirmed. Accused/appellants Top Singh, Lalu Patel & Ashok Nirmalkar are reported to be in jail, therefore, no further order regarding their arrest, surrender etc. is required to be passed.

Sd/

(Prashant Kumar Mishra)

Judge

Sd/

(Gautam Chourdiya)

Judge