

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

217

CRA-D-1334-DB of 2015 (O&M)

Reserved on:08.09.2022

Date of Decision: 14.09. 2022

Kaimdeen Bania

...Applicant

Versus

State of Punjab

... Respondent

**CORAM : HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE N.S.SHEKHAWAT**

Present : Mrs. Hema Kakkar, Legal Aid Counsel
for the appellant.

Ms. Ishma Randhawa, Addl. Advocate General, Punjab.

N.S.SHEKHAWAT, J.

The present appeal is directed against the judgment of conviction and order of sentence dated 30.09.2014 passed by the Court of learned Sessions Judge, Fatehgarh Sahib, whereby, the appellant/accused was convicted for committing offences under Sections 302 IPC read with Section 376/511 IPC and sentenced as under:-

Offence (under Section)	Sentence	Fine	In default of payment of fine, the convict is to undergo
Section 302 IPC	Imprison ment for life	Rs.20,000/- (Rs. Twenty Thousands only)	R.I. for six months
Sections 376/511 IPC	R.I. For four years	Rs. 10,000/- (Rs. Ten Thousands only)	R.I. for six months.

The case set up by the prosecution is that the statement
Ex.P2 of Hardeep Singh @ Gola son of Gurmail Singh was recorded

by the police with regard to the murder of an unknown lady, aged about 40 years, who was resident of Nepal. On the basis of statement Ex.P2, FIR No. 124 dated 09.08.2012 under Sections 302/34 IPC Police Station Fatehgtarh Sahib was registered against unknown persons. It was alleged by complainant Hardeep Singh @ Gola that they owned two shops opposite District Courts, Fatehgarh Sahib. Out of the said shops, one shop was run by his brother Bhagwant Singh @ Pinka and three boys were employed by his brother. The complainant and his father Gurmail Singh were running a restaurant (Dhaba) in the second shop. Pal Singh @ Baba was working since last 3 years and Billu was working for the last 15/16 years and Raju @ Vishal Kumar was working from the last 03 years. Complainant and his father Gurmail Singh also used to work in the Dhaba, owned by them. About 1 ½ months ago, an unknown Nepali lady aged about 40 years came there and his father Gurmail Singh provided her food and water. She started washing utensils and did not leave the place, even on their asking. She started working on the Dhaba and used to take food only. She was provided with a cot and used to sleep inside the Dhaba, whereas, Gurmail Singh and other servants used to sleep outside the Dhaba. On 08.08.2012 at about 09.00 p.m., Raju who had left the shop at the Dhaba about 15/16 years back came with Baba. Baba asked the complainant to employ Raju again at shop, but the complainant expressed his inability to provide him work, showing that there was not much work in their Dhaba. They wanted to take

liquor and took Rs. 140/- from the complainant and went to the liquor shop and purchased the bottle of country made liquor. The complainant went to his house at Bassi Pathana and his father and other servants slept outside the Dhaba. On 09.08.2012 at about 06.00 a.m., Gurmail Singh returned home and told the complainant that the unknown Nepali lady, who was working in their Dhaba had been murdered by some unknown persons. The complainant, his father and other persons came back to the Dhaba and reported the matter to the police. With these broad allegations, the FIR was initially registered against the unknown persons.

During the course of the investigation, the postmortem on the dead body Ex.P12 was conducted by PW4 Dr. Kuldeep Singh and two other doctors and the Board of doctors notices the following injuries:-

“1.Lacerated wound on left side of fore head 1.5 cm above left eye brow present obliquely measuring 5 cm x 2.5 cm bone deep with clotted blood present. On exploration underlying frontal bone was fractured, lacerating the corresponding part of meninges and brain. There was also present swelling on left side of face.

The visceras were pale in colour. Vaginal and extravaginal swabs were taken in tube I and II and sent to chemical examiner for spermatozoa”.

As per the opinion of Board of Doctors the cause of death in the present case was coma and shock due to ante-mortem

injury No. 1, described in the PMR, which was sufficient to cause death in ordinary course of nature. The vaginal and extra-vaginal swabs were taken to rule out any sexual offences, as requested by the police. The probable duration between the injury and death was immediate and between death and postmortem examination was between 3 to 7 days. The report of the chemical examiner Ex.P13 was received, on which, the doctors gave their opinion Ex.P14 that there was nothing which suggests that sexual offence had taken place as there was no injury to sexual organ and chemical examiner's report points out that no spermatozoa was detected in the contents of Ex.(I) and Ex.(II).

Still further, the police took into possession the broken piece of bangles smeared with blood, one bottle of liquor and glass on 09.08.2012 itself vide memos Ex.P27 and P28. Furthermore, in the presence of PW13 SI Gurjit Singh and PW14 ASI Avtar Singh, the foot moulds/marks of the suspected accused were taken into possession. Both moulds of left foot and right foot were sealed with the stamp 'DS' and the memo Ex.P29 dated 09.08.2012, duly witnessed by ASI Avtar Singh and HC Gurjit Singh and signed by Station House Officer, Police Station Fatehgarh Sahib.

Still further, the police collected various incriminating evidence, recorded the statements of the witnesses under Section 161 Cr.P.C. Ultimately on 21.08.2012, the present accused suffered extra judicial confession in the presence of PW2 Gamdoor Singh,

Ex. Sarpanch, who produced the accused before the police and the accused was formally arrested.

The police moved an application Ex.P23 in the court of learned Judicial Magistrate Fatehgarh Sahib and submitted that the marks of feet of suspected persons were taken and permission may be granted to take the marks of feet of accused for comparison. Vide order dated 16.10.2012, the learned Judicial Magistrate, Fatehgarh Sahib allowed the said application to take foot prints of the accused on 16.10.2012 itself. Consequently, the memos regarding preparation of foot moulds of the accused was prepared and the moulds of feet were prepared and were sealed with the stamp of 'DK'. After using the stamp, the same was handed over to ASI Avtar Singh.

Apart from that, the accused suffered disclosure statement and in pursuance of the said disclosure statement, a small hammer and a vest (Baniyan), both stained with blood were recovered at the instance of the accused. Subsequently, the small hammer and the vest were sent to FSL and as per the FSL report Ex.P41, both these articles were found to be stained with human blood. Still further, the FSL report was prepared with regard to the foot marks and report Ex.P43 was prepared by the FSL, which clearly showed that the impressions of left and right naked foot, which were found at the place of occurrence, matched with the test impressions of left and right foot of the accused.

Finally, the report under Section 173 Cr.P.C. was prepared and was presented before the competent Court of law. The accused was tried by the Court of learned Sessions Judge, Fatehgarh Sahib and vide impugned judgment and order dated 30.09.2014, the appellant/accused was convicted and sentenced as mentioned above. Assailing the findings recorded by the learned Sessions Court, the instant appeal has been preferred by the appellant before this court.

We have heard learned counsel for the parties and perused the records of the trial Court, which includes the oral testimonies of the witnesses, statement under Section 313 Cr.P.C., exhibits and the records of the investigation.

Learned counsel for the appellant has vehemently contended that the appellant has been wrongly convicted by the trial Court. The appellant was nominated as an accused during the course of investigation, based on extra judicial confession of the accused made to PW2 Gamdoor Singh, who has been declared as a stock witness vide order dated 20.02.2003 Ex.DX. Neither PW2 Gamdoor Singh knew about the residence of the appellant nor anything about his family. It was further argued that the extra judicial confession is a weak piece of evidence and cannot be relied in the facts of the instant case. She further submitted that it was a case of blind murder with no conclusive/convincing evidence and there was no eye witness to the occurrence. Even, the prosecution had miserably failed to prove the motive against the appellant. It was further submitted that the

investigation had been faulty on every stage. On finding the dead body, the complainant went to his house in Bassi Pathana, instead of lodging a report with the police. She further submitted that there was no exhibit of foot moulds nor there is any mention of foot prints at the place of occurrence. It was further submitted that PW4 Dr. Kuldeep Singh had attributed the injury found on the body of the deceased by a brick or a stone, however, no weapon of offence was shown to the doctor by the police. It was further submitted that as per PW1, the complainant alongwith two more persons had consumed country made liquor, for which, he was given Rs.140/- and even one glass was found near the dead body whereas all three of them had consumed liquor outside the Dhaba. Still further, as per the statement of PW14 ASI Avtar Singh, two persons with whom PW1 Hardeep Singh (complainant) had consumed liquor, namely, Raju and Baba were missing. However, no efforts were made by the investigating team to locate/search for them or to interrogate them in the said case. Still further, it was submitted that the result of the FSL report simply states that the vest and hammer were stained with blood, which can never be considered to be clinching evidence. She further submitted that it is highly unsafe to base the judgement of conviction only on the basis of extra judicial confession.

Learned State counsel has vehemently contended that the prosecution had led cogent and convincing evidence to prove the guilt of the accused. Learned State counsel has referred to statement of

PW1 Hardeep Singh @ Gola (complainant), who had shown the presence of the present appellant at the Dhaba on the night intervening 8/9.08.2012, when the offence was committed. Still further, he relied upon statement made by PW2 Gamdoor Singh to submit that the present appellant had made extra judicial confession before him and they were acquainted with each other. Even PW2 Gamdoor Singh stated that appellant/accused was on visiting terms with him. The learned counsel further submitted that in fact the appellant went to commit rape with unknown Nepali lady and when she resisted, he caused injuries. Still further, the learned State counsel referred to FSL reports Ex.P-40 to Ex.P-43 and submitted that the hammer and vest recovered from the appellant were found to be stained with human blood. Still further, the impression of both naked feet marked as Ex.C-1 and Ex.C-2 were found to be of present appellant/accused. Consequently, apart from various testimonies of the witnesses, there were scientific evidence to connect the appellant with the commission of the crime. Even during the course of investigation, sufficient material was found against the appellant and he is liable to be convicted by this Court.

It has been held by the the Hon'ble Supreme Court in the matter of Shanti Devi Vs. State of Rajasthan, 2013(1) EcrC 260 as follows:-

“Having heard learned counsel for the respective parties and having bestowed our serious consideration to the

judgment impugned before us and other material papers, as it is a case of circumstantial evidence, we wish to quote the well settled principles laid down by this Court in various decisions which are to be applied in order to examine the conclusions arrived at by the Courts below while convicting the accused based on circumstantial evidence. The principles laid down in those decisions can be mentioned before finding out whether or not the conviction and sentence on the appellant can be held to have been established as stated in the judgment of the High Court as well as that of the learned Trial Court. The principles can be set out as under:

- (i) The circumstances from which an interference of guilt is sought to be proved must be conjointly or firmly established.*
- ii) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused”.*

Further, the Hon’ble Supreme Court in the matter of

Sharad Birdhichand Sarda Vs. State of Maharashtra AIR 1984

Supreme Court, 1622 has held as under:-

“Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Vs. State of Madhya Pradesh, 1952 SCR 1091: (AIR 1952 SC 343). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of

Tufail Vs. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal Vs. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):

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

152. A close analysis of the decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(I) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793: (AIR 1973 SC 2622) where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions”.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be prove; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

The principle for basing a conviction on the basis of circumstantial evidence has been laid down by the Hon’ble Supreme court in catena of judgments and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events, from which, only irresistible conclusion about

the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In the light of the above said principles, which have been reiterated by the Hon'ble Supreme Court and this Court in number of pronouncements, we proceed to ascertain whether the prosecution has been able to establish a chain of circumstances so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused.

The first circumstance is the presence of the accused at the place of occurrence on the night intervening 08/09.08.2022. The appellant alongwith other workers were sleeping in front of the Dhaba, whereas, the victim was sleeping inside the Dhaba. In the morning, the father of the complainant had found that the unknown Nepali had been murdered. Still further, the appellant had come to the Dhaba after 15 years, who took the meal at Dhaba on 08.08.2012. He alongwith Baba had also consumed country made liquor on the said night. Still further, after his arrest, the appellant confessed before the complainant in police station that he had committed the murder of the said Nepali lady.

Still further, the learned counsel for the appellant has raised serious doubts about the veracity of the statement made by PW2 Gamdoor Singh, Ex-Sarpanch, in whose presence, the appellant had suffered an extra judicial confession. We find no substance in the arguments raised by the learned counsel for the appellant. In fact, PW2 Gamdoor Singh had specifically deposed that he was Ex-Sarpanch of the village and he had been attending different Courts and offices at Fatehgarh Sahib, which establishes that he wielded considerable influence in the area. Even, he identified the accused present in the Court as the person who had come to him and had confessed the crime. He specifically stated that he was acquainted with the appellant, who used to come to his house on holiday. Learned counsel for the appellant submitted that PW2 Gamdoor Singh was a stock witness and he relied upon the judgment Ex.DX in this regard.

Again the said argument is merit-less because from a perusal of Ex.DX, it is apparent that in the said case, Gamdoor Singh had turned hostile and made certain unfounded averments. He was declared to be hostile and consequently, the accused was ordered to be acquitted in the judgment Ex.DX. As a consequence, the findings

recorded in the said judgment Ex.DX would not be relevant and cannot be relied upon by the appellant to submit that PW2 Gamdoor Singh is a stock witness. Secondly, for declaring a witness to be a “stock witness”, it has to be shown that he had appeared as a witness falsely in many cases. From a perusal of the testimony of PW2, it is apparent that in the cross-examination, no such details of other cases were put to the witness. PW2 Gamdoor Singh denied a suggestion that he was a witness in 20/25 cases regarding extra judicial confession and his evidence was discarded. Even the appellant did not lead any evidence to show that PW2 Gamdoor Singh had ever appeared as a witness in any case except judgment Ex.DX. Still further, the suggestions made to a witness in the cross-examination can never take place of the evidence. The defence counsel was permitted to cross-examine PW2 Gamdoor Singh at length and nothing material could be elicited from the same. Thus, the trial Court had correctly placed reliance on the testimony of PW2 Gamdoor Singh. No doubt the law is well settled that an extra judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of

clinging nature, ordinarily conviction with the offence of murder should not be made only on the evidence of extra judicial confession. The extra judicial confession made by the accused could be admitted in evidence only as a corroborative piece of evidence. In absence of any substantive evidence against the accused, the extra judicial confession made by the accused loses its significance and there cannot be any conviction based on extra judicial confession. Keeping in view the said principle of law, in the instant case, the testimony of PW2 Gamdoor Singh is worth placing reliance and is not lacking in credence. The appellant was known to him and had reposed confidence in Gamdoor Singh. Still further, the testimony of PW2 Gamdoor Singh was duly corroborated, including the reports of FSL, which conclusively proved the involvement of the appellant in the commission of crime.

Still further, the prosecution examined PW8 HC Devinder Singh, who was part of the initial investigation. He witnessed the disclosure statement Ex.P-20 made by the appellant before the police. The accused had thumb marked the said disclosure statement and ASI Avtar Singh had witnessed the same. The accused

took the police party to the disclosed place and by moving ahead of the police party, he got recovered one hammer and vest stained with blood lying in a polythene bag. The Investigating Officer made two separate parcels of the recovered hammer and vest with the seal impression 'DS' and the seal after use was handed over to ASI Avtar Singh. Vide memo Ex.P-21 the said parcels were taken into possession and the memo was witnessed by PW8 HC Devinder Singh and PW-14 ASI Avtar Singh. The hammer and the vest recovered from the appellant were sent to the FSL and both exhibits were found to be stained with human blood by the FSL in its report Ex.P-41. Similarly, the moulds of both naked feet of appellant were taken on 09.08.2012, i.e. on the date of occurrence itself vide memo Ex.P-29. Both the moulds were sealed with the stamp 'DS'. After the arrest of the accused, the police moved an application Ex.P-23 in the Court of learned Judicial Magistrate 1st Class, Fatehgarh Sahib and permission was sought to take the foot marks of the accused. Vide order dated 16.10.2012, the permission was granted by the Magistrate on the same day itself. In compliance of the said order, the moulds of the feet were prepared and after preparing the moulds, these were got sealed

with the stamp 'DK', on 16.10.2012. The FSL again submitted a report Ex.P-43 and the results of the examination have been reproduced below-

Description of articles/exhibits received

- Parcel C1* It contained one mould bearing impression of left naked foot stated to be lifted from the scene of crime. It has been marked as exhibit C-1 by this laboratory.
- Parcel C2* It contained one mould bearing impression of right naked foot stated to be lifted from the scene of crime. It has been marked as exhibit C-2 by this laboratory.
- Parcel T1* It contained one mould bearing impression of left naked foot stated to be of the accused Kaimdeen. It has been marked as exhibit T-1 by this laboratory.
- Parcel T2* It contained one mould bearing impression of right naked foot stated to be of the accused Kaimdeen. It has been marked as exhibit T-2 by this laboratory.

RESULT OF EXAMINATION

1. The impression of left naked foot marked as exhibit C-1 contained in parcel C1 is from the accused Kaimdeen, the test impression of which has been provided on the mould marked as exhibit T-1 contained in parcel T1 as referred above.

2. *The impression of right naked foot marked as C-2 contained in parcel C2 is from the accused Kaimdeen, the test impression of which has been provided on the mould marked as exhibit T-2 contained in parcel T2 as referred above”.*

Still further, we find no substance in the arguments raised by the learned counsel for the appellant that it was a case of blind murder with no conclusive and clinching evidence and no motive had been proved against the appellant. In fact, the unknown Nepali lady was living in the Dhaba and the accused was sleeping with other servants outside Dhaba. In the night they consumed liquor and the accused wanted to commit rape on the victim. However, when the victim resisted, he gave injuries with a hammer to the said lady, who ultimately died due to the injuries suffered by her. Even, the said fact was duly established during the course of the investigation. Still further, there were sufficient incriminating evidence to connect the accused with the crime in the shape of oral testimonies and forensic evidence, consequently, motive on the part of the appellant was not so relevant. Still further, the appellant cannot be permitted to take advantage of the shortcomings in the investigation as the law is well

settled that the victim cannot be made to suffer because of the fault on the part of the Investigating Officer. Consequently, there was sufficient clinching and reliable evidence to hold that the appellant had committed murder of the unknown Nepali lady and we affirm the findings of the trial Court in this regard.

Even the murder was committed, when the appellant tried to commit rape on the Nepali lady and when she resisted, he committed the murder in an extremely brutal and diabolical manner, which is evident from the evidence led by the prosecution. Still further, even vide Ex.P-27, the broken pieces of bangles stained with blood were lifted from the place of occurrence. This clearly shows that the appellant, who was drunk at that time tried to commit rape on the deceased. Even he disclosed to the police that this was the motive for commission of the crime, which otherwise appears to be logical. Consequently, from the evidence led by the prosecution, it is apparent that chain of events has been established clearly and such completed chain of events as such, rules out the reasonable likelihood of the innocence of the appellant.

In view of the above, we find no substance in the arguments raised by learned counsel for the appellant and we upheld and affirm the impugned judgment and order dated 30.09.2014 passed by the learned Sessions Judge, Fatehgarh Sahib.

Resultantly, the instant appeal stands dismissed.

The case property, if any, may be dealt with in accordance with law after the expiry of the period of limitation.

The accused shall be taken into custody forthwith, if on bail in the instant case, to serve the remaining sentence.

The trial Court record be transmitted back.

(SURESHWAR THAKUR)
JUDGE

14.09.2022
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No