

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.969 of 2015**

Arising Out of PS. Case No.-572 Year-2006 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

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Md. Raju Son of Md. Salahuddin Resident of mohalla- Bhikanpur Tank Lane,
Police Station -Ishakchak, District Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (DB) No. 914 of 2015

Arising Out of PS. Case No.-572 Year-2006 Thana- BHAGALPUR KOTWALI District-
Bhagalpur

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Md. Sonu son of Late Md. Mansur Resident of Mohalla - Bhikanpur Tank
Lane, Police Station - Ishakchak, District - Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 969 of 2015)

For the Appellant/s : Md. Najmul Hoda, Adv.
Ms. Shweta, Adv.
Mr. Pranjal Kumar, Adv.

For the Respondent/s : Ms. S.B. Verma, APP
(In CRIMINAL APPEAL (DB) No. 914 of 2015)

For the Appellant/s : Md. Najmul Hoda, Adv.
Ms. Shweta, Adv.
Mr. Pranjal Kumar, Adv.

For the Respondent/s : Mr.S.B.Verma, APP

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**CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE HARISH KUMAR**

**ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)**

Date : 02-05-2023



Heard Md. Najmul Hoda for the appellants in Cr. Appeal (DB) No. 969 of 2015 (Md. Raju) and Cr. Appeal (DB) No. 914 of 2015 (Md. Sonu). The State has been represented in both the appeals by Ms. Shashi Bala Verma, learned Additional Public Prosecutor.

2. Both the appellants have been convicted under Sections 302, 201 and 34 of the Indian Penal Code vide judgment and order of conviction dated 28.08.2015 and order of sentence dated 31.08.2015 passed in Sessions Trial No. 245 of 2007 arising out of Kotwali (Ishakchak) P.S. Case No. 572 of 2006 and have been sentenced to undergo rigorous imprisonment for life, to pay a fine of Rs. 10,000/- and in default of payment of fine to further suffer rigorous imprisonment for two years for the offence under Sections 302/34 of the Indian Penal Code and rigorous imprisonment for two years, a fine of Rs. 2000/- each and in default of payment of fine, to suffer further simple imprisonment of two months for the offence under Section 201 of the



Indian Penal Code.

3. The case against the appellants rests on the extra judicial confession having been made by appellant/Md. Raju and the circumstantial evidence in the case. Md. Irshad Alam, who is the father of the deceased and has been examined as PW9 in the case, had lodged the F.I.R. on 08.09.2006 which was recorded at his house by the Officer-in-charge of Ishakchak police station in the district of Bhagalpur in which he had alleged that when he came back from the court, where he had been working as a peon, his wife Rukhsana Khatoon (PW8) informed him that one of his sons namely Imran Alam aged about 14 years had not come back from home. On this information, PW9 went out of his house to look for his son in the neighborhood but to no avail till about 9 O'clock in the evening. While the search was still on, PW9 claims to have learnt from somebody, whose identity has not been disclosed, that one Md. Raja son of Md. Akil Ansari, a neighbour of



PW11, had disclosed that while the son of PW9 had been sitting with him, appellant/Md. Raju had goaded them to come out of the house for the purposes of taking snacks. Both of them were taken by the appellant/Md. Raju near a railway over-bridge where he Raju strangled the deceased by means of a cloth and left the dead body there. On such information, PW9 along with the villagers and neighbours came to the house of Akil Ansari and questioned Md. Raja, who also informed him and others that while he was sitting along with the deceased at his house, Md. Raju came at about 7 PM and took them near the railway over-bridge. Suddenly thereafter, Md. Raja informed PW9, appellant/Md. Raju, by using a Gamcha, tied the neck of the deceased and started yanking it. The deceased kept on pleading that he should not be killed but the appellant/Raju did not pay heed to his pleadings. No sooner was the deceased rendered unconscious because of such strangulation, appellant/Raju lifted a stone and



threw it on the head of the deceased. Md. Raja claims to have ran away from the place of occurrence. He was also attempted to be chased but, he could anyhow come back to his house.

4. On such information having been collected from Md. Raja, PW9 along with others reached the house of appellant/Raju and questioned him. Initially, Raju feigned ignorance but later, admitted that he had killed the deceased and that the dead body is still lying under the railway over-bridge. On hearing such statement from Raju, the crowd which had collected there became restive and Raju was assaulted. He was also tied up to prevent him from running away. Other persons informed PW9 that a day before i.e. on 07.09.2006, Raju had stolen a goat belonging to one Md. Khurshid Alam and the deceased had seen him taking away that goat. Later, Raju left the goat in a field. Even thereafter, Khurshid Alam was trying to locate as to who had stolen the goat. Raju suspected that since



the deceased had seen him taking away the goat, he killed him. The PW9 claims to have given all such information to the Officer-in-charge of the concerned police station on telephone whereafter the police arrived and before him, his statement was given which was converted into FIR.

5. The police after investigation submitted charge-sheet against the appellants. As against appellant/Md. Sonu, during the course of investigation, it was found that he was the associate of Raju in killing the deceased. Charges were framed against both the appellants under Sections 302/34 and 201 of the Indian Penal Code and they were tried.

6. The learned trial court, after examining twelve witnesses on behalf of the prosecution, including the doctor and the I.O., convicted both the appellants under Section 302/34 and 201 of the I.P.C. and sentenced them to undergo rigorous imprisonment for life for the offence under Section 302/34 IPC, to pay a



fine of Rs. 10,000/- and in default of payment of fine, to further suffer rigorous imprisonment for two years and rigorous imprisonment for two years, a fine of Rs. 2000/- each and in default of payment of fine, to further simple imprisonment of two months for the offence under Section 201 of the Indian Penal Code.

7. The entire evidence on which the conviction has been recorded is based on extra judicial confession made by Md. Raju.

8. It has been argued on behalf of the appellants that the prosecution has not been able to prove the case beyond all reasonable doubts; that all the witnesses except the I.O. and the doctor are closely associated with the informant and the deceased; the source of information to PW9 was Md. Raja son of Md. Akil who has turned hostile and has not supported the prosecution version and that the dead body was not recovered on the confession of either of the appellants for it to be accepted in evidence under Sections 27 of



the Evidence Act. On these grounds, it has been urged that merely because appellant/Raju was coerced by the villagers and threatened of dire consequences that he might have made some statements under the belief that he shall be allowed to go and that statement is the basis of convicting the appellants. It has also been urged that there is nothing on record to prove the complicity of the appellant/Sonu whose name has transpired during the course of investigation but who has not been named by Md. Raja, who was the eyewitness to the occurrence.

9. Md. Jasimuddin, Md. Abu Perwez and Md. Wasad Rajjak, all of whom are related to PW9 and the deceased, have been examined as PWs. 1, 2 & 3 who have only reiterated the fact that when they came out of the house on *Hulla*, they heard that Raju had killed the deceased and that the occurrence had taken place because of an incident of theft of a goat of Khurshid Alam by one of the appellants Md. Raju.

10. The brother of the deceased has been



examined as PW4 who also repeats the same story all over again. Md. Akil, who is the father of Md. Raja who had seen the occurrence, has also expressed complete ignorance about anything else except his knowledge derived from the talk of the town and neighborhood that the deceased had been killed by Raju and Sonu. He has offered no clue to any further event in connection with his son Md. Raja (PW10) having gone with the deceased and the appellants near a railway over-bridge where the two appellants killed the deceased.

11. The evidence of two of the other persons namely Rukhsana Khatoon, who is the mother of the deceased and Farooque Azam who have been examined as PW8 and PW7 respectively are required to be analyzed. PW8 for the first time has deposed before the Court that she saw her son (deceased) go along with Raja and Raju for playing cricket but, when her son did not return, she asked Farooque Azam (PW7) to look for him. This has been affirmed by PW7 but, he has stated



that while he was looking for the deceased, PW9 also arrived and during the course of search of the deceased, both of them learnt that Md. Raja (PW10) had gone along with the deceased on the asking of appellant/Raju at railway over-bridge at some distance where the deceased was killed with the help of Md. Sonu.

12. The prosecution aims to bring the case within the fold of the appellants having been last seen with the deceased and no explanation was coming forth from them regarding his whereabouts; rather an extra judicial confession of Raju that he strangled and killed the deceased with the help of one person, whom he was reluctant to name before the public. All the aforementioned witnesses have stated that they came to learn that Raja disclosed the story first whereafter Raju was apprehended by the people of the neighborhood and when he admitted of his having killed the deceased, he was assaulted and made captive by the persons of the neighborhood. It was only thereafter that the police was



informed P.W.11 arrived at the scene, recorded the First Information Report and proceeded for recovery of the dead body at the place indicated by Raja as also by one of the appellants viz. Md. Raju. The dead body was recovered but, it appears that inquest report was prepared the next day i.e. on 08.09.2006. From the perusal of the inquest report, it further appears that the same was prepared near the railway over-bridge and there was a ligature mark on the neck, confirming the case of strangulation of the deceased before his head was smashed.

13. The dead body has been identified by all including PW9.

14. On the same day, autopsy was performed on the dead body.

15. Dr. Yogesh Prasad Sah (PW12), who conducted the postmortem, found multiple bruises of different sizes and shapes below the knee joint. There were bruises on the face and arms of the deceased as



well. One lacerated injury of 2"x 1½" x skull bone deep was found on the front temporal area of the scalp. The frontal and the temporal bones were found to have been fractured. The inside of the brain in the occipital area was also found to have been smashed, which protruded out of the scalp. A ligature mark of 7"x ¾" width was found extending from one side to the other of the neck, which was continuous. The death was reported to be on account of asphyxia because of strangulation. The time assessed of the death was 12 to 24 hours before the postmortem (postmortem report has been exhibited as Ext.6).

16. The question for consideration in these appeals is whether the recovery of the dead body could be considered to be admissible under Section 27 of the Indian Evidence Act, 1872.

17. Section 27 of the Evidence Act provides that when any fact is deposed to as discovered in consequence of information received from a person



accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, could be proved.

18. For acceptance of such recovery under Section 27 of the Evidence Act, as an evidence which could be proved, it is necessary that the discovery be made on the confession of an accused, in the custody of the police and that such discovery ought to be of some new fact for it to be admissible.

19. From the evidence on record, it appears that before the PW11 (Investigating Officer) took Raju into custody, Md. Raja (PW10) had disclosed that the dead body was lying under the railway over-bridge. It was only on the basis of such statement and the extra judicial confession of appellant/Raju that the dead body was recovered.

20. In order to appreciate the arguments advanced on behalf of the appellants, it would be



necessary to refer to Sections 24 and 25 of the Evidence Act of which Section 27 is an exception.

21. Section 24 provides that a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

22. Section 25 of the Evidence Act makes it very clear that no confession made to a police officer shall be proved as against a person accused of any offence.

23. As noted above, Section 27 of the



Evidence Act which has been referred to the preceding paragraph, is an exception to Sections 25 and 26. The rationale of Sections 25 and 26 is that the police may procure a confession by coercion or threat. The exception under Section 27 is applicable, but only if the confessional statement leads to the discovery of some new fact. So much of such information in the statement only as it relates distinctly to the facts discovered is admissible in evidence and not anything else.

24. On a perusal of the records of this case as also the deposition of the witnesses, it is absolutely clear that the knowledge about the dead body lying under the railway over-bridge was procured from PW10, whose statement was recorded under Section 164 of the Code of Criminal Procedure. When appellant/Raju was confronted by the people of the neighborhood, he first feigned ignorance and thereafter admitted of having killed the deceased by strangulating and then pounding his face by means of big stone. He also claims to have



been helped in this act by another person, whose name he did not disclose either before the public or the police.

25. It is apodictic that an extra judicial confession, if corroborated by other evidence on record could be taken into consideration to prove the guilt of the accused but it nonetheless remains a weak piece of evidence. Thus, the Courts have very consciously rejected such extra judicial confessions if it is offered as the sole basis for conviction of the accused and that also, when such extra judicial confession is not voluntary. The corroboration of such extra judicial confession has to be of every circumstance mentioned in the confession with regard to the participation of the accused separately and independently.

26. We find from the records that the extra judicial confession of appellant/Raju does not fit in the scheme of Section 24 of the I.E.A, 1872, as it was under a threat of local persons who had, as noted above, grew very angry and restive on hearing that a 14 years



old child had been killed for a trifle. Thus even if such extra judicial confession is corroborated by other sources, it remains irrelevant as it is not at all voluntary.

27. There is nothing on record for us to be of any opinion that any confession was made before the police officer and therefore, the recovery of the dead body would not be considered to be on the basis of any such statement made by the accused/appellant Raju.

28. So far as its applicability (confession by Md. Raju) to the case of appellant/Sonu is concerned, Section 30 of the Evidence Act comes into play. Section 30 of the IEA, 1872 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against the other person as well as against the person who makes such confession.

29. For Section 30 of the Act to apply



positively in case of Md. Sonu, it has first to be proved that any confession was made by a co-accused, which was inculpatory and it affected co-accused Md. Sonu and such confession stood proved. Then only it could have been used against Md. Sonu.

30. We have seen that there is no confession before the police officer of accused leading to discovery of new fact. The confession was extra judicial while the appellant/Md. Raju was not in custody either of the people or of the police.

31. That apart, a court of law cannot start with the confession of an accused person. It must begin with other evidence adduced by the prosecution and only thereafter it is permissible to turn to the confession, in order to receive assurance to the conclusion of the guilt which a judicial mind is about to reach on the said other evidence. (Refer to ***Hari Charan Kurmi Vs. The State of Bihar (AIR 1964 SC 1184)***)

32. In case of ***Surinder Kumar Khanna Vs.***



Intelligence Officer, DRI, (2018) 8 SCC 271, the Supreme Court while dealing with a case of Narcotics, Intoxicants and Liquor under the Narcotic Drugs and Psychotropic Substances Act, 1985 had an occasion to analyze Sections 3 and 30 of the IE Act regarding the scope of confession of co-accused and its admissibility against the other accused. The Supreme Court referred to ***Kashmira Singh Vs State of Madhya Pradesh, AIR 1952 SC 159*** in which the Supreme Court had relied upon a decision of the Privy Council in ***Bhuboni Sahu v. R (1949 SCC OnLine PC 12)*** wherein the question was as to how far and in what way the confession of an accused person could be used against a co-accused. It does not indeed come within the definition of evidence as contained in Section 3 of the Evidence Act; and is a very weak type of evidence which cannot be made the foundation of a conviction and can only be used in support of other evidence. Such a confession could only lend assurance to other evidence against a co-accused and no further.



33. We have also tried to test the case from another angle. Could it be a case of circumstantial evidence in the light of the statement made by PW8, the mother of the deceased. She had seen the deceased go along with Md. Raja and appellant Md. Raju in the afternoon. Thereafter, he was not to be found. This statement of PW 8 has been confirmed by PW7, who was asked by PW8 to look for her son. This itself would not qualify for evidence strong enough to jump to any conclusion that one of the persons seen last with the deceased had committed the murder sans the confession said to have been made by him before the public.

34. One of the most cardinal principles of criminal jurisprudence is that a case could be said to have been proved only if there is certain and explicit evidence. No person can be convicted on any moral conviction.

35. In ***Sharad Birdhi Chand Sarda Vs State of Maharashtra, 1984 AIR SC 1622***, it has been very pithily



explained that 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. It has further been clarified that the circumstances should be of a conclusive nature and tendency and should be such as to exclude every hypothesis but the one proposed to be proved. This means that 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.

36. In the case at hand, except for an extra judicial confession apparently made by appellant/Md. Raju without their being any corroboration of any kind is the sole evidence on which conviction has been recorded. There is no other material to come to a definite finding



that the deceased was killed at the hands of the appellants; more so when PW10 has made a complete *volte-face* and has been declared hostile.

37. Thus, we find that the conviction of the appellants has been recorded on material which are not at all admissible in evidence and per force we would be required to set aside the judgment and order of conviction of both the appellants and we declare it so.

38. The judgment and order of conviction as against the appellants are set aside.

39. The appellant Md. Raju is in custody. He is directed to be released forthwith, if not wanted in any other case.

40. The appellant/Md. Sonu is on bail. He is discharged of his liabilities of his bail bonds.

41. The copy of the judgment be immediately communicated to the Superintendent of Central Jail, Bhagalpur for immediate release of the appellant/Md. Raju.



42. Both the appeals stand allowed and
disposed of accordingly.

(Ashutosh Kumar, J)

(Harish Kumar, J)

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AFR/NAFR	AFR
CAV DATE	NA
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