

**HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH****DIVISION BENCH****G.S. AHLUWALIA
&
RAJEEV KUMAR SHRIVASTAVA J.J.****Cr. A. No. 23/2010****Vir Singh & Ors.****Vs.****State of M.P.**

Shri Padam Singh with Shri Udayveer Singh, Counsel for the Appellants.

Shri C.P. Singh, Counsel for the State.

Date of Hearing : 04-10-2021
Date of Judgment : 21-10-2021
Approved for Reporting : Yes

Judgment**21- Oct.-2021****Per G.S. Ahluwalia J.**

1. This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 29-12-2009 passed by 2nd Additional Sessions Judge (Fast Track), Datia in S.T. No.64/2009, by which the appellants have been convicted and sentenced for the following offences :

Conviction under Section	Sentence
302 IPC	Life Imprisonment and fine of Rs. 5000/- in default 2 years R.I.

201 IPC	3 years R.I. and fine of Rs. 2000/- in default 6 months R.I.
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2. The prosecution story in short is that the complainant Phool Singh, lodged a Dehati Nalishi on 8-12-2008 at 7:00 A.M., that he is the resident of Jakhoria and is an agriculturist by profession. Smt. Pista Kushwaha, wife of appellant no.1 had instituted a case against Hargovind which is pending in the Court. In the said case, the appellant no.1 was demanding money for entering into compromise, whereas Hargovind was not ready to pay money. On 7-12-2008 at about 11 A.M., Bihari, Siyasharan, Bali, Ravindra, Vir Singh, Sewak, Harprasad Kushwaha came to his house and took Hargovind with them for having talks on the issue of compromise. When Hargovind did not return till 8 in the night, then he and his Bhabhi Jayanti Bai and Rati went to the well of Bihari and asked for the whereabouts of Hargovind. It was replied by Bihari that they have killed Hargovind and thereafter, Bihari and Bali ran away. He saw that blood was lying in front of the room of Bihari. Thereafter, he came to the main road and was crying. He saw the drops of blood on the road and accordingly, when he reached near the culvert on the main road, he saw that Bali, Siyasharan, Ravindra, Vir Singh, Sewak, Harprasad were taking away the dead body of Hargovind and after noticing the complainant, they ran away after keeping the dead body under the culvert. Then the complainant came back to his village and on the way he met with Pista, Lallan and Mira. They also confessed that

they have killed Hargovind. At that time, Bhuri and Imarti were also present. Accordingly, it was alleged that Hargovind has been killed by Bihari, Siyasharan, Ravindra, Vir Singh, Sewak, Lallan, Harprasad, Bali, Pista and Meera and have kept the dead body of Hargovind under the culvert.

3. On this Dehati Nalishi, the police registered the F.I.R. The dead body of Hargovind was sent for post-mortem. The Statements of witnesses were recorded. Blood stained and plain earth was seized. The spot map was prepared. Weapons of offence were seized. The police after completing the investigation, filed the charge sheet for offence under Sections 302, 201, 34 of I.P.C. against the appellants Vir Singh, Bali @ Bal Kishan, Biharilal, Siyasharan and Ravindra and did not file charge sheet against the remaining accused persons, as the police could not get sufficient evidence against them.

4. The Trial Court by order dated 18-6-2009, framed charges under Sections 302, 201 of I.P.C.

5. The Appellants abjured their guilt and pleaded not guilty.

6. The prosecution examined Phool Singh (P.W.1), Jayanti Bai (P.W. 2), Rati Bai (P.W.3), Imrati Bai (P.W. 4), Bhuribai (P.W. 5), Hariram (.W. 6), Haricharan (P.W.7), Hariram (P.W.8), Dr. Dinesh Kumar Gupta (P.W.9), Ramcharan Kushwaha (P.W.10), Pritam Singh (P.W. 11), Ghanshyam Kushwaha (P.W.12), Jwala Prasad Kushwaha (P.W. 13), Veer Singh Kushwaha (P.W. 14), Mata Prasad (P.W. 14A), Hari Singh Baghel (P.W. 15), Maharam (P.W. 16), Ramdas (P.W 17),

R.P. Sharma (P.W. 18), and Shailendra Martin (P.W. 19).

7. The appellants examined Badam Singh (D.W.1), Mansharam (D.W.2), Siyasharan Sharma (D.W.3) and Khusiram (D.W.4) in their defence.

8. The Trial Court by impugned judgment and sentence, convicted and sentenced the appellants for the offences mentioned above.

9. Challenging the judgment and sentence passed by the Court below, it is submitted by the Counsel for the appellants, that the entire case is based on the circumstance of Extra Judicial Confession and Last Seen Together. In fact the prosecution has failed to prove both the circumstances. Even the police had found that there was no evidence against some of the persons, against whom also similar allegations were made. The witnesses have changed the timings as per their convenience. It was not possible to see the blood drops on the road in the night. Even according to the prosecution case, no blood drops were found on the road. It is incorrect to suggest that any blood was found in front of the room of Bihari. There was no motive for the appellants to kill Hargovind because according to the prosecution, the appellant Vir Singh was insisting the deceased Hargovind to enter into a compromise, whereas the wife of Vir Singh was the complainant in the said case and Hargovind was the accused, and in fact the person facing prosecution makes an attempt to win over the witnesses by entering into compromise.

10. Per contra, the Counsel for the State has supported the findings

recorded by the Trial Court.

11. Heard the learned Counsel for the parties.

12. Before considering the merits of the case, this Court thinks it apposite to find out as to whether the death of Hargovind was homicidal in nature or not?

13. Dr. Dinesh Kumar Gupta (P.W. 9) has conducted the Post-mortem of the dead body of deceased Hargovind and found the following injuries on his body :

- (i) Lacerated wound 4 x 1 x bone deep vertical in direction over left side of scalp in left perital region posterially clotted blood and blood seen inside and outside the wound. Fractured pieces of skull bone seen from the wound and brain matter seen from the wound.
- (ii) Contusion 6 cm x 4 cm size over left side of forehead. On dissection of contusion, there is a fracture of frontal bone of skull.
- (iii) Lacerated wound 3 cm x 1 cm x skin deep over finger of right hand over terminal margin.
- (iv) Abrasion 2 cm x 2 cm size present over right surface of spine.

The injuries were antemortem in nature. Injuries No. 1 to 3 were caused by heavy hard and blunt object. Injury no. 4 was caused by hard and blunt object.

Cause of death – Coma due to head injury.

Nature of death – Homicidal in nature.

Time since death- eight to 24 hours.

The post-mortem report is Ex. P.8.

14. This witness was cross examined. He admitted that the copy of F.I.R. and weapons seized from the appellants were not sent to this witness. He stated that rigormortis starts developing after 6 to 8 hours of death and rigormortis was present all over the body. The injury nos. 1 and 2 could have been caused by a lathi or iron rod which should have been a heavy one. He also admitted that injuries no. 3 and 4 were simple in nature. He also stated that broken pieces of bone which were found in head were that of parietal bone. However, he clarified that he had not counted the number of pieces. He also admitted that the direction of the injury no.1 was vertical. He also admitted that he has not mentioned the direction of the injury no.2, but on his own, clarified that the injury no.2 was oval in shape, therefore, he had not mentioned the direction of the same. He denied that both the injuries were overlapping each other.

15. Thus, it is clear that the death of Hargovind was homicidal in nature.

16. The next question for consideration is as to whether the appellants are the authors of the injuries to Hargovind or not?

17. Phool Singh (P.W.1), Jayanti Bai (P.W.2), Rati Bai (P.W.3), Vir Singh Kushwaha (P.W. 14), Jwala Prasad Kushwaha (P.W. 13) have supported the prosecution story, whereas Imrati Bai (P.W.4), Pritam Singh (P.W. 11), have partially turned hostile, whereas Bhuri Bai (P.W. 5), Hariram (P.W.6), Haricharan (P.W. 7), Ghanshyam Kushwaha (P.W.12), have turned hostile. Hariram (P.W. 8) and

Ramcharan Kushwaha (P.W. 10) are hearsay witnesses.

18. Phool Singh (P.W. 1), Jayanti Bai (P.W. 2) and Rati Bai (P.W. 3) are the witnesses of motive, Extra Judicial Confession and Last Seen Together. Whereas according to prosecution story, Phool Singh (P.W. 1) informed Hariram (P.W. 8) and Ramcharan Kushwaha (P.W. 10) on mobile about the murder of Hargovind.

19. Imarti Bai (P.W.4) is a witness of seeing the deceased Hargovind in the company of Bihari for the last time.

Motive

20. Phool Singh (P.W.1) has stated that the deceased Hargovind was his brother. Vir Singh (appellant no.1) and Pista (wife of appellant no.1) had instituted a case against deceased Hargovind. The case was fixed for 6th. However, could not clarify the month. Thereafter, on 7th the appellants Bali, Vir Singh, Bihari, Siyasharan, Ravindra and Harprasad as well as Ramsewak (Not charge-sheeted by police) came to his house at about 11 P.M. and took away the deceased Hargovind with them for having talks on the question of compromise. In cross-examination, this witness admitted that on 6th, he had not gone to the Court along with the deceased Hargovind. This witness also admitted that no talks regarding compromise had taken place in his presence. He further stated that on 7th, when the accused persons had come, they were talking about compromise. He also stated that he had informed this fact to the police but could not explain as to why it was not mentioned in his Dehati Nalishi, Ex. P.1.

He also stated that no talks of compromise had taken place with his wife and Bhabhi. He further stated that after his brother, deceased Hargovind, had come back from Court, he had informed that the appellant Vir Singh is talking about compromise but is demanding money for the same. He further admitted that in the case instituted by Pista, the deceased Hargovind, Jayanti Bai and Manku were accused. He further stated that the deceased Hargovind and Pista were having illicit relationship. He further admitted that on this issue, the wife of Hargovind used to quarrel with him. He further admitted that Pista, wife of Vir Singh (Appellant No.1) had made a complaint against the deceased Hargovind, his wife Jayanti Bai and mother Manku for offence under Sections 323, 324 of I.P.C. He further admitted that the said criminal case is pending and was also fixed on the same date of recording of his evidence. He denied that on 17-12-2006, the wife of the appellant no.1 Vir Singh was going to answer the call of nature, then she was abused by his Bhabhi and had given a teeth bite on her left hand. He further denied that the deceased Hargovind and his mother Manku had beaten Pistabai. He further admitted that his Bhabhi Jayanti Bai and his mother Manku had also come to the Court on 6-12-2008, to attend the Court proceedings. He denied for want of knowledge that on the said date (i.e., 6-12-2008) Vir Singh and Pista had not come to the Court for giving evidence. He denied that on 6-12-2008, Vir Singh and Pista had gone to village Ravri.

21. Jayanti Bai (P.W.2) is the widow of deceased Hargovind. She

has stated that her husband Hargovind had kept Pista and accordingly, one case was pending in Datia Court. About 2 years back, her husband had gone to attend the Court proceedings. After coming back, he informed that the appellants are asking him to compromise the matter. Vir Singh was demanding money for compromise, which was refused by Hargovind. On 7th, Bali, Vir Singh, Bihari, Siyasharan, Ravindra (All appellants) and Harprasad and Sewak (Not charge sheeted by prosecution) came to her house at about 11 A.M. and took her husband Hargovind for compromise purposes. In cross-examination, this witness could not give any explanation as to why the allegations “that her husband had kept Pista and on this issue a case was pending in Datia Court” is not mentioned in her police statement, Ex. D.2. She denied that a case for assaulting Pista, wife of appellant no.1 Vir Singh, was pending against her, deceased Hargovind and her mother-in-law Manku. She claimed that they had not assaulted Pista, but claimed that in fact they were assaulted by Pista. She further admitted that it is true that She, along with her husband Hargovind and Manku (Mother-in-law) used to attend the Court proceedings. She further admitted that on 6-12-2008, she had attended the Court proceedings along with Manku and her husband deceased Hargovind. She stated that she does not know as to whether Pista and Vir Singh had attended the Court proceedings or not. She further denied for want of knowledge that whether on 6-12-2008, the case was fixed for recording of evidence or not. She

further stated that on the said date, after attending the Court proceedings, She along with her husband Hargovind and Manku came back together. They reached their village Jakhoria at about 2 P.M. Thereafter, her husband did not go anywhere and was in the house for all the time. She further stated that after returning back from Court, at about 4 P.M., Vir Singh had talked to Hargovind about compromise. She further claimed that the compromise talks had taken place in her presence, but could not explain as to why this fact is not mentioned in her Police Statement, Ex.D.2. She denied that her husband had informed her after returning back that Vir Singh is demanding exorbitant money for compromise, but stated that She had not stated the above fact to the police, and therefore, could not explain as to why the above allegation was mentioned in her police statement, Ex. D.2.

22. Rati Bai (P.W.3) has stated that on 6th, Hargovind had gone to attend the Court proceeding. He did not inform anything to her after returning back. On 7th, Bali, Vir Singh, Bihari, Siyasharan, Ravindra, and Hariprasad and Sewak (Not charge-sheeted) came to house and took the deceased Hargovind with them for having talks on the question of compromise. In cross-examination, she admitted that Hargovind, Jayanti Bai and Manku had returned back at about 3 P.M., after attending the Court proceedings. She further admitted that She did not have any talks with the accused persons on the question of compromise. She claimed that she had informed the police that the

accused persons had taken away the deceased Hargovind, to *Kothi* for having talks on the question of compromise, but could not explain as to why this fact is not mentioned in her police statement, Ex. D.3.

23. Phool Singh (P.W.1), Jayanti Bai (P.W.2), and Rati Bai (P.W.3) are closely related to deceased Hargovind. Phool Singh (P.W.1) is the brother, Jayanti Bai (P.W.2) is the widow of Hargovind and Rati Bai (P.W.3) is *Bhabhi* (wife of Hariram) of Phool Singh (P.W.1). It is true that merely because the witnesses are related witnesses, cannot be a ground to discard their evidence, but at the same time, it is necessary to appreciate their evidence meticulously.

24. It is the case of the prosecution that Hargovind (deceased), Jayanti Bai (P.W. 2) and Manku (mother of Hargovind) were facing trial for assaulting Pistabai, wife of appellant no.1. On 6th, all the three persons, namely Hargovind, Jayanti Bai (P.W.2) and Manku had attended the Court proceedings. It is not the case of Jayanti Bai (P.W. 2) that either Vir Singh or Pistabai were also present in the Court, or they had any talks with Hargovind on the issue of compromise. It is also the case of Jayanti Bai (P.W.2) that at about 4 P.M. on 6th, Vir Singh came to her house and had a talk with Hargovind on the question of compromise. But, this fact is not mentioned in her police statement, Ex.D.2. On the contrary, it was mentioned in the police statement, Ex.D.2, that her husband, after coming back from *Datia*, had informed this witness, that Vir Singh is demanding exorbitant money for compromise. Jayanti Bai (P.W.2) has also admitted in her

cross-examination, that She, Hargovind and Manku had returned back together. She has not stated that either in the Court premises or on their way back to the village, Vir Singh had ever met them or had a talk on the issue of compromise. Whereas Phool Singh (P.W.1) has stated in para 4 of his cross-examination, that after returning back from the Court proceedings, Hargovind had informed this witness, that Vir Singh is talking about compromise and is demanding money for the same. Thus, it is clear that on one hand, Jayanti Bai (P.W.2) who had gone to attend the Court proceedings on 6th along with her husband, deceased Hargovind and had also come back together, has not stated that Vir Singh had ever met them in the Court premises or had any talk regarding compromise, whereas Phool Singh (P.W.1) has claimed that after coming back from court, Hargovind had informed that Vir Singh was talking about compromise and was demanding money. Further, Hargovind, his wife Jayanti Bai and Mother Manku were facing prosecution whereas Pista, wife of Vir Singh was the complainant. Thus, in fact Hargovind, his wife Jayanti Bai and mother Manku should have been interested in compromise, so that they may not be convicted and there was no reason for Vir Singh to insist for compromise. Further, although Jayanti Bai (P.W. 2) has claimed that on 6th, Vir Singh had come to her house and had a talk regarding compromise, but this fact is missing in her police statement, Ex. D.2. Further, Jayanti Bai (P.W.2) in her police statement, Ex. D.2 had stated that after returning back from Datia, her

husband Hargovind had informed that Vir Singh was talking about compromise but is demanding money, but the aforesaid allegation was disowned by Jayanti Bai (P.W.2) in her Court evidence. Further, it is not the case of Phool Singh (P.W. 1) or Jayanti Bai (P.W.2) that talks of compromise had taken place on earlier occasion also. In view of material variance in the evidence of Phool Singh (P.W.1) and Jayanti Bai (P.W. 2) on the question of talks regarding Compromise, this Court is of the considered opinion, that the prosecution has failed to prove beyond reasonable doubt that any compromise talks had taken place between Vir Singh and Hargovind. Accordingly, it is also held that the prosecution has failed to prove that the appellants and two more non-charge-sheeted persons, namely Harprasad and Sewak had taken the deceased Hargovind along with them on 7th on the pretext of having talks on compromise. Thus, the motive as alleged by the prosecution has not been proved.

Extra Judicial Confession

25. Before considering the evidence led by the prosecution, this Court would like to consider the law relating to Extra Judicial Confession.

26. The Supreme Court in the case of **Sahib Hussain v. State of Rajasthan**, reported in **(2013) 9 SCC 778** has held as under :

15.....The Extra-Judicial confession, though a weak type of evidence, can form the basis for conviction if the confession made by the accused is voluntary, true and trustworthy. In other words, if it inspires the confidence, it can be acted upon.....

The Supreme Court in the case of **Sk. Yusuf v. State of W.B., (2011) 11 SCC 754** has held as under :

28.....The Court while dealing with a circumstance of Extra-Judicial confession must keep in mind that it is a very weak type of evidence and requires appreciation with great caution. Extra-Judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that the accused is the perpetrator of the crime. The “Extra-Judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility”. (See *State of Rajasthan v. Raja Ram* and *Kulvinder Singh v. State of Haryana.*)

The Supreme Court in the case of **R. Kuppusamy v. State,** reported in **(2013) 3 SCC 322** has held as under :

8. That a truthful Extra-Judicial confession made voluntarily and without any inducement can be made a basis for recording a conviction against the person making the confession was not disputed before us at the hearing. What was argued by Ms Mahalakshmi Pavani, counsel appearing for the appellant, was that an Extra-Judicial confession being in its very nature an evidence of a weak type, the courts would adopt a cautious approach while dealing with such evidence and record a conviction only if the Extra-Judicial confession is, apart from being found truthful and voluntary, also corroborated by other evidence. There was, according to the learned counsel, no such corroboration forthcoming in the present case which according to her was sufficient by itself to justify rejection of the confessional statement as a piece of evidence against the appellant. Reliance, in support of the contention urged by the learned counsel, was placed upon the decisions of this Court in *Gura Singh v. State of Rajasthan* and *Sahadevan v. State of T.N.*

9. In *Gura Singh case* a two-Judge Bench of this Court was also dealing with an Extra-Judicial confession and the question whether the same could be made a basis for recording the conviction against the accused. This Court held that despite the inherent weakness of an Extra-Judicial confession as a piece of evidence, the same cannot be ignored if it is otherwise shown to be voluntary and

truthful. This Court also held that Extra-Judicial confession cannot always be termed as tainted evidence and that corroboration of such evidence is required only as a measure of abundant caution. If the court found the witness to whom confession was made to be trustworthy and that the confession was true and voluntary, a conviction can be founded on such evidence alone. More importantly, the Court declared that courts cannot start with the presumption that Extra-Judicial confession is always suspect or a weak type of evidence but it would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak about such a confession and whether the confession is voluntary and truthful.

10. In *Sahadevan case* a two-Judge Bench of this Court comprehensively reviewed the case law on the subject and concluded that an Extra-Judicial confession is an admissible piece of evidence capable of supporting the conviction of an accused provided the same is made voluntarily and is otherwise found to be truthful. This Court also reiterated the principle that if an Extra-Judicial confession is supported by a chain of cogent circumstances and is corroborated by other evidence, it acquires credibility. To the same effect are the decisions of this Court in *Balbir Singh v. State of Punjab* and *Jaspal Singh v. State of Punjab*.

11. It is unnecessary, in the light of above pronouncements, to embark upon any further review of the decisions of this Court on the subject. The legal position is fairly well settled that an Extra-Judicial confession is capable of sustaining a conviction provided the same is not made under any inducement, is voluntary and truthful. Whether or not these attributes of an Extra-Judicial confession are satisfied in a given case will, however, depend upon the facts and circumstances of each case. It is eventually the satisfaction of the court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if any, available as to the truth of such a confession that will determine whether the Extra-Judicial confession ought to be made a basis for holding the accused guilty.

The Supreme Court in the case of **Kusal Toppo v. State of Jharkhand**, reported in **(2019) 13 SCC 676** has held as under :

18. As argued by the learned amicus curiae appearing for the accused, an Extra-Judicial confession is a weak piece of evidence, and an accused cannot be convicted on its basis in the absence of other reliable evidence establishing the guilt of the accused. It will be pertinent to advert to the decisions relied upon by the learned amicus curiae at this juncture i.e. *Gopal Sah* and *Pancho*.

19. In *Gopal Sah*, the Court held that an Extra-Judicial confession is, on the face of it, a weak piece of evidence and should not be relied upon to record a conviction, in the absence of a chain of cogent circumstances. In *Pancho* as well, the Court refused to convict the accused on the basis of an Extra-Judicial confession, in the absence of other evidence of sterling quality on record, establishing his involvement.

20. In *Pancho*, the Court discussed the evidentiary value of an Extra-Judicial confession, as laid down by a Constitution Bench of this Court in *Haricharan Kurmi v. State of Bihar*. In this case, referring to Section 3 and Section 30 of the Evidence Act, 1872, the Court came to the conclusion that an Extra-Judicial confession cannot be treated as a substantive piece of evidence against the co-accused, holding that the proper judicial approach is to use it only to strengthen the opinion formed by the Court after perusing other evidence placed on record.

21. It is pertinent to refer to the observations in *Pancho* in this regard: (SCC pp. 171-72, paras 26-28)

“26. In *Haricharan Kurmi v. State of Bihar* the Constitution Bench of this Court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act, 1872 and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This Court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence Act, “it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way”. (*Haricharan case*, AIR p. 1188,

para 11a.)

27. This Court in *Haricharan case* further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

28. This Court in *Haricharan case* clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.”

22. Furthermore, in *Sahadevan v. State of T.N.*, this Court culled out certain principles regarding the reliability of an Extra-Judicial confession, which have also been relied upon in *Jagroop Singh v. State of Punjab*, *Tejinder Singh v. State of Punjab*, and *Vijay Shankar v. State of Haryana*. The principles as stated in *Sahadevan* are reproduced below: (SCC pp. 412-13, para 16)

“16. Upon a proper analysis of the aboveresferred judgments of this Court, it will be appropriate to state the principles which would make an Extra-Judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an Extra-Judicial confession alleged to have been made by the accused:

- (i) The Extra-Judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence.
- (iv) An Extra-Judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an Extra-Judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

23. The proposition that Extra-Judicial confessions are a weak type of evidence and should not be relied upon in the absence of corroborative evidence has also been affirmed by this Court in several other decisions, such as *Pakkirisamy v. State of T.N.*, *Makhan Singh v. State of Punjab*, *Baldev Singh v. State of Punjab*, and even recently in *Satish v. State of Haryana*.

The Supreme Court in the case of **Kulwinder Singh Vs. State of Punjab** reported in **(2006) 12 SCC 538** has held as under:

31. The evidentiary value of an Extra-Judicial confession must be judged in the fact situation obtaining in each case. It would depend not only on the nature of the circumstances but also the time when the confession had been made and the credibility of the witness who testifies thereto.

The Supreme Court in the case of **State of Rajasthan Vs. Kashiram** reported in **(2006) 12 SCC 254** has held as under :

14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before advertng to the other incriminating circumstances we may at the threshold notice two of them, namely, the circumstance that the respondent made an extrajudicial confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist cord used for strangulating Kalawati (the deceased) and the keys of the

locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extrajudicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extrajudicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW 3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW 3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW 4 admitted that he was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the respondent had made an extrajudicial confession before PWs 3 and 4 must be rejected.

27. Thus Extra-Judicial Confession is a weak type of evidence, but if it is proved that it was made voluntarily and is truthful, then it can be a sole ground for recording conviction also.

28. Phool Singh (P.W.1) has stated that when the deceased Hargovind did not return back till 6-7 P.M., then he, Jayanti Bai (P.W. 2) and Rati Bai (P.W.3) went to the well of Bihari and enquired about the whereabouts of Hargovind, then Bali and Bihari made an Extra-Judicial confession that they have killed Hargovind and then ran away. Thereafter, he started crying. Blood was lying in front of the room belonging to Bihari. He went towards the road and found blood drops going towards the road. By following the blood drops,

he went towards the road (Datia-Dabra road as per spot map) and reached near the culvert. In the light of the torch, he saw that Bali, Vir Singh, Bihari, Harprasad, Siyasharan, Ravindra and Ramsewak were keeping the dead body and thereafter they ran away. It was further alleged that thereafter he came back to village Jakhoria. He was crying while he was coming back. The villagers asked him about the cause, then the entire incident was narrated to them. While he was coming back, he met with Pista, Lallan and Meera, who also made an Extra-Judicial Confession that they have killed Hargovind. At about 6-7 A.M. on the next day, he went to Police Station and lodged the report. Thereafter, he on his own clarified that the police had reached near the culvert itself and the report was lodged at that place. The dead body of Hargovind was got identified by the police. Safina form, Ex. P.2 was signed and thereafter, *Lash Panchnama* Ex. P.3 was prepared. Spot map was also prepared. This witness was cross-examined in detail. The evidence of this witness shall be considered in the coming paragraphs on each and every aspect.

29. Jayanti Bai (P.W. 2) has stated that Hargovind was her husband. As Hargovind had kept Pista, therefore, a case is pending in Datia Court. It is alleged that when Hargovind did not return back, then at 7-8 P.M., She along with Phool Singh (P.W. 1) and Rati Bai (P.W.3) went to *Kothi* of Bihari in search of Hargovind. There they met with Bali and Bihari who made an Extra-Judicial Confession that they have killed Hargovind and have thrown his dead body and the

witnesses can do whatever they can. Thereafter, this witness searched for her husband and found blood. She started crying. By following the blood drops, they reached to the road and in the light of the torch they saw that the accused persons, namely Bali, Bihari, Siyasharan, Ravindra, Vir Singh were taking away the dead body of her husband. The moment, they lit the torch, the accused persons, after leaving the dead body under the culvert, ran away. The accused persons had also extended a threat to the witnesses. While they were returning back to the village, they met with Pista, Meera and Lallan wives of Vir Singh, Dhan Singh and Sewak and they also made an Extra-Judicial Confession that they have killed Hargovind and the witnesses would not be able to do anything. Since, wife of Vir Singh had kept her husband therefore, on this enmity, her husband has been killed by Vir Singh and other co-accused persons. This witness was cross-examined and her evidence would be considered in detail in the coming paragraphs.

30. Rati Bai (P.W. 3) has stated that deceased Hargovind was her younger-brother-in-law. The deceased Hargovind did not return back till 7-8 P.M. Thereafter, they all went in search of Hargovind. They went to the *Kothi* of Bihari, where they met with Bihari and Bali. Bihari made an Extra-Judicial Confession that they have killed Hargovind and the witnesses will not be able to do anything. Thereafter, this witness started crying. Jayanti Bai (P.W. 2) fell unconscious. She regained consciousness after water was given to

her. Blood was lying in front of the room of Bihari. By following the blood drops, they reached near the road and in the light of the torch, they saw that Bali, Vir Singh, Bihari, Harprasad, Siyasharan, Ravindra and Sewak were holding Hargovind and were taking away. After noticing the witnesses, they kept Hargovind under the culvert and ran away. This witness also came back to her house. On her way back to her house, She had met with Pista, Lallan and Meera, who also made Extra-Judicial Confession that they have killed Hargovind. This witness was also cross-examined in detail and her evidence would be considered in the following paragraphs on each and every aspect.

At what time, the witnesses left their house for searching the whereabouts of Hargovind

31. Phool Singh (P.W.1) in his examination-in-chief has stated that when Hargovind did not return back, then at about 6-7 P.M., they went in search of Hargovind. Thereafter, once again in para 5 and 6 of his cross-examination, this witness has stated that they left at about 6-7 P.M. for searching Hargovind. In para 6 of his cross-examination itself, this witness admitted that during winter season, it is dark at 6-7 P.M. He further stated that the *Kothi* of Bihari is at a distance of about 1 Km. Thereafter, this witness improved his version and claimed that he left his house at 5:30 P.M., and reached the *Kothi* of Bihari in about 30 minutes. This witness also could not explain as to how it is mentioned in his police statement, Ex.D.1 that

when the deceased Hargovind did not come back to his house till 8 P.M., then he went in search for him. Thus, it is clear that in Dehati Nalishi, Ex. P.1, and in his police statement, Ex.D.1, this witness had stated that when the deceased Hargovind did not come back till 8 P.M., then they went in search of him, whereas in the Court evidence, initially he tried to say that they left somewhere in between 6-7 P.M., and when he admitted that during winter season, it is already dark till 6-7 P.M., then he improved his version by saying that he had left the house at 5:30 P.M.

32. This improvement in the evidence of Phool Singh (P.W.1) is very important. The State Counsel had argued that the place of incident is the coldest area of Datia District. The incident took place on 7th of December 2008 and according to this witness, it is already dark till 6-7 P.M. Since, this witness had subsequently claimed that they went upto the road by following the blood drops on the street and it is not their case that they were following the blood drops in the light of the torch, and as it was impossible to follow the blood drops in the dark, therefore, this witness improved his version from place to place, so as to justify that he could have followed the blood drops. Therefore, he tried to prepone the time of leaving his house, so that it can be inferred that there was some sun light so that he could have followed the blood drops. Thus, there is a material contradiction in his Evidence and in his previous statements, i.e., Dehati Nalishi, Ex. P.1 and Police Statement, Ex. D.1.

33. Jayanti Bai (P.W.2) has stated in her examination-in-chief, that they left the house in between 6-7 P.M., but in Para 7 of her cross examination, She admitted that She did not leave the house prior to 8 P.M., and it was already very dark. She further stated that they took approximately 25 minutes to reach to the *Kothi* of Bihari.

34. Thus, it can be inferred from the evidence of Jayanti Bai (P.W.2) that She herself, Phool Singh (P.W. 1) and Rati Bai (P.W. 3) reached the *Kothi* of Bihari, some time at 8:30 P.M. and it was already very dark.

35. Rati Bai (P.W. 3) again tried to improve the version. She stated that when Hargovind did not return till 7-8 P.M., then they went in search of Hargovind. However, She could not explain the reason as to why the fact of going for search of Hargovind at about 7-8 P.M. is not mentioned in her police statement. However, in para 7 of her cross-examination, She clearly admitted that when they left for searching Hargovind, it was very dark and nothing was visible. In para 8 of her cross-examination, this witness has also admitted that they took 30 minutes to reach to the *Kothi* of Bihari. Thus, it is clear that when these witnesses claim to have reached the *Kothi* of Bihari, it was already very dark and nothing was visible.

36. Thus, it is clear that in order to counter the hurdle of darkness, these witnesses have improved their versions in the Court evidence, by preponing their departure from their house.

Why these witnesses directly went to the Kothi of Bihari and not to

his house situated in village itself.

37. Phool Singh (P.W. 1) in para 3 of his cross-examination, has admitted that Bihari resides in village Jakhoria itself along with his family. In Para 6 of his cross-examination, this witness has admitted that he did not go to the house of Bihari and went to *Kothi* of Bihari. However, he tried to explain this situation by claiming that Hargovind while leaving the house at 11 A.M., had informed him that he is going to *Kothi* of Bihari, but admitted that this fact was not disclosed by him to the Police. Thus, it is clear that this witness had no reason to go to *Kothi* of Bihari directly without searching for Hargovind either in the house of Bihari or in the house of any other accused persons. Further, this witness tried to deny the suggestion for want of knowledge that the field of Ramsewak is situated by the side of the field of Bihari but thereafter clarified that the adjoining field belongs to Raghunath, son of Ramsewak. He further admitted that after the field of Ramsewak, the field of Bali is situated. He further admitted that Bihari has no enmity with Hargovind. He also admitted in para 18 of his cross-examination, that the house of Vir Singh is also situated in the village itself. He further admitted that Bali is resident of village Gadhi. He denied that *Kothi* of Bihari is situated at an isolated place. As per crime detail form, spot map, Ex. P.28 was prepared by Shailendra Martin (P.W. 19). It is clear from the spot map, Ex. P.28, the *Kothi* (A room) of Bihari is situated in his field and there are no houses at nearby places. Thus, it can be

presumed that the *Kothi* of Bihari is situated at an isolated place. Further, according to Phool Singh (P.W. 1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) they took about 30 minutes to reach to the *Kothi* of Bihari. Therefore, there was no occasion for these witnesses to go to the *Kothi* of Bihari directly, without searching for Hargovind, either in the village or in the houses of the appellants.

38. Jayanti Bai (P.W. 2) has also admitted in para 7 of her cross-examination, that before going to *Kothi* of Bihari, they did not go to the house of Bihari or Vir Singh. However, once again She also tried to explain that since, her husband had said that he is going to *Kothi* therefore, they went directly to *Kothi*. However, this witness could not give any reason as to why the above mentioned fact is not mentioned in her police statement Ex. D.2. She further admitted in para 8 of her cross-examination, that the *Kothi* of Bihari is situated outside the village. She further admitted in para 10 of her cross-examination, that the village is situated by the side of Datia-Gwalior road and there is a road which connects their village with Datia-Gwalior road. She further admitted that there is one more *Kaccha Rasta* which passes by the side *Kothi* of Bihari. This admission is further supported by spot map, Ex. P.28 according to which there is one *Kaccha Rasta* which comes from village Jakhoria and merges with Datia-Gwalior Road. But here one thing is clear that according to the witnesses, the blood drops were not on the said *Kaccha Rasta* but they were on other place which has been marked as “E” in the

spot map, Ex. P.28.

39. Rati Bai (P.W.3) in para 8 of her cross-examination, has admitted that there are two roads to reach to the *Kothi* of Bihari. She admitted that they can reach much faster by going by *Pacca Road*. Houses of various villagers are situated on either side of *Pacca Road*. She further admitted that they did not inform any body that they are going to *Kothi* of Bihari.

40. Thus, in view of material contradictions, it is clear that Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W. 3) had no reason to go to the *Kothi* of Bihari directly, specifically when it is situated at an isolated place and is far away from the village. The witnesses have also failed to explain as to why they did not search for Hargovind in the village itself. This conduct of the witnesses, in going to the *Kothi* of Bihari directly, without searching for him in the village itself, specifically in the houses of the accused persons, makes their evidence doubtful and suspicious.

Whether any blood was found in front of the Kothi of Bihari

41. It is the case of the prosecution, that Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) saw blood in front of the *Kothi* of Bihari.

42. Blood stained earth and plain earth was seized from the spot, i.e., in front of the *Kothi* of Bihari vide seizure memo Ex. P.26. The blood stained and plain earth were sent to R.F.S.L., Gwalior vide memo, Ex. P.29 and the F.S.L. report is Ex. P.30. The blood stained

earth was marked as Article B. As per the F.S.L. report, Ex. P.30, blood was found on Article B, but Human Blood was not found in Article B i.e., blood stained earth. Since, the blood had disintegrated, therefore, the origin could not be ascertained. Thus, there is no forensic evidence to show that any human blood was found in front of the *Kothi* of Bihari.

Extra-Judicial Confession

43. Phool Singh (P.W.1) has stated that when they reached *Kothi* of Bihari, then Bali and Bihari made an Extra-Judicial Confession and thereafter, they ran away. However, in Dehati Nalishi, Ex. P.1, it was alleged that only Bihari had made an Extra-Judicial Confession, although the presence of Bali was also alleged. Even in police statement, Ex. D.1, this witness had not disclosed that Bali had also made an Extra-Judicial Confession. However, in para 7 of his cross-examination, this witness could not explain as to why the fact that Bali also made an Extra-Judicial Confession, is not mentioned in his Dehati Nalishi Ex. P.1.

44. Jayanti Bai (P.W. 2) has stated that Extra-Judicial Confession was made by Bihari only.

45. Similarly, Rati Bai (P.W. 3) has also stated that Extra-Judicial Confession was made by Bihari only.

46. Thus, it is clear that there is an improvement in the evidence of Phool Singh (P.W.1) regarding making of Extra-Judicial Confession by Bali. Further, R.P. Sharma (P.W. 18) has admitted that Phool

Singh (P.W.1) had never informed him that Bali had also made an Extra-Judicial Confession. Thus, it is held that no Extra-Judicial Confession was made by Bali.

Whether the allegation of making of Extra-Judicial Confession by Bihari is truthful or not?

47. This Court has already come to a conclusion that there was no reason for Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) to go to the *Kothi* of Bihari directly without searching for Hargovind in the village specially in the houses of accused persons. Further, there was no occasion for Bihari to make any Extra-Judicial Confession before these three witnesses. However, whether the Extra-Judicial Confession was made or not shall be considered after considering the other circumstances.

Whether Bali was present in the Kothi of Bihari when Extra-Judicial Confession was allegedly made or not?

48. The evidence of all the three witnesses that Bali was also there when Bihari allegedly made Extra-Judicial Confession is consistent. But in view of the fact that the witnesses have failed to explain as to why they went to the *Kothi* of Bihari directly without searching for Hargovind in the village specially in the houses of the accused persons, the evidence regarding presence of Bali in the *Kothi* of Bihari is also doubtful and suspicious.

Whether the three witnesses had seen the accused persons, keeping the dead body of Hargovind under the culvert or not or

Last Seen Together?

49. Phool Singh (P.W.1) has stated that after Extra-Judicial Confession was made by Bihari and Bali and they ran away. This witness saw blood in front of the room/*Kothi* of Bihari and thereafter he saw blood drops and after following the blood drops he went upto the road and at that time, he in the light of the torch saw that the accused persons were keeping the dead body under the culvert and thereafter, they ran away.

50. From the spot map, Ex. P.28, it appears that some blood was allegedly seen in front of the room/*Kothi* of Bihari but from thereafter, it is not mentioned that any blood drops upto the culvert were found. It is important to note that the so-called blood drops were not found on the road which connects village Jakhoria with main road, but according to the witnesses, the path on which blood drops were allegedly found has been shown as "E" in the spot map, Ex. P.28 whereas the road which connects the village Jakhoria is marked as "Road going to village Jakhoria". Further, as per the spot map, Ex. P.28, the path on which the blood drops were allegedly found was a boundary of a field which has been described as "खेत की पगडंडी". Thus, it is clear that the path which has been shown as "E" in Spot map, Ex. P.28 is not a regular pathway or road.

51. *Now the next question for consideration is that whether any blood drops were found on path marked as "E" in the spot map?*

52. R.P. Sharma (P.W. 18) A.S.I., posted in Police Station Civil

Lines, Datia in the police department, was first police personal who reached on the spot and also recorded Dehati Nalishi, Ex. P.1 and also prepared spot map, Ex. P.28. In para 9 of his cross-examination, this witness has stated that he had seen blood drops on the path "E" which goes from the room/*Kothi* of Bihari upto the culvert.

53. However, in para 16 of his cross-examination, this witness has admitted that he has not mentioned in the spot map, Ex. P.28 that any blood drops were seen on the path marked as "E". He also admitted that he has not mentioned in spot map, Ex. P.28 that any blood drops were seen on the road which connects village Jakhoria with main road. In para 17 of his cross-examination, he further admitted that he has not shown the place, in the spot map, Ex. P.28, from where Phool Singh (P.W.1) had seen the accused persons keeping the dead body under the culvert. He further admitted that he has also not shown the place in the spot map, from where Phool Singh (P.W.1) had seen the accused persons taking away the dead body of Hargovind. In Para 18, this witness also admitted that since, the above mentioned information was not given by Phool Singh (P.W.1), therefore, the aforementioned information has not been shown in spot map. Further, in para 18 of his cross-examination, this witness has admitted that in the spot map, Ex. P.28, he had not shown any blood on the place, where the dead body was found. Further, it is the case of the prosecution, that one *Kathri* of the deceased was found near the road which connects village Jakhoria with the main road, but he did not

investigate that from where the said *Kathri* was brought and when it was thrown. He further admitted that the place from where *Kathri* was seized and the room/*Kothi* of Bihari are easily accessible by any person. He further admitted that he did not investigate as to whether any other person had seen the accused persons along with the deceased at 11:30 A.M. He also admitted that he did not investigate as to whether any person had seen Phool Singh and his *Bhabhis* going towards the *Kothi* of Bihari. Further, in spot map, Ex. P.28, the place "A" has been shown as spot where Hargovind was killed after beating him. It was accepted by this witness, that aforesaid information was given by Phool Singh (P.W.1), but Phool Singh (P.W.1) is not an eye witness of beating or murder.

54. Further, there is a material discrepancy as to whether Phool Singh (P.W.1) and his *Bhabhis* i.e., Jayanti Bai (P.W.2) and Ratibai (P.W.3) went directly towards the culvert or not?

55. Phool Singh (P.W.1) in his police statement, Ex. D.1 had stated that after an Extra-Judicial Confession was made by Bihari and after noticing the blood in front of the *Kothi* of Bihari, he and his *Bhabhis* came back to village and informed the villagers and again went to the spot along with villagers and his *Bhabhis* were also accompanying him. However, in Court evidence, this witness claimed that after noticing the blood in front of the *Kothi* of Bihari, he and his *Bhabhis* namely Jayanti Bai (P.W. 2) and Ratibai (P.W.3) went towards the culvert by following the blood drops. This improvement is material

and gives a deep dent to the prosecution case. The original prosecution case was that at 8 P.M., three witnesses left for searching Hargovind and they took about 30 minutes to reach to the room/*Kothi* of Bihari where they met with Bali and Bihari. Bihari made an Extra-Judicial Confession and then after noticing blood in front of room/*kothi* of Bihari, they came back to village and again went back to spot and thereafter they went upto culvert after following blood drops. If the timings are considered, then the following situation would emerge :

- (i) At 8 P.M., three witnesses namely Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Ratibai (P.W. 3) left their house in search of Hargovind.
- (ii) They took 30 minutes to reach to room/*kothi* of Bihari i.e., must have reached at 8:30 P.M.
- (iii) Extra-Judicial Confession was made by Bihari and thereafter these three witnesses noticed blood outside the room/*kothi* of Bihari, therefore, further 30 minutes must have been spent i.e., upto 9 P.M.
- (iv) Then again these three witnesses came back to village, therefore, they must have consumed further time of 30 minutes i.e., upto 9:30 P.M.
- (v) They informed the villagers about the incident which must have taken atleast 30 minutes i.e., 10 P.M.
- (vi) Then again they came back to spot and must have consumed further time of 30 minutes i.e., 10:30 P.M.

(v) Then they followed the blood drops and went upto culvert. Which means they must have reached culvert sometimes in between 10:30 to 11 P.M.

56. Whereas Phool Singh (P.W.1) in his Court evidence, has claimed that he left his house at 5:30 P.M. and took 30 minutes to reach to room/*kothi* of Bihari and after the Extra-Judicial Confession was made by Bihari and Bali, he went towards the culvert after following the blood drops. Thus, if the timings disclosed by Phool Singh (P.W.1) in his Court evidence are considered, then it is his case, that he had seen the accused persons, keeping the dead body under the culvert some time between 6:30-7:00 P.M. It is not out of place to mention here that the incident is alleged to have taken place on 7-12-2008 and there was no independent source of light. The witnesses have admitted that it was complete dark and nothing was visible. Therefore, a difference of about 4 hours in the night of winter season would make lot of difference and it would also create a doubt that whether any Extra-Judicial Confession was made by Bihari or not, as the time of reaching *Kothi* of Bihari is also under doubt?

57. Further, Phool Singh (P.W.1) had stated in his police statement, Ex. D.1 that the accused persons were taking away the dead body of the deceased in *Kathri* but in the Court evidence, he took a somersault and denied the said aspect and also could not explain as to how it was mentioned in his police statement, Ex.D.1, that he had

seen the accused persons, taking away the dead body of Hargovind in *Kathri*. As already pointed out, R. P. Sharma (P.W.18) has already admitted that he had not investigated on the issue as to how and from where the *Kathri* was thrown at a place which is shown in spot map, Ex. P.28. Further, it is clear from spot map, Ex. P.28, *Kathri* was found by the side of road which connects village Jakhoria with main road, i.e., Datia-Gwalior Road. If the prosecution story that the accused persons after keeping the dead body under the culvert, ran away is considered, then there was no occasion for them to come back to the road connecting the village Jakhoria with Main Road and to throw the *Kathri* at a place which is shown in spot map, Ex. P.28. That is why, Phool Singh (P.W.1) disowned his police statement, Ex. D.1 that the accused persons were carrying the dead body of Hargovind in his *Kathri*.

58. Jayanti Bai (P.W.2) in her police statement, Ex. D.2 had also stated that after an Extra-Judicial Confession was made by Bihari, they came back to village and informed, Asharam Kushwaha and thereafter, they started for searching for Hargovind along with villagers. However, in her Court evidence, She has omitted the fact that after Extra-Judicial Confession was made by Bihari, they came back to village. She was confronted with her police statement, Ex. D.2, and she could not explain as to why the fact of coming back to village and informing the villagers was mentioned in her police statement. Further, if the police statement, Ex. D.2 is considered,

then it is clear that this witness had stated that for the first time, they started searching for Hargovind along with the villagers, in the light of the torch. Thus, it appears that earlier, these witnesses were not having torch with them. Further, this witness in para 14 of her cross-examination, has stated that they had shown the Battery (Torch) to the police, which was seized by it, but the prosecution has not relied upon such seizure.

59. Similar improvement has been made by Rati Bai (P.W. 3). In her police statement, Ex. D.3, She had stated that after Extra-Judicial Confession was made by Bihari, they came back to village and informed Asharam Kushwaha and other villagers and again went back to the spot in search of Hargovind along with villagers. Whereas this part of her police statement, Ex. D.3, does not find place in her Court evidence, and She claimed that after Extra-Judicial Confession was made by Bihari, they went in search of Hargovind by following the blood drops. When this witness was confronted with above improvement, then She could not explain as to how the fact of coming back to village and informing the villagers and thereafter, going in search of Hargovind is mentioned in her police statement, Ex. D.3.

60. Further, it was a dark night with no independent source of light. It was impossible to see the blood drops in the dark. If it is presumed that the witnesses were following the blood drops in the light of torch, then the light of torch could have been noticed by the

accused persons from a very distant place itself and they would not have allowed the witnesses to come closer to them, so that they can identify them. Thus, the very reason for reaching the culvert by following the blood drops on the path marked as "E" in the spot map itself is doubtful and suspicious.

Conduct of witnesses

61. It is the prosecution case that Phool Singh (P.W.1) informed his brother Hariram (P.W. 8) on mobile at about 2 A.M. in the night, that his younger brother Hargovind has been killed. Thereafter, this witness informed his father Ramcharan. Hariram (P.W.8) did not say even in his examination-in-chief that he was ever informed by Phool Singh (P.W.1) about Extra-Judicial Confession by Bihari or he had seen the accused persons, keeping the dead body of Hargovind under the culvert. Hariram (P.W. 8) has stated in his examination-in-chief itself that only after coming back to village, he came to know that his brother has been killed by appellants. He further stated that his father does not have any mobile phone and therefore, he came to Tharet and informed his father. He further stated that he was doing labour work in Sevdha and before starting from Sevdha he did not inform his father. He further stated that he and his father reached village Jakhoria on a motorcycle of one person and they did not have any conversation with Phool Singh from Tharet. He further stated that he was informed by Jayanti Bai (P.W.2) about the incident, but admitted that this fact is not mentioned in his police statement, Ex.D.4 and

could not give any reason for the same.

62. Ramcharan Kushwaha (P.W.10) is the father of the deceased Hargovind. He stated that at about 6-7 A.M., his son Phool Singh informed him on phone that his son Hargovind has been killed. Thereafter, he came to village Jakhoria along with Hariram (P.W.8) and one Motorcyclist. This witness has not stated that he was ever informed by Phool Singh about Extra-Judicial Confession or that the accused persons have left the dead body under the culvert. He further stated that only in the hospital, he was informed by Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati (P.W.3) about the incident. However, in his police statement, Ex. P.9, this witness had stated that after coming back to village, he had seen the dead body of his son under the culvert. When this witness was confronted with aforementioned statement, then he could not explain as to how this fact was mentioned in his police statement, Ex. P.9. In cross-examination, this witness has admitted that he does not have any mobile phone, but tried to develop a new story that his son Phool Singh (P.W.1) had given the information to Lal Singh Patwari on his mobile phone. Whereas Phool Singh (P.W.1) does not say so.

63. Thus, it is clear that Phool Singh (P.W.1) did not inform the names of assailants to Hariram (P.W.8) and Ramcharan (P.W.10) at the earliest point of time.

64. This lapse on the part of Phool Singh (P.W.1) assumes importance in the light of the evidence of R.P. Sharma (P.W.18).

65. R.P. Sharma (P.W. 18) has stated that on 7-12-2008, he was posted as A.S.I. in Police Station Civil Lines, Datia. At about 4 A.M., a telephonic information was received that Hargovind is missing. Therefore, he went to village Jakhoria along with Constable Hari Singh. He searched for Hargovind and came to know that the dead body of Hargovind was lying under the culvert. He recorded the Dehati Nalishi, Ex. P.1 on the instructions of Phool Singh (P.W.1). In cross-examination, this witness had clarified that the telephonic information about missing of Hargovind was received at about 4:00 A.M. Thus, it is clear that till 4 A.M. i.e., in the intervening night of 7th and 8th December, 2008, it was not known to anybody that whether Hargovind was alive or dead. In para 7 of his cross-examination, this witness has stated that he had reached village Jakhoria at about 6 A.M. and lot of villagers informed that the dead body of Hargovind is lying under the culvert. He admitted that the culvert is situated on Datia-Gwalior road. He further stated that there is one *Kuccha Road* which goes by the side of Datia Hospital to village Jakhoria. He further admitted that when he reached to culvert, 5-6 persons were already there. He further stated that Phool Singh (P.W.1) had also gone with him on his vehicle (This shows that Phool Singh was not at the culvert). He could not disclose the names of the villagers who had met him.

66. Thus from the evidence of Hariram (P.W. 8) and Ramcharan (P.W. 10) Phool Singh had mobile and had also informed his brother

and father about the death of Hargovind, but did not inform the names of assailants. Thus, it is clear that till information was given to Hariram (P.W. 8) and Ramcharan (P.W. 10), Phool Singh (P.W. 1) was not aware of the names of the assailants, otherwise, he would have certainly informed his brother and father about the names of assailants as well as about Extra-Judicial Confession. Further, according to R.P. Sharma (P.W. 18) the only information which was received in Police Station at 4 A.M. was that Hargovind was missing. Thus, it is clear that Phool Singh (P.W.1) was not aware of the fact that Hargovind has been killed by the accused persons.

67. Further, when Phool Singh (P.W. 1) was having mobile phone with him, then why he did not inform the police about the Extra-Judicial Confession and keeping of dead body of Hargovind by accused in the night itself? As already pointed out, Phool Singh (P.W. 1) claims to have seen the accused persons keeping the dead body of Hargovind under the culvert at about 7 P.M., and prior to that the so-called Extra-Judicial Confession was also made by Bihari, then why Phool Singh (P.W.1) did not go to Police Station to lodge F.I.R., or why he did not inform the police on mobile immediately after noticing the dead body of Hargovind. Thus, it is clear that the evidence of Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W. 3) about Extra-Judicial Confession by Bihari and seeing the accused persons keeping the dead body of Hargovind under the culvert is suspicious and unreliable.

68. Further, Phool Singh (P.W.1) has admitted in para 9 of his cross-examination that he did not go to the Police Station Civil Lines, Datia which is 10 kms away from his village. He further admitted that even Chowkidar of village Jakhoria did not inform the police. He further claimed that at about 6-7 A.M., he had gone to Police Station and came back along with the police and his report was lodged at culvert at around 8 A.M.

69. Further, Phool Singh (P.W.1) and Rati Bai (P.W.3) have specifically admitted that they did not go near to the dead body. Phool Singh (P.W.1) in para 15 of his cross-examination, has admitted that after seeing that the accused persons have kept the dead body under the culvert, he did not go near to the dead body and came back after seeing from a distance. It is true that the eyes of the villagers are accustomed to identify the things even in poor light, but in the present case, there is a clear admission by the witnesses, that it was dark and nothing was visible. Similarly, Rati Bai (P.W.3) in para 11 of her cross-examination has admitted that they did not go near to the dead body. In para 12 of her cross-examination, She also admitted that Datia-Gwalior road is a busy road but still did not raise any hue and cry. The witnesses have also admitted that after coming back to village, they did not inform any villager.

70. Further, it is the case of the prosecution, that they went upto culvert by following the blood drops and saw that the accused persons were keeping a dead body under the culvert. If the witnesses

were following the accused persons, then at the best, they could have seen the accused persons from their back. Further, according to Phool Singh (P.W.1), the accused persons were holding the hands and legs of the dead body. How it is possible to identify the dead body when it was in lying condition?

Whether Hargovind was alive till 7:30 P.M. ?

71. Imrati Bai (P.W.4) has partially turned hostile. But the evidence of hostile witness cannot be washed away. She has stated that on 6th She had gone to village Uprai and came back on 7th. While She was coming back, She had seen Bihari and Hargovind were sitting on a road. In the cross examination, this witness admitted that She came back from Uprai to Sonagiri Tiraha at 6:30 P.M. and distance between Sonagiri Tiraha and village Jakhoria is 5-6 Km.s and She came from Sonagiri Tiraha to village Jakhoria by walking. Thus, if this witness had seen Hargovind and Bihari sitting on the road while She was coming back from Sonagiri Tiraha to her village Jakhoria, then it is clear that She must have seen Hargovind alive some times between 7:00 P.M. to 7:30 P.M. According to this witness in para 4 of her cross-examination by public prosecutor, She had said that She had seen Hargovind and Bihari near the *Kothi* of Bihari, whereas according to Phool Singh (P.W.1) he had reached the *Kothi* of Bihari at about 6 P.M. (as he left his house at 5:30 P.M. and took 30 minutes to reach *Kothi* of Bihari [Para 6 of his cross-examination]), then it is clear that making of Extra-Judicial

Confession by Bihari at 6:00 P.M. about killing of Hargovind was not possible. Further, it is not the case of Phool Singh (P.W.1) that he had seen the assault on Hargovind. In para 11 of his cross-examination, this witness has admitted that he had not seen the accused persons assaulting the deceased.

72. It is true that Imrati Bai (P.W.4) claims to have seen the deceased alive in the company of Bihari, and claims that She informed the villagers after coming back to village but in para 7 of her cross examination, She has admitted that She had not informed the police about the said fact and also admitted that She is stating for the first time in the Court. Thus, it is clear that although Imrati Bai (P.W.4) has claimed that when She reached back to her village, She came to know that Hargovind is missing and accordingly, She informed the villager. However, in her police statement, Ex. P.4, she is completely silent on the issue of informing the villagers. Thus, it is clear that Imrati Bai (P.W.4) in spite of coming to know that Hargovind is missing, still did not inform anybody that She has seen Hargovind sitting with Bihari. Further, it is not the case of the prosecution, that anybody was told by Imrati (P.W.4) that She has seen Bihari sitting along with Hargovind. Further, in view of the evidence of Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W. 3) her evidence also becomes doubtful. It is well established principle of law that however strong the suspicion may be but it cannot take place of proof. The Supreme Court in the case of **Mohd.**

Faizan Ahmad v. State of Bihar, reported in **(2013) 2 SCC 131** has held as under :

18. The High Court's observation that there was a preconceived plan to abduct the children would not be applicable to the appellant because there is nothing on record to establish that the appellant met the co-accused and planned a strategy to abduct the children and demand ransom. His case stands on a different footing from that of the other accused. The case of the other accused will have to be dealt with on its own merit. The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. If a criminal court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence. We hope and trust that this is just an aberration.

(Underline supplied)

73. The Supreme Court in the case of **Pattu Rajan v. State of T.N.**, reported in **(2019) 4 SCC 77** has held as under :

30. Before we undertake a consideration of the evidence supporting such circumstances, we would like to note that the law relating to circumstantial evidence is well settled. The Judge while deciding matters resting on circumstantial evidence should always tread cautiously so as to not allow conjectures or suspicion, however strong, to take the place of proof. If the alleged circumstances are conclusively proved before the Court by leading cogent and reliable evidence, the Court need not look any further before affirming the guilt of the accused. Moreover, human agency may be faulty in expressing the picturisation of the actual incident, but circumstances cannot fail or be ignored. As aptly put in this oft-quoted phrase: "Men may lie, but circumstances do not".

31. As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude every other hypothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving

the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not necessary for this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in *Sharad Birdhichand Sarda v. State of Maharashtra*: (SCC p. 185, paras 153-54)

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

(1) 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 Sahabrao Bobade v. State of Maharashtra* where the observations were made: (SCC p. 807, para 19)

‘19. ... 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 proved, 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.

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

(emphasis in original)

Rajasthan, reported in (2017) 8 SCC 497 has held as under :

29. It is now well established, by a catena of judgments of this Court, that circumstantial evidence of the following character needs to be fully established:

- (i) Circumstances should be fully proved.
- (ii) Circumstances should be conclusive in nature.
- (iii) All the facts established should be consistent only with the hypothesis of guilt.
- (iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused (see *State of U.P. v. Ravindra Prakash Mittal*; *Chandrakant Chimanlal Desai v. State of Gujarat*). It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence, the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other person.

75. Thus, this Court is of the considered opinion, that the evidence of Imrati Bai (P.W.4) that She had seen Hargovind sitting along with Bihari merely creates a doubt against Bihari, but in the light of the evidence led by prosecution, the doubt against Bihari fails to take place of proof.

Blood stained weapons

76. According to prosecution, blood stained weapons were seized from the possession of appellants.

77. Pritam Singh (P.W.11) has said that Vir Singh was arrested in his presence, vide arrest memo Ex. P. 10. However, this witness turned hostile on the question of making of confessional statement or recovery of weapon. However, he clarified that his signatures were

obtained by S.H.O. on Ex. P.11 and P.12. Similarly Ghanshyam Kushwaha (P.W. 12) has also turned hostile and stated that neither Vir Singh was arrested in his presence, nor his memorandum, Ex. P.11 was recorded. No weapon was seized, however, SHO had obtained his signatures on Seizure Memo, Ex. P.12.

78. Jwala Prasad Kushwaha (P.W.13) has stated Bali was arrested vide arrest memo Ex. P.13. He had given his confessional statement and accordingly, one lathi was seized from his possession. The memorandum is Ex. P. 14 and seizure memo is Ex. P.15. Since, this witness was not in a position to disclose the details of confessional statement of Bali, therefore, he was declared hostile by the Public Prosecutor and in cross-examination, this witness admitted that Bali had given information about the place where he had kept the lathi in his memorandums, Ex. P. 14. He further admitted that one Muffler was also seized on the disclosure statement made by Bali.

79. Vir Singh Kushwaha (P.W.14) has stated that Bihari, Siyasharan and Ravindra were arrested vide arrest memo Ex. P.16A, 17A, and 18A. Their memorandum were recorded but could not say that what was disclosed by these three accused persons. He further stated that lathi was seized from the possession of Bihari vide Seizure Memo Ex. P.22. Lathi was seized from the possession of Ravindra vide seizure memo Ex. P.23 and Lathi was also seized from the possession of Siyasharan, Ex. P.24. As this witness could not say that what was disclosed by the three accused persons in their

memorandum, therefore, he was declared hostile by the Public Prosecutor and in cross-examination, this witness admitted that all the three accused persons had given information about the place where they have kept the lathi in their memorandums, Ex. P. 19, 20 and 21.

80. Maharam (P.W. 16) has also proved the arrest of Bali vide arrest memo Ex. P.13. He also proved the memorandum, Ex. P.14 and seizure of lathi and muffler on the disclosure statement made by Bali vide seizure memo Ex. P.15.

81. Ramdas (P.W. 17) has turned hostile and did support the seizure of Blood stained earth vide seizure memo Ex. P.26. He also denied the seizure of *Kathri* vide seizure memo Ex. P.25.

82. Shailendra Martin (P.W. 19) is the police officer, who took over the investigation from R.P. Sharma (P.18) and proved the seizure of weapons and cloths i.e., lathis and cloths of appellants.

83. Now the only question is that whether the lathis and clothes seized from the possession of the appellants prove the culpability of the appellants or not?

84. The seized lathis and clothes of the appellants were sent to R.F.S.L. Gwalior vide memo dated 29-1-2009, Ex. P.29. Surprisingly, these articles reached R.F.S.L. Gwalior on 11-2-2009 i.e., after 12 days, whereas the distance between Datia and Gwalior is about 75 Km.s only. It is not known that during this period, where these articles were kept. However, even otherwise, it is clear from

the F.S.L. Report, Ex. P. 30, Human Blood was found on Muffler seized from Bali, Lathi from Vir Singh, Lathi from Bihari, Paint and shirt of Bihari, Baniyan and Paint of Ravindra, and Paint, Shirt and Towel seized from Siyasharan. However, blood group could not be ascertained as its results were “Inconclusive”. It is not known as to whether the above mentioned articles were containing the blood group of deceased or not? Whereas “A” blood group was found on *Kathri*, Paint, Shirt, Baniyan, underwear and Safi of the deceased, which indicates that the blood group of deceased was “A”. The Supreme Court in the case of **Kansa Behera Vs. State of Orissa** reported in (1987) 3 SCC 480 has held as under :

12. As regards the recovery of a shirt or a dhoti with bloodstains which according to the serologist’s report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small bloodstains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the bloodstains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.

85. Since, the case in hand is based on Circumstantial Evidence, therefore, the prosecution must prove that it was the accused and the accused only who had committed the offence. The Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in (1984) 4 SCC 116 has held as under :

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

(1) 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 Sahabrao Bobade v. State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“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 proved, 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.

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

86. The present case is based on circumstantial evidence, and all other circumstances have been found to be “not proved”, then ascertainment of blood group on the incriminating articles become crucial. In the present case, although human blood was found on the articles mentioned in para 83 of this judgment, but in absence of blood group specifically when the blood group of deceased appeared

to be 'A', this Court is of the considered opinion, that presence of human blood on the articles mentioned in para 83 of this judgment are not sufficient to hold the appellants guilty.

87. Therefore, seizure of weapons and clothes from the possession of the appellants does not indicate towards their guilt.

Conclusion

88. Thus, from appreciation of the evidence led by the prosecution, it is clear that the prosecution has failed to prove that Vir Singh had ever tried to persuade/pressurize the deceased Hargovind to enter into a compromise. Furthermore, there was no reason for Vir Singh to persuade Hargovind to enter into compromise, because Hargovind, his wife Jayanti Bai and his mother Manku were facing prosecution on the complaint made by Pista, wife of Vir Singh. Further, the allegation that Pista was kept by Hargovind was made for the first time by the witnesses in the Court. The prosecution has failed to prove that at what time, they left their house to search Hargovind. Undisputedly, it was winter night, and the witnesses have admitted that it was complete dark and nothing was visible. The witnesses have changed their time of leaving their house for searching the deceased. In the Dehati Nalishi, Ex. P.1 and police statements Ex. D.1, D.2 and D.3, the witnesses had stated that they left the house when Hargovind did not return home till 8 P.M., but thereafter, they changed their version in the Court and tried to project that either they went in search of Hargovind at 5-6 or 7-8 or 5:30 P.M. This change

in timing was crucial and was made with a solitary intention to project that there was some light to see the blood drops. Although the house of Bihari is situated in the village itself, but all the three witnesses, i.e., Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) did not go the houses of the accused persons, and went directly to the room/*Kothi* of Bihari which is situated at an isolated place and is at a distance of 30 minutes. There is a material contradiction as to who made Extra-Judicial Confession. The improvement by Phool Singh (P.W.1) that Bali also made an Extra-Judicial Confession is not reliable in absence of any support by Jayanti Bai (P.W.2) and Ratibai (P.W.3). Even otherwise, neither in the Dehati Nalishi Ex. P.1, nor in the police statement, Ex. D.1, Phool Singh (P.W.1) had alleged that Bali had also made an Extra-Judicial Confession.

89. Further, it was the case of the prosecution, that after Extra-Judicial Confession was made by Bihari, both i.e., Bali and Bihari ran away and the witnesses, i.e., Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W. 3) noticed blood in front of the room/*Kothi* of Bihari and thereafter they saw blood drops and they followed the blood drops. Since, admittedly, it was already dark and nothing was visible and there was no source of light, therefore, it is difficult to accept the evidence of the witnesses that they went upto the Culvert after following the blood drops on path marked as “E” in the spot map, Ex. P.28. Further, even in the spot map, no blood drops

were pointed out in path “E” or at the place where dead body was found. Further, no blood stained earth was lifted from path “E” or from the place where the dead body was found. If the blood drops were falling on the path “E” as claimed by the witnesses, then the investigating officer should have found blood on the place where the dead body was found. Although R.P. Sharma (P.W. 18) has claimed in his evidence that he had seen blood drops on Path “E” and also at the place where the dead body was found, therefore, the non lifting of blood stained earth from path “E” or from the place where the dead body was found could have been the result of faulty investigation, but if the entire prosecution evidence is considered, then it is clear that the evidence of the witnesses, that they followed the blood drops for reaching to the culvert itself was unreliable on account of the fact that it was completely dark and it was not possible to see the blood drops and therefore, Phool Singh (P.W.1) had ultimately claimed that he had left his house at 5:30 P.M. and reached the room/*Kothi* of Bihari within 30 minutes, so that he can claim that there was some day light at the relevant time, to see the blood drops. Further, it is clear from the spot map, that the three witnesses, namely Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) were following the accused persons, therefore, they had no occasion to see their faces. Further, the case of the prosecution is that the accused persons were carrying the dead body by holding its hands and legs, thus, it is clear that the dead body was being carried in lying condition, and under

these circumstances, it was not possible for the witnesses to see that the dead body of Hargovind was being taken away by the miscreants. Further, the witnesses have specifically stated that they did not go near to the dead body and returned to the village from a distance. Thereafter, the witnesses namely Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) came back to village but did not tell the incident to anybody. Although it is the case of the prosecution that Phool Singh (P.W. 1) had informed his brother Hariram (P.W. 8) and father Ramcharan (P.W.10) on mobile, but it is not the case of Hariram (P.W.8) and Ramcharan (P.W.10) that the names of assailants were also disclosed. Thus, it is clear that even in the night, Phool Singh (P.W. 1) did not disclose the names of assailants to his brother Hariram (P.W. 8) and Ramcharan (P.W.10). Further, Phool Singh (P.W.1) has admitted that he has mobile phone and has motorcycle and tractor in his family, but even then he neither went to police station nor gave any information to the police on mobile. On the contrary, R.P. Sharma (P.W.18) has claimed that at 4:00 A.M., an information was received in the Police Station that Hargovind is missing. Thus, it is clear that till 4:00 A.M., nobody knew that Hargovind has been killed. Thus, the evidence of the three witnesses namely Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W.3) is not worth acceptance. Furthermore, Phool Singh (P.W.1) also tried to improve by alleging that Bali had also made an Extra-Judicial Confession. Even in the spot map, Ex. P.28, the investigating officer

had not shown the place from where the witnesses had seen the accused persons keeping the dead body.

90. So far as the presence of Human blood on the weapons and other articles mentioned in para 84 of this judgment are concerned, it is suffice to mention here that since, the prosecution has failed to prove the other circumstances against the appellants, then the non-ascertainment of the blood group on the articles would assume importance and mere recovery of blood stained lathis and clothes is not sufficient to hold the appellants guilty.

91. Further so far as the allegation that Pista had illicit relationship with Hargovind is concerned, the said allegation does not find place in the police statements, Ex. D.1, D.2 and D.3 of Phool Singh (P.W.1), Jayanti Bai (P.W.2) and Rati Bai (P.W. 3) respectively. Thus, the prosecution has also failed to prove that Pista bai had illicit relationship with Hargovind.

92. Further the evidence of Imrati bai (P.W.4) to the effect that She had seen Hargovind sitting with Bihari is also not acceptable, because not only the timings of seeing both the persons near the room /*Kothi* of Bihari does not match with the evidence of three witnesses, but Imrati Bai (P.W. 4) has also admitted in her cross-examination that She has not stated in her police statement, that after coming back to village, She had informed the villagers that She has seen Hargovind sitting with Bihari. Furthermore, when the case is based on circumstantial evidence, then the prosecution must prove the case

beyond reasonable doubt. Suspicion however strong it may be, cannot take place of proof. Therefore, considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt.

93. Therefore, all the appellants namely, Vir Singh, Bali @ Balkishan, Biharilal, Siyasharan and Ravindra are acquitted of charges under Sections 302 and 201 of I.P.C.

94. *Ex consequenti*, the judgment and sentence dated 29-12-2009 passed by 2nd Additional Sessions Judge (Fast Track Court), Datia in Sessions Trial No.64 of 2009 is hereby **set aside**.

95. All the appellants are in jail. They be released immediately, if not required in any other case. Fine amount if deposited be returned back to the appellants.

96. A copy of this judgment be provided to the appellants free of cost.

97. The Registry of this Court is directed to immediately send a copy of this judgment along with the Record to the Trial Court for necessary information and compliance.

98. The appeal succeeds and is **Allowed**.

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge