

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

**1. MRC No. 01 of 2017
Date of Decision: 13.02.2020**

State of HaryanaProsecutor

VERSUS

PushpaConvict

2. CRA-D-127-DB of 2017 (O&M)

Surender @ SonuAppellant

VERSUS

State of HaryanaRespondent

3. CRA-D-75-DB of 2018 (O&M)

PushpaAppellant

VERSUS

State of HaryanaRespondent

**CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY
HON'BLE MR. JUSTICE SURINDER GUPTA**

Present: Mr. Ankur Mittal, Additional Advocate General, Haryana.

Mr. Jasraj Singh, Advocate
for appellant-Surender @ Sonu in CRA-D-127-DB-2017.

Mr. Atul Partap Dhankhar, Advocate
for appellant-Pushpa in CRA-D-75-DB-2018.

Mr. A.P.S. Deol, Senior Advocate with
Mr. Vishal Rattan Lamba, Advocate
Amicus curiae.

Surinder Gupta, J.

Vide judgment dated 02.12.2016, in case FIR no. 219 dated
09.04.2013, registered at Police Station Sadar Bahadurgarh, initially for
offence punishable under Sections 304-A and 279 of Indian Penal Code (for

short 'IPC') and later for offences punishable under Sections 120-B and 302 read with Section 120-B IPC, Surender @ Sonu son of Diwan Singh and Pushpa wife of Suresh, were convicted for offence punishable under Sections 120-B and 302 read with Section 120-B IPC for murder of Suresh (later referred to as 'the deceased'). Convict-Surender @ Sonu was awarded sentence to undergo life imprisonment till death in natural course with fine of ₹5 lakhs, while convict-Pushpa was sentenced to be hanged till her death and also ordered to pay fine of ₹5 lakhs. Amount of fine, if recovered from both the convicts, was ordered to be paid to children of the deceased as per provisions of Section 357 Cr.P.C.

2. Learned Additional Sessions Judge, Jhajjar made reference (MRC No. 01 of 2017) for confirmation of death sentence awarded to convict-Pushpa, which has been taken up alongwith appeals (CRA-D-127-DB-2017 and CRA-D-75-DB-2018) filed by both the convicts.

Brief Facts:-

3. Dead body of deceased-Suresh was found on 09.04.2013 at Gubhana-Bahadurgarh road near bridge and on information (PW-10) ASI Sudhir Kumar of Police Station Sadar Bahadurgarh reached the spot and recorded statement (Ex. PA) of Suraj Mal, brother of the deceased, wherein he stated that his younger brother Suresh (deceased) aged about 40 years had gone from his house at about 10.00 p.m. on 08.04.2013, after telling his children that he had some work and will return after sometime but did not return. At 07.00 a.m., they received information that his dead body was lying on Gubhana-Bahadurgarh road near bridge. He alongwith some villagers reached the spot and found his dead body, which had deep wounds on neck, left arm and fingers. He suspected that some unidentified vehicle

had hit and killed his brother. On his statement, the police registered FIR (Ex. PW-9/A) for offences punishable under Sections 279 and 304-A IPC. The inquest report (Ex. PW-10/B) of deceased was prepared and photographs (Ex. PW-10/D to Ex. PW-10/J) were taken at the spot. Dead body of the deceased was sent for postmortem examination, which was conducted by Dr. Sushant Sharma (PW-14) of Government Hospital, Bahadurgarh. He found following injuries on the person of deceased:-

- “(i) 15 cm X 6 cm lacerated wound on the right side in the mandibular region exposing the underlying issue of mandibular maxilla bleeding was present and paroloble wall not present;*
- (ii) Lacerated wound 10 cm X 6 cm extending from right occipital region to the zygomatic region exposing the underlying tissue and exposer of brain matter;*
- (iii) Lacerated wound 3 cm X 1 cm with bone exposed on the right hand on the posterior aspect of the forearm just below the elbow underlying tissue echymosis on deeper dye-section.*
- (iv) Lacerated wound 3 cm X 1 cm with the underlying tissue exposed on posterior aspect of right hand 8 cm below the elbow underlying tissue echymosis present;*
- (v) Fracture found in both bone about 5 cm proximal to the wrist joint of right side;*
- (vi) Lacerated wound almost 5 cm on the dorsal of the wrist of right side with tissue echymosis on deeper dye-section;*

- (vii) *Lacerated wound at the base of index big and ring finger of 1.5 cm X .5 cm each of left side on deeper dye-section tissue echymosis present;*
- (viii) *Lacerated wound on dorsum of head 4.5 cm X .5 cm just distal to the wrist on left side of deeper dye-section underlying tissue echymosis; and*
- (ix) *Lacerated wound of 3 cm. X .5 cm on the knee just proximal to the tibia tubrosity on left side on deeper dye-section underlying tissue echymosis.”*

4. On 20.04.2013, ASI Sudhir Kumar received application (Ex. PB) moved by complainant-Suraj Mal, wherein he stated that initially FIR was registered as an accidental case but there were injuries with sharp edged weapon on the neck, head and hands of the deceased. He was apprised by Jai Parkash son of Rattan Singh of his family that on the preceding night i.e. 08.04.2013 at about 10.00 p.m., he had seen the deceased with appellant-Surender @ Sonu, going on foot near '*Balwan Singh Judge Piao*'. Gaurav son of the deceased had also apprised him that appellant-Surender @ Sonu used to come to their house at odd hours due to which his father (deceased) was very annoyed. There had been quarrel between the deceased and his wife (appellant-Pushpa) on this score. His mother used to indulge in talk with appellant-Surender @ Sonu till midnight. On the fateful day, his father had received a call from someone at about 10.00 p.m. and had gone out. Complainant-Suraj Mal requested the investigating officer that call details of his brother, appellant-Pushpa and appellant-Surender @ Sonu be verified to find the truth. He suspected that his brother had been got killed by his wife in conspiracy with appellant-

Surender @ Sonu.

5. On 19.05.2013, appellant-Surender @ Sonu was produced before SI Attar Singh by Shiv Kumar (PW-2), when he was present at Bus Stand Majri. He recorded statement of Shiv Kumar, who apprised regarding extra-judicial confession made by Surender @ Sonu about murder of the deceased in conspiracy with appellant-Pushpa. Thereafter, offences under Sections 279 and 304-A IPC were deleted and offences under Sections 302 read with Section 120-B IPC were added in the FIR. Surender @ Sonu was arrested in this case while Pushpa was arrested on the next day i.e. 20.05.2013. At the time of arrest, Pushpa handed over two mobile phones, one Nokia phone mark-2700 of black colour having sim bearing no. 9050051328 and another mobile phone mark Nokia 704 of white colour without sim. Both the mobile phones were sealed and taken into possession vide recovery memo (Ex. PW-10/O). On interrogation, Pushpa suffered a disclosure statement (Ex. PW-10/P) admitting her relations with Surender @ Sonu and her involvement in murder of her husband. On the disclosure statement (Ex. PC) of Surender @ Sonu, weapon of offence i.e. 'Farsa' and his mobile phone were recovered and taken into possession vide recovery memo (Ex. PW-10/R). On the demarcation by Surender @ Sonu, memo of demarcation of the place of occurrence (Ex. PW-10/S) was prepared. On 24.04.2013, ASI Sudhir Kumar (PW-10) obtained call details (Ex. PW-10/K) of mobile nos. 96711-07950, 88169-19531 and 96711-07950 (Ex. PW-10/M) and took the same into possession vide memo Ex. PW-10/N. On examination of call details, it was found that on the day of occurrence Surender @ Sonu had called deceased at about 10.00 p.m. and thereafter at about 10.23 p.m. On that day, Surender @ Sonu had 31 calls with Pushpa

and they had talked for long duration. The police also recorded statement of (PW-11) Dharmender son of Jagdish, who had taken the sim bearing no. 96711-07950 and stated that his sim was taken from him for ten days by Surender @ Sonu, but he did not return the same on the pretext that the sim had been lost. After completion of investigation, challan against the appellants was presented in Court of Judicial Magistrate Ist Class, Bahadurgarh and the case was committed to Court of Sessions for trial vide order dated 09.09.2013.

6. Both Surender @ Sonu and Pushpa were charge-sheeted for offences punishable under Section 120-B IPC and Section 302 read with Section 120-B IPC to which they pleaded not guilty and claimed trial.

7. In support of its case the prosecution examined Suraj Mal (complainant) as PW-1, Shiv Kumar as PW-2, Laxminarain as PW-3, EASI Ranbir Singh as PW-4, Pawan Kumar as PW-5, ASI Jagmal Singh as PW-6, EHC Jai Bhagwan as PW-7, ASI Karan Singh as PW-8, SI Balraj as PW-9, ASI Sudhir Kumar as PW-10, Dharmender as PW-11, SI Attar Singh as PW-12, Gaurav as PW-13 and DR. Sushant Sharma as PW-14.

8. On completion of evidence of the prosecution, statements of both the appellants as required under Sections 313 Cr.P.C. were recorded, wherein they denied allegations against them and pleaded their false implication. Appellant-Pushpa stated in her statement as follows:-

“I am innocent. I was falsely implicated in this case. I have no concern with this case in any manner whatsoever.”

9. Appellant-Pushpa was also confronted with statement of her son, namely, Gaurav (PW-13), who had stated about her relations with appellant-Surender @ Sonu and that he had seen both of them lying naked

on a cot, which she controverted by saying 'it is incorrect'.

10. Appellant-Surender @ Sonu also denied allegations against him and pleaded his false implication. He was also confronted with extra-judicial confession made by him before PW-2 Shiv Kumar and statement of PW-13 Gaurav about his illicit relations with his mother and that he had seen both of them lying on a cot in naked condition, which he denied.

11. Both the appellants did not produce any evidence in defence.

12. Learned trial Court found the evidence produced by the prosecution as reliable while convicting and sentencing both the appellants.

13. Learned counsel for appellants have argued that it is a case based on circumstantial evidence. As per initial version, it was found to be a case of death of the deceased in an accident. Later on PW-1 Suraj Mal, the brother of the deceased, moved an application (Ex. PB) that appellant-Surender @ Sonu had relations with appellant-Pushpa, wife of the deceased, and had been visiting his home at odd hours. On this score there was quarrel between the deceased and his wife. Jai Parkash son of Rattan Singh had seen both, Surender @ Sonu and the deceased, going together at about 10.00 p.m. on 08.04.2013, when he was returning from the side of Luksar. However, Jai Parkash was not examined and given up as having been won over. The case of prosecution is based on extra-judicial confession made by Surender @ Sonu before PW-2 Shiv Kumar. Surender @ Sonu had no reason to make statement before him. The evidence of extra-judicial confession is a very weak type of evidence and cannot be relied upon. Shiv Kumar claims himself to be head of *Khap Panchayat*. He was having no authority to help the appellant before police and also belongs to community of the deceased. Learned trial Court has committed grave error while

relying on his statement. The prosecution has also relied on the call details of mobile nos. 96711-07950, 88169-19531 and 90500-51328 without producing on record any evidence that any of the above mobile phones belongs to appellants. The call details were also not got duly proved.

14. Learned trial Court has also relied on the testimony of Gaurav (PW-13), a child witness, who appears to be a tutored witness as his statement was recorded after more than two years of the occurrence and during this period he had lived with his *bua* and could be tutored against his mother. At the time of occurrence, he was 12 years of age. Being of delicate mindset a child can be easily influenced and tutored, as such, his statement is required to be scrutinized with caution keeping in view other facts and circumstances that have come on record in this case. In the absence of any incredible evidence, it is not safe to rely on the testimony of a child, who simply depose about the motive of murder of his father by the appellants and is not an eye-witness to the occurrence. Statement of Gaurav (PW-13) was also recorded by police after three months of the occurrence, when an objection to this effect was raised by the prosecution at the time of filing of the final report in Court. PW-1 Suraj Mal vide his application dated 19.04.2013 had alleged that son of the deceased had apprised him about the visit of appellant-Surender @ Sonu to his house at odd hours and strained relations of deceased with his wife on this score. The police could record statement of the child immediately thereafter and delay in recording statement of Gaurav cast doubt about veracity of his statement. The chain of circumstantial evidence in this case is not complete. Statement of doctor that possibility of injuries on the person of deceased by weapon recovered from Surender @ Sonu cannot be ruled out, is not a reason to draw the

inference that injuries on the person of deceased were caused by that weapon. As per report of Forensic Science Laboratory (Ex. PE), no blood stains on that weapon were found. While concluding, learned counsel for appellants have argued that there is no cogent and convincing evidence to reach the conclusion about the guilt of appellants and learned trial Court has committed grave error while relying on the testimony of PW-2 Shiv Kumar about the extra-judicial confession made by Surender @ Sonu and testimony of the child witness while convicting and awarding capital sentence to appellant-Pushpa and life imprisonment till natural death to Surender @ Sonu.

15. Learned State counsel has argued that it is a case of blind murder and the prosecution has to rely upon the circumstantial evidence. First and most important aspect is about the motive for both the appellants to eliminate (murder) the deceased, which has been proved from the testimony of PW-13 Gaurav, who is none other than son of appellant-Pushpa. He has categorically stated about her illicit relations and contact with appellant-Surender @ Sonu. The deceased was having quarrel with his wife on this score. Both the appellants conspired to eliminate the deceased to facilitate continuance of their illicit relationship. PW-13 Gaurav was of the age of about 12 years at the time of incident. A child of this age is quite mature to see and understand the happenings around him. He had seen his mother with Surender @ Sonu in naked condition over a cot. Though, he is not an eye-witness to the occurrence of murder of his father but his statement strongly establishes the motive for both the appellants to eliminate the deceased, who was called from his house and then killed. Initially, it was presented before the police as a case of death due to accident

but injuries on the person of the deceased could not be caused by accident. There were wounds and cuts by sharp edged weapon and the doctor on examination of the weapon recovered from Surender @ Sonu had given a clear opinion that injuries on the person of the deceased with that weapon could not be ruled out. The prosecution has established by examining PW-11 Dharmender that Surender @ Sonu was using mobile no. 96711-07950. The mobile phone recovered from Pushpa was having sim bearing no. 90500-51328. Though, the prosecution has not produced the evidence as to whom the said sim was issued but the appellants have not denied the recovery of mobile with sims having aforesaid mobile phone numbers from Pushpa and call details produced on file shows talk between both the appellants particularly on the day of occurrence, which indicate that both have conspired to murder Suresh. Statements of prosecution witnesses are almost un-rebutted. Though, extra-judicial confession is a weak piece of evidence but the same is very relevant in this case as Surender @ Sonu belongs to the village of deceased. PW-2 Shiv Kumar is also resident of same village and was President of *Khap Panchayat*, which in the State of Haryana wield a lot of authority and influence over the villagers within their area. The appellants have not come up with any reason or motive for their false implication and for PW-2 Shiv Kumar to depose against them. His statement finds corroboration from the testimony of PW-13 Gaurav son of the deceased and Pushpa. Learned trial Court has committed no error while appreciating the evidence on record and recording conviction of both the appellants for offences punishable under Section 120-B IPC and Section 302 read with Section 120-B IPC.

16. We have given a careful thought to submissions of Mr. Jasraj

Singh, Advocate representing appellant-Surender @ Sonu, Mr. Atul Partap Singh, Advocate representing appellant-Pushpa, Mr. Ankur Mittal, Additional Advocate General representing the State of Haryana and Mr. A.P.S. Deol, Senior Advocate, appointed as Amicus Curiae in this case and have also perused the file with their assistance.

17. In this case the prosecution has tried to prove the charges against the appellants by producing evidence on following aspects:-

(i) **Motive** : To prove motive for murder of Suresh (deceased), PW-13 Gaurav, son of the deceased and appellant-Pushpa, has been examined, who has stated about physical relations of both the appellants and quarrel between Pushpa and the deceased on this score.

(ii) **Circumstantial evidence** : Call details of mobile phone allegedly used by appellants and the deceased.

(iii) Extra-judicial confession of appellant-Surender @ Sonu before PW-2 Shiv Kumar, who produced him before the police.

18. Firstly, we take evidence relating to call details of deceased as produced on file.

19. Dead body of deceased-Suresh was found at about 07.00 a.m., on 09.04.2013. He had left his house at about 10.00 p.m. on 08.04.2013, after receiving a telephone call. The case of prosecution is that call was made by appellant-Surender @ Sonu pretending to be some other person. Initially it was considered to be a case of death in a motor vehicle accident and FIR was registered for offences punishable under Sections 304-A and 279 IPC. Later it was converted into a case of murder of deceased-Suresh by Surender @ Sonu in conspiracy with appellant-Pushpa, wife of the

deceased. Reasons which gave rise to suspicion for murder of the deceased

by Surender @ Sonu as mentioned in the application (Ex. PB) moved by complainant-Suraj Mal are as follows:-

- (i) Jai Parkash son of Rattan Singh from family of complainant has apprised him that on the night of 08.04.2013 at about 10.00 p.m., when he was returning from Luksar he had seen appellant-Surender @ Sonu going with the deceased on foot near '*Piao of Balwan Singh Judge*'. Jai Parkash was not examined by the prosecution and given up as having been won over by the appellants.
- (ii) He came to know from his nephew PW-13 Gaurav, son of the deceased, that appellant-Surender @ Sonu had been visiting their house frequently. The deceased was annoyed on this score and had been quarreling with appellant-Pushpa, his wife on this score. Pushpa had been talking with Surender @ Sonu on phone till midnight and this was also the reason for dispute between her and the deceased.

20. The police arrested appellant-Surender @ Sonu on 19.04.2013 and appellant-Pushpa on 20.04.2013. From possession of Pushpa two mobile phones were taken into possession out of which one was having the sim of mobile no. 90500-51328. On the disclosure statement of Surender @ Sonu, one mobile phone and weapon used in the crime (*Farsa*) were also recovered. That mobile was not having any sim. On investigation, the police came to know that mobile number being used by Surender @ Sonu was 96711-07950, which was issued in the name of Dharmender son of Jagdish,

who appeared as PW-11 and stated that Surender @ Sonu is his friend. He had obtained Vodafone sim card from S.K. Communications situated at bus-stand of village Gubhana. There Surender @ Sonu met him and asked him to give the sim for ten days. On his asking he gave that sim to him and after ten days asked him to return the same but Surender @ Sonu did not return it and told that the sim had been lost. After murder of deceased-Suresh police came to his house and enquired about the sim and he apprised the police that he had given the same to Surender @ Sonu. The testimony of PW-11 Dharmender is suffice to prove that Surender @ Sonu had been using mobile phone no. 96711-07950. From possession of Pushpa two mobile phones were recovered and one mobile phone was having sim bearing no. 90500-51328. Though, the prosecution has not produced any evidence or document to prove as to in whose name the aforesaid sim was issued but in the cross-examination of PW-12 SI Attar Singh, investigating officer, no suggestion has been given that the mobile phone recovered from Pushpa was not bearing number 90500-51328.

21. ASI Sudhir Kumar (PW-10) has stated that on 21.04.2013 he filled form for obtaining call details of mobile phone of the deceased, appellant-Pushpa and appellant-Surender @ Sonu and submitted the same in Cyber Cell Bahadurgarh. On 24.04.2013, he obtained call details of mobile no. 96711-07950, which was used by Surender @ Sonu (Ex. PW-10/K), mobile no. 88169-19531 being used by appellant-Pushpa (Ex. PW-10/L) and that of the deceased bearing no. 90500-51328 (Ex. PW-10/M).

22. On scrutinizing the above evidence, we find that the entire exercise of prosecution in getting the mobile call details is not an exercise in futility. On examination of call details of mobile phone of appellant-

Surender @ Sonu, we find that he had made numerous calls at mobile no. 88169-19531, which was allegedly used by appellant-Pushpa. Even on the date of incident there were number of calls on this number before the incident and after the incident. From his mobile number Surender @ Sonu made a call at 10.02 p.m. and again on 10.23 p.m. on mobile no. 90500-51328 recovered from Pushpa. This proves the case of prosecution to the extent that from mobile phone of Surender @ Sonu calls were made on 08.04.2013 at 10.02 p.m. and 10.23 p.m. at the mobile phone recovered from Pushpa.

23. The story of prosecution starts with extra-judicial confession of appellant-Surender @ Sonu before PW-2 Shiv Kumar, who has stated that on 19.05.2013, Surender @ Sonu came to him, admitted his guilt and made a request for producing him before the police as he was under the impression that he (Shiv Kumar) was having good terms with the police. He assured to help Surender @ Sonu on his revealing the truth. At this, Surender @ Sonu suffered extra-judicial confession before him. Relevant part of testimony of PW-2 Shiv Kumar to this effect is reproduced as follows:-

“.....Upon this accused Surender gone clarifying before me that he had worked as construction labourer at the house of deceased Surender about 2 and half years back. Thereafter, he had also worked the job of whitewash at the house of Suresh. During that spell he developed illicit relation with Pushpa wife of Suresh. We used to talk on phone for long duration. Once Pushpa asked me not to come to her house upon which I

attempted to commit suicide by swallowing Sulphas tablets but survive(d). Two days prior to Diwali, I and Pushpa were in compromising position at the house of Suresh and her son Gaurav saw us. Suresh thereafter started beating Pushpa and was annoyed of her. Accused Surender further conveyed to me that he and Pushpa conspired to eliminate Suresh for enjoying their illicit relations. Accused Surender also stated that as and when he consumed liquor then he should be called telephonically. On 08.04.2013, Pushpa during night time gave a telephonic message to him and after receiving the telephone of Pushpa Surender called Suresh in the name of some other person. Thereafter, he was taken to Gubhana-Bahadurgarh road and he committed the murder of Suresh with Farsa blow and since the day he was truant and police is following him. On hearing the above said version, I was going to produce him before the police but police met me in the way at Majri Bus stand where I produced him before the police. My statement was recorded by the police. Accused Surender (is) present in the Court today.”

24. Learned counsel for appellants have argued that extra-judicial confession is a very weak evidence and require corroboration before being relied upon but this case lacks corroborative evidence to rely upon extra-judicial confession allegedly made by appellant-Surender @ Sonu before PW-2 Shiv Kumar. In support of their contention they have relied on observations in cases of **Satinder Pal Singh @ Sikander Singh and others vs. State of Punjab, 2005 (4) RCR (Criminal) 494; State of Punjab vs.**

Bhajan Singh and others, 1975 SCC (Cri.) 584; Sunny Kapoor vs. State (U.T. of Chandigarh), (2006) 10 SCC 182; State of M.P. through CBI and others vs. Paltan Mallah and others, (2005) 3 SCC 169; Pancho vs. State of Haryana, (2011) 10 SCC 165.

25. In all the aforesaid cases, it has been observed that extra-judicial confession is a weak evidence and the Court should look for corroboration from other evidence to find whether there are other cogent circumstances on record to support it.

26. Learned State counsel has relied on observations in case of **Gagan Kanojia and another vs. state of Punjab, (2006) 13 SCC 516,** wherein while discussing the evidentiary value of extra-judicial confession Hon'ble Apex Court has observed as follows:-

“25. Extra-judicial confession, as is well-known, can form the basis of a conviction. By way of abundant caution, however, the court may look for some corroboration. Extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved can be relied upon by the courts. [See Sukhwant Singh @ Balwinder Singh v. State through CBI, 2003 (4) RCR (Cri.) 670; 2004 (1) Apex Criminal 590 (SC)].”

27. In case of **Gura Singh vs. State of Rajasthan, (2001) 2 SCC 205,** Hon'ble Apex Court has observed as follows:-

“6. It is settled position of law that extra-judicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime

*alleged. Despite inherent weakness of extra judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Relying upon an earlier judgment in **Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 SCR 1098**, this Court again in **Maghar Singh v. State of Punjab, AIR 1975 SC 1320** held that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the confession was true and voluntarily made, then the conviction can be founded on such evidence alone. In **Narayan Singh v. State of M.P., AIR 1985 SC 1678** this Court cautioned that it is not open to the court trying the criminal case to start with presumption that extra judicial confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extra-judicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon*

such a confession. In **Kishore Chand v. State of H.P., AIR 1990 SC 2140** this Court held that an unambiguous extra judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under Section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26. The Court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinized. To the same effect is the judgment in **Baldev Raj v. State of Haryana, AIR 1994 (1) RCR (CrL) 42 (P&H)**. After referring to the judgment in **Piara Singh v. State of Punjab, AIR 1977 SC 2274** this Court in **Madan Gopal Kakkad v. Naval Dubey & Anr., JT 1992 (3) SC 270** held that the extra judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in

character and voluntary in nature can be made the basis for conviction even without corroboration.”

28. While dealing with admissibility of extra-judicial confession, the Apex Court in case of ***Sivakumar vs. State by Inspector of Police, 2006 (1) SCC (Cri.) 470***, has observed as follows:-

“45. *In Mujeeb and another v. State of Kerala, 2000 (1) RCR (Cri.) 156 (SC); AIR 2000 SC 591, whereupon again Mr. Sampath relied, the prosecution failed to prove even the circumstances pointed out to the guilt of the Appellant.*

46. *Extra-judicial confession may or may not be a weak evidence. Each case is required to be examined on its own fact. In Sidharth etc. etc. v. State of Bihar, 2005 (4) RCR (CrL) 651 (SC); 2005 (3) Apex Criminal 452 (SC); JT 2005 (12) SC 310 a Division Bench of this Court held:*

“....He had also made extra-judicial confession to PW-8 Arko Pratim Banerjee. The confession made by appellant Arnit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act.....”

47. *In Piara Singh and others v. State of Punjab, (1977) 4 SCC 452, this Court observed:*

".....The learned Sessions Judge regarded the extra judicial confession to be a very weak type of

evidence and therefore refused to rely on the same. Here the learned Sessions Judge committed a clear error of law. Law does not require that the evidence of an extra judicial confession should in all cases be corroborated. In the instant case, the extra judicial confession was proved by an independent witness who was a responsible officer and who bore no animus against the appellants. There was hardly any justification for the Sessions Judge to disbelieve the evidence of Balbir Singh particularly when the extra judicial confession was corroborated by the recovery of an empty from the place of occurrence."

48. Yet again in ***State of Rajasthan v. Raja Ram, 2003 (4) RCR (CrL) 238 (SC); 2004 (1) Apex Criminal 471 (SC); (2003) 8 SCC 180***, it was stated:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-

judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

29. In order to rely upon extra-judicial confession fact relevant to see is as to whether statement was voluntary and was made before a person of authority and whether such person has any reason or motive for false implication of the accused by attributing extra-judicial confession made by him of commission of crime.

30. It is evident that both the appellants are resident of village Gubhana, District Jhajjar. PW-2 Shiv Kumar is also resident of the same village. He is an agriculturist and was president of joint brotherhood *panchayats* of four villages Gubhana, Majri, Gangdua and Jargadpur (*khap panchayat*). It is a well known factor in the State of Haryana that office bearers of *khap panchayat* particularly its president is considered to be a man of authority in his village. Though, *khap panchayats* are not legally recognized body but this fact cannot be overlooked that as on today these *panchayats* wield a lot of influence on the villagers of their area. Being President of *khap panchayat*, PW-2 Shiv Kumar was a person having influence and authority and appellant-Surender @ Sonu was having reasons to know this. Initially FIR in this case was registered for death of deceased-Suresh in a motor accident and later from the facts that came to knowledge of PW-1 Suraj Mal, the police zeroed down on Surender @ Sonu. In order to avoid the police wrath, he took help of PW-2 Shiv Kumar, who produced him before the police. Shiv Kumar appeared as PW-2 and made statement about the extra-judicial confession made to him by Surender @ Sonu. He was extensively cross-examined but his statement in cross-examination remained un-shattered. There is nothing in evidence that confession was made to PW-2 Shiv Kumar under any undue influence, coercion or pressure. Moreover, it is not a case of false implication. In case complainant had to falsely implicate appellants, he could make statement at the first instance at the time of registration of FIR naming appellants as accused. He appears to have been got swayed by the fact that dead body of the deceased was found on road and took it as a case of death by accident. However, injuries on the person of the deceased, which were lacerated wounds on the mandibular

region or occipital region, arms, hands etc. clearly show that these type of injuries cannot be caused in an accident. Photographs (Ex. PW-10/J) taken at the spot show the use of sharp edged weapon to cause injuries on person of the deceased. There are marks of use of sharp edged weapon on trouser of the deceased, which got cuts at several places. PW-14 Dr. Sushant Sharma on examination of 'Farsa' recovered from Surender @ Sonu has also opined that possibility of injuries on the person of the deceased with this weapon cannot be ruled out. It is very difficult, rather not possible to give a specific opinion that injuries were caused by a particular weapon but the opinion of doctor is clear that the possibility of injuries on the person of the deceased being caused by the weapon recovered from Surender @ Sonu is there. Keeping in view facts of the case, we find testimony of PW-2 Shiv Kumar about extra-judicial confession made by Surender @ Sonu as a reliable piece of evidence.

31. The testimony of PW-12 Shiv Kumar is not a sole evidence on record to prove the guilt of appellants. The prosecution has examined PW-13 Gaurav to prove the motive for appellants to eliminate the deceased. Statement made by him is extracted as follows:-

“Stated that in the year 2013, I used to study in 7th Class in L.R. School, Gubhana. I have one brother and one sister. Before some days of Diwali, we both brother and sister were sleeping. I saw in the night that my mother & Surender were lying naked on a cot. Next day, I told this fact to my father. My father became angry. On the evening my father received a telephone call and after that he said that he will come after sometime and asked us to sleep. This phone call was received

by my father on 08.04.2013 at about 10.00 p.m. My father did not return in the night. Next day we came to know that my father had died. The dead body of my father was lying on Bahadurgarh road. The fact that my mother and Surrender were lying naked on a cot was disclosed by me to my Tau Surajmal (elder brother of father) after 10 days from the death of my father. Nothing happened between father and mother after I told him about the said incident. My father used to get angry on my mother and also used to quarrel with her. After about 3 months of the occurrence, police came and recorded my statement.”

32. Learned counsel representing appellants have challenged statement of PW-13 Gaurav on the ground that he is a child witness and can be moulded/tutored to make a false statement. Learned counsel for appellants have mainly stressed on the issue that PW-13 Gaurav after the incident had been living with his *bua*, who could influence his tender mind and make him to depose falsely against his mother. They have further argued that the police has also recorded statement of this witness after about three months of the occurrence despite coming to know of the fact that he was aware of alleged relations of appellants and quarrel between the deceased and appellant-Pushpa on this score. They have relied on observations of the Apex Court in case of **State of Karnataka vs. Shantappa Madivalappa Galapuji and others, 2010 (1) SCC (Cri.) 717**, wherein it has been observed as follows:-

“6. *The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a*

*determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in **Wheeler v. United States, (159 US 523)**. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See **Suryanarayana v. State of Karnataka, 2001 (1) RCR (Cri.) 602: 2001 (9) SCC 129.**”*

7. *In **Dattu Ramrao Sakhare v. State of Maharashtra, 1997 (3) RCR (Criminal) 227: (1997) 5 SCC 341**, it was held as follows: (SCC p. 343, para 5):*

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness

can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced

easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

33. In this case PW-13 Gaurav son of the deceased and appellant-Pushpa was around 12 years of age in the year 2013, when his father died/killed. Learned trial Court before recording his statement tested his capability to depose and recorded its satisfaction that he is competent to depose. No doubt there is delay on the part of investigating agency in recording statement of this witness but this fact is not material to discard it for the reason that PW-1 Suraj Mal in his application (Ex. PB) submitted on 19.04.2013 has disclosed that this witness apprised him about the frequent visits of appellant-Surender @ Sonu at their house, annoyance of the deceased and quarrel of the deceased and Pushpa on this score. While appearing as PW-13 he has stated that he had seen his mother and Surender @ Sonu lying naked on a cot and apprised his father of this fact and this has led to quarrel between him and Pushpa. He disclosed this fact to his *tau* after ten days of the incident and then left with his *bua*. This witness appears to be sensible and there was no reason for him to depose against his mother. After the murder of his father and imprisonment of his mother on this score, he had to live with some relative, who is close to him. This does not mean that he is a tutored witness. In the case of **Satish and another etc. vs. State of Haryana, (2018) 11 SCC 300**, the Apex Court while examining statement of a 12 years old child, who deposed against his mother, has observed as follows:-

“8. PW-2 was the son of the appellant Anita. He was a school going child aged 12 years. Both, the trial Court and the High Court have found him to be reliable and convincing. We do not find anything from his evidence to make it suspicious as the result of any tutoring by PW-4. The witness has clearly mentioned that his mother was present in the room when the assault was taking place and she asked them to leave the room on the bidding of one of the assailants. We do find it a little strange, according to normal human behavior, that at the dead of night, the appellant after witnessing an assault on her own husband, did not rush to the house of PW-1 for informing the same and sent her minor son for the purpose. The fact that she created no commotion by shouting and seeking help reinforces the prosecution case because of her unnatural conduct. We also cannot lose sight of the fact that the child witness was not deposing against another family member or a stranger, but his own mother. It would call for courage and conviction to name his own mother, as the child was grown up enough to understand the matter as a witness to a murder.”

34. In this case PW-13 Gaurav has stood the vigor of cross-examination and answered all the questions put to him very intelligently. A suggestion has been given to him that his *bua* and *tau* Suraj Mal (complainant) want to usurp the property of his father and have falsely

implicated his mother in this case. This suggestion has no basis because the deceased has left behind three children and any property if left by him will devolve on the children and not on *tau* or *bua*.

35. From the testimony of PW-13 Gaurav it is apparent that appellant-Surender @ Sonu was having illicit relations with appellant-Pushpa. He had gone to the extent of consuming *Sulphas*, when Pushpa tried to avoid him, as stated by him in his extra-judicial confession before PW-2 Shiv Kumar. *Sulphas* was also recovered from his possession. From the statement of PW-6 ASI Jagmal Singh, who was posted as MHC, it is evident that two packets of *Sulphas* each containing 10 gms. were also recovered from possession of Surender @ Sonu and were deposited with him at Police Station Sadar, Bahadurgarh, where he was posted as MHC. No person keeps *Sulphas* in his pocket. Surender @ Sonu is not an agriculturist that he requires *Sulphas* for his crop. Possession of *Sulphas* shows that he was having some frustration. As per statement of PW-2 Shiv Kumar, he has earlier attempted to commit suicide by swallowing *Sulphas*. Recovery of *Sulphas* from him reflects the outrage in the mind of Surender @ Sonu and give credence to statement of PW-2 Shiv Kumar about the disclosure statement of Surender @ Sonu. Both the appellants have suffered disclosure statements admitting their guilt and on the basis of their disclosure statements recovery of mobiles and weapon of offence was effected. Surender @ Sonu had also identified the place of occurrence as per identification memo (Ex. PW-10/S).

36. Testimony of PW-13 Gaurav proves the motive for appellants to eliminate the deceased, who used to quarrel with appellant-Pushpa due to her illicit relations with appellant-Surender @ Sonu. It is evident from the

extra-judicial confession made by Surender @ Sonu that to remove the hurdle in their way of having illicit relations both, Surender @ Sonu and Pushpa, conspired to kill the deceased.

37. There cannot be a direct evidence of conspiracy. It is to be inferred from the facts and circumstances of the case. The facts of case eloquently speaks of reasons for the appellants to eliminate the deceased. Appellant-Surender @ Sonu was feeling perturbed when appellant-Pushpa tried to distance herself from him. Pushpa was aggrieved as the deceased used to quarrel with her because of her relations with Surender @ Sonu.

38. Testimonies of complainant PW-1 Suraj Mal, PW-2 Shiv Kumar, PW-10 ASI Sudhir Kumar, investigating officer, and PW-13 Gaurav are un-shattered and are suffice to prove the charges framed against appellants.

39. As a sequel of facts and evidence discussed above, we find no reason to interfere with conviction of appellants as recorded by learned trial Court and affirm the same.

40. We have also heard learned counsel for appellants on the quantum of sentence awarded by learned trial Court.

41. Learned counsel for both the appellants have argued that it is a case of blind murder based on circumstantial evidence and extra-judicial confession of appellant-Surender @ Sonu and does not fall in the category of rarest of rare cases. Punishment awarded by learned trial Court to both the appellants is very harsh and is not made out in facts and circumstances of the case.

42. Learned trial Court has awarded the sentence of imprisonment for life till natural death to appellant-Surender @ Sonu and death sentence

to appellant-Pushpa. While awarding sentence to Surender @ Sonu, it has taken into account his age, past history, family background and family circumstances. While awarding sentence to Pushpa, learned trial Court has observed that she was unrepentant, shameless, her having illicit sexual relations with Surender @ Sonu and the fact that her son PW-13 Gaurav did not opt to meet her despite persuasion.

43. The Apex Court in case of **Machhi Singh vs. State of Punjab, (1983) 3 SCC 470** culled out guidelines to be taken into consideration while imposing the death sentence. Observations of Hon'ble Apex Court in paras 33 to 35 of the aforesaid judgment are as follows:-

33. *In this background the guidelines indicated in **Bachan Singh vs. State of Punjab, (1980) 2 SCC 684** will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from **Bachan Singh's case**:*

- (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;*
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.*
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate*

punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

- (iv) *A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.*

34. *In order to apply these guidelines inter-alia the following questions may be asked and answered:*

- (a) *Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
- (b) *Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?*

35. *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions*

posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

44. In this case it is evident that neither appellant-Surender @ Sonu nor appellant-Pushpa are history-sheeters or have any criminal antecedents. As per case of prosecution, murder of the deceased was planned because of illicit relations between both the appellants, who wanted to get rid of the deceased (husband of appellant-Pushpa). While awarding the death sentence to Pushpa, learned trial Court has taken her to be a lady of bad character and termed her to be a risk to the society. It appears that learned trial Court has drawn reasons by keeping in mind social setup without taking note of the fact that she has been alleged to be a conspirator and the murder was committed by her co-convict, Surender @ Sonu, who has been awarded imprisonment for life.

45. The question, which arises for consideration, is as to whether present case falls in the category of rarest of rare cases. In case of **Bablu @ Mubarik Hussain vs. State of Rajasthan, (2006) 13 SCC 116**, the Apex Court after taking note of principles laid down in case of **Machhi Singh (supra)** and **Bachan Singh vs. State of Punjab, (1980) 2 SCC 684** observed as follows:-

“31. In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may

entertain such sentiment in the following circumstances:

- (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.*
- (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.*
- (3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.*
- (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.*
- (5) When the victim of murder is an innocent child, or*

a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

32. *If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”*

46. Taking note of the guidelines indicated in cases of **Bachan Singh (supra)** and **Machhi Singh (supra)**, we are of the considered opinion that facts and circumstances of the case and crime committed by appellants are not such that there is no alternative but to impose death sentence to appellant-Pushpa and life imprisonment to appellant-Surender @ Sonu till his natural death in confinement. Keeping in view age, antecedents of appellants and facts of the case, we are of the opinion that sentence awarded to them by learned trial Court is on higher side and ends of justice shall be fully met if it is reduced to sentence of imprisonment for life to both the convicts.

47. As a sequel of our above discussion, MRC No. 1 of 2017 and appeals filed by both the appellants are answered as follows:-

- (i) Conviction of appellants, as recorded by learned trial Court, is upheld. However, sentence of death awarded to appellant-Pushpa is reduced to the sentence of imprisonment for life with fine of ₹1 lakh.

- (ii) Appeal filed by appellant-Surender @ Sonu is partly accepted. His conviction as recorded by learned trial Court for offence punishable under Sections 120-B and 302 read with Section 120-B IPC is affirmed. However, the sentence of imprisonment for life awarded to him till his natural death in custody is modified to the sentence of imprisonment for life with fine of ₹1 lakh.
- (iii) Amount of fine on recovery shall be paid to children of deceased-Suresh in equal share.

48. Copy of this judgment be conveyed to learned trial Court, Chief Judicial Magistrate, Jhajjar and Superintendent of Jail for information.

(DAYA CHAUDHARY)
JUDGE

(SURINDER GUPTA)
JUDGE

February 13, 2020
jk

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No