

(2018) 08 SHI CK 0038
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 163 of 2017

Kanhakru Ram

APPELLANT

Vs

State of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 31-08-2018

Acts Referred:

Indian Evidence Act, 1872 — Section 27
Code Of Criminal Procedure, 1973 — Section 154, 164, 300, 313
Indian Penal Code, 1860 — Section 299, 302

Citation : (2018) 08 SHI CK 0038

Hon'ble Judges : DHARAM CHAND CHAUDHARY, J; VIVEK SINGH THAKUR, J

Bench : Division Bench

Advocate : Satyen Vaidya, Vivek Sharma, Y.P. Sood, Vikas Rathore, Narinder Guleria

Final Decision : Allowed

Judgement

Dharam Chand Chaudhary, J.

1. Appellant Kanhakru Ram is convict. He has been tried and convicted for the commission of offence punishable under Section 302 of the Indian

Penal Code vide judgment dated 25.04.2017 passed by learned Additional Sessions Judge-II, Mandi, H.P. circuit Court at Sarkaghat and sentenced to

undergo rigorous imprisonment for life and to pay Rs.1,00,000/- as fine. Aggrieved thereby, the present appeal has been filed on the grounds inter-alia

that learned trial Court has not appreciated the evidence available on record in its right perspective and rather based the findings on conjectures and

surmises. No legal and acceptable evidence has come on record which suggests the involvement of the accused with the commission of the offence.

He has been convicted merely on the basis of so called extra judicial confession he made before Suresh Kumar (PW-1) and the disclosure statement

Ext.PW-10/B under Section 27 of the Indian Evidence Act leading to the recovery of weapon of offence the axe, Ext. P-2, blood stained jean pant

Ext. P-11 as well as shirt Ext. P-13 of the accused. There is, however, no reliable evidence to show that the extra judicial confession was made by the

accused and that on the basis of thereof axe Ext. P-2, pant and shirt Ext. P-12 and Ext. P-13 were recovered in the presence of witnesses. The

witnesses to such recovery PW-6 Brij Lal, PW-13 Champa Devi and PW-14 Hem Raj, however, have not supported the prosecution case and turned

hostile. The axe Ext. P-2 as per prosecution evidence itself was lying on the spot as has come in the statement made by PW-1 Suresh Kumar the star

prosecution witnesses. Learned trial Judge allegedly erred legally and factually while concluding that the facts established on record are consistent

only with the hypothesis to the guilt of the accused and exclude every possible hypothesis except it. The contradictions, improvements and

inconsistencies in the statements of prosecution witnesses have also been ignored. The impugned judgment, as such, has been sought to be quashed.

2. Now if coming to the factual matrix, accused Kanhakru Ram and PW-1 Suresh Kumar both belong to village Sakoh, Post Office Sidhpur, Tehsil

Dharampur, District Mandi, hence neighbour. While accused is working as Beldar (Pump Operator) in the pump house of I & P.H. Section, Sidhpur,

the complainant Suresh Kumar was working as Junior Technician in the Public Works Department, Sidhpur. There is a temple of 'Shri Hanuman Ji

' in the village at a distance of 400-500 meters from their house. On 8.5.2015, accused came to the house of PW-1 during day time and asked for

axe from his wife, Smt. Champa Devi, PW-13, which allegedly was required by him to fence the temple. She revealed such facts to her husband PW-

1 Suresh Kumar in the evening at 7.30 p.m when he returned to his house from duty. At that very time, accused allegedly came to PW-21 and told

that he was called by Baba (Priest) in the temple. He accompanied by accused left towards temple side. On the way, accused disclosed that he has

killed the Baba with axe and kept his body outside the 'Kutia' (hut) and fled away. The complainant informed the police over telephone that

accused had killed the baba in 'Hanuman Ji' temple at village Sakoh. The information so given to the police was entered in daily diary vide rapat

Ext. PW-11/A, the complainant when reached in the temple noticed that the dead body of baba was lying in southern corner outside the kutia and an

axe stained with blood was also lying there.

3. The police also reached on the spot and recorded the statement of complainant Suresh Kumar, Ext. PW-1/A under Section 154 Cr.P.C. On the

basis of the statement so made by the complainant FIR Ext. PW-10/A came to be registered in the police station. The investigation was conducted by

PW-15 Inspector/SHO Amar Singh, Police Station, Dharampur, District Mandi, H.P. He inspected the body, taken its photograph, completed inquest

papers. The spot map Ext. PW-15/B was also prepared. The blood stained soil and controlled soil were taken in possession vide seizure memo. The

photographs of the hut were also taken. The mobile phone, Adhaar card, ration card of baba were also taken in possession in the presence of

witnesses. On the next day i.e. 9.5.2015, the accused was arrested. The post-mortem of the dead body was conducted by Dr. Dharam Pal, Medical

Officer, Civil Hospital, Sarkaghat on that very day. The post-mortem report Ext. PW-9/C was issued. The viscera, part of liver, kidney, stomach,

intestine and blood etc, were taken in possession and sealed in a parcel with seal of Sarkaghat. The impression of seal Ext. PW-9/B was

also obtained separately. As per his opinion, Ext. PW-9/D, formed on the basis of report, no poison and alcohol could be detected in the viscera,

therefore, as per his opinion, the cause of death of the deceased was head injury.

4. On 10.05.2015, the accused while in custody allegedly made the disclosure statement Ext. PW-10/B in the presence of PW-6 Brij Lal and PW-10

Sandeep Kumar and PW-14 Hem Raj. Consequent upon the disclosure statement so made by him, axe Ext. P-2 and clothes were recovered in the

presence of the witnesses. The axe allegedly was got identified from PW-13 Champa Devi. The case property i.e. axe and other stomach contents

preserved by PW-9 at the time of post-mortem were sent to Forensic Science Laboratory and the report Ext. PW-15/E and Ext. PW-15/F were

received.

5. On completion of investigation, the investigating agency has filed the report in the Court below. On completion of committal proceedings, the case

was committed to learned Sessions Court for trial.

6. Learned trial Judge has framed the charge under Section 302 of the Indian Penal code against the accused to which he pleaded not guilty and

claimed trial. This has led in producing evidence to sustain the charge against

the accused by the prosecution.

7. The material prosecution witness is the complainant, who has stepped into the witness box as PW-1. According to him, the statement Ext. PW-1/A

was made by him before the police. According to him, his statement under Section 164 Cr.P.C was also recorded by learned Magistrate. Portion

â??Aâ?? thereof was admitted by him to be true and correct. He has identified the axe along with its handle Ext. P-2 and stated that

the same was his axe, taken away by the accused from his wife. PW-2 Ganga Ram was the Pradhan of Gram Panchayat, Sidhpur at the relevant

time.

In his presence the inquest papers Ext. PW-2/A and Ext. PW-2/B were completed by the I.O. The blood stained soil and clean soil were also taken

from the courtyard of the hut in his presence vide memo Ext. PW-2/D, which was duly sealed with seal â??Hâ??. He has also supported the

prosecution case qua search of the hut of deceased Baba and recovery of his ration card, Adhar card and cellphone of â??intex companyâ??

therefrom. The accused was also arrested on 9.5.2015 at 1.00 a.m. vide memo Ext. PW-2/E. PW-6 Brij Lal was examined to prove the recovery of

pant Ext. P-12 and shirt Ext. P-13, which were taken in possession vide memo Ext. PW-6/A allegedly in his presence and in presence of PW-14 Hem

Raj. The same were lying on the bed in the house of accused and not produced by him before the police. According to him, no axe was recovered at

the instance of accused on that day in his presence. PW- 10 MHC Sandeep Kumar, Police Station, Dharampur is a witness to the disclosure

statement Ext. PW-10/B allegedly made by the accused qua recovery of axe and blood stained clothes allegedly concealed by him. The clothes the

accused allegedly got recovered by taking out behind the tin box kept inside the room and were taken in possession vide recovery memo Ext. PW-6/A,

which were sealed with impression of seal â??Dâ??.

On that very day, the accused allegedly led the police party to a field adjoining to path in village Sakoh-Balli. He had taken out one axe concealed

beneath leaves in a heap of cow dung. The handle of the axe was blood stained. The same was got identified from Champa Devi PW-13, who was

called on the spot and its photographs Ext. PW-7/A-10 and A-11 with regard to recovery of pant and shirt, whereas, Ext. PW-7/A-12 to A-14 axe

were also taken. The axe was sealed and taken in possession vide recovery memo Ext. PW-6/D. He has identified the axe Ext. P-2, jean pant Ext. P-

12, whereas, shirt Ext. P-13, which were taken in possession in his presence. PW-13 Champa Devi has admitted that axe was taken away from her

by the accused for fencing â??Shri Hanuman Jiâ?? temple, however, according to her the axe was got identified from her by the police in Police

Station. She turned hostile and allowed to be cross-examined. PW-14 Hem Raj allegedly a witness to the recovery of pant, shirt and axe has not

supported the prosecution case and also turned hostile. The remaining prosecution witnesses are formal as PW-3 Pawan Kumar is the Junior Engineer

and at the instance of police prepared the spot map Ext. PW-3/A. PW-4 HHC Rakesh Kumar taken the copy of FIR to S.D.P.O.

Sarkaghat and its copy was taken to the Court of JMIC Sarkaghat and also to the S.P. office, Mandi. PW-5 HC Sarwan Kumar was working as

additional MHC on the day of occurrence and retained the case property in the Malkhana when deposited with him by the I.O. He has made the entry

also in the Malkhana register. The case property was forwarded by him to RFSL, Mandi. PW-7 Hem Raj is the Photographer and he has taken the

photographs Ext. PW-7/A-1 to A-14. PW-8 Hazari Lal was working as Patwari in patwar circle Taroon. On the application, Ext. PW-8/A moved to

S.D.M. Dharampur, he had issued the jamabandi Ext. PW-8/B, spot tatima Ext. PW-8/C to the police. He had also submitted the compliance report

Ext. PW-8/D in this regard to the Naib-Tehsildar, Dharampur. PW-9 Dr. Dharampal has conducted the post-mortem of the dead body and in his

opinion the cause of death is the head injury. As per his further version, the injuries could have been caused with axe Ext. P-2 and were sufficient to

cause death in ordinary course. PW-11 Constable Karam Singh has proved the rapat rojnamcha Ext. PW-11/A, Ext. PW-11/B and Ext. PW-11/C.

PW-12 HHC Rasal Singh had taken the rukka Ext. PW-1/A handed over to him by the IO ASI Bidhi Chand to police station, which he had handed

over to MHC Sandeep Kumar who registered the FIR Ext. PW-10A. He had also taken the case property to the laboratory at Mandi. PW-15 is the

I.O. of this case. He has deposed what the police has said in the challan filed against the accused.

8. The accused has also been examined under Section 313 Cr.P.C. He has denied the entire prosecution case either being wrong or for want of

knowledge and pleaded that he has been falsely implicated in this case. He has also examined DW-1 Vijay Singh, Assistant Engineer, H.P.P.W.D.

Sub-Division, Dharampur, who has produced the record and stated that complainant PW-1 Suresh Kumar was not on duty on 9.5.2015 being holiday

on account of Second Saturday. DW-2 Yashpal Sharma, S.D.O I&PH Dharampur has stated that on 8.5.2015, the accused was present on duty as

he marked his attendance at 2.00 p.m. However, as has come in his cross-examination, in the evening the accused only switched on and switched off

the motor and fled away thereafter and he was not physically present on duty in the evening time.

9. Learned trial Judge on appreciation of the evidence available on record and hearing learned Public Prosecutor and also learned defence counsel has

noticed the following circumstances having appeared in the evidence against the accused:-

Firstly, he has submitted that the accused has taken the axe from the wife of the complainant from his house on the day of occurrence.

Secondly, the accused disclosed to the complainant that he has committed the murder of Baba in his kutia. Thirdly, the accused made the statement,

while, in custody and got recovered the blood stained clothes and the weapon of offence in presence of the witnesses. The presence of the blood on

the clothes of the accused was not explained on the record file and the accused has taken the plea of alibi which falsify from his evidence.

10. While considering the circumstances so appeared against the accused with the help of the evidence available on record, the prosecution was found

to have proved its case against the accused beyond all reasonable doubt. The accused, as such, has been convicted for the commission of offence

punishable under Section 302 IPC and sentenced in the manner as pointed out at the very outset.

11. Mr. Satyen Vaidya, learned Senior Advocate assisted by S/Sh. Y.P. Sood and Vivek Sharma, Advocates has argued very ably that the present is a

case of no evidence nor the prosecution has proved its case against the accused beyond all reasonable doubt, however, irrespective of it, learned trial

Judge has convicted and sentenced him. Learned defence counsel has pointed out that there is no evidence to show that the accused has made extra

judicial confession. Again there is no cogent and reliable evidence to show that axe Ext. P-2 and clothes i.e. jean pant and shirt Ext. P-12 and Ext. P-

13 have been recovered at the instance of accused, consequent upon the disclosure statement Ext. PW-10/B he made, in the manner, as claimed by the prosecution. The prosecution witnesses i.e. PW-6 and PW-14 have turned hostile. Even PW-13 Champa Devi has also not supported the prosecution case qua the recovery of axe in the manner as claimed by the prosecution. Therefore, according to learned counsel, there was no iota of evidence to connect the accused with the commission of offence. He, in all fairness and in the ends of justice, was entitled to the benefit of doubt and resultantly acquittal.

12. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General while supporting the judgment passed by learned trial Court has stated that the same is supported by the evidence available on record. Also that, the accused has rightly been convicted and sentenced.

13. The present being not a case of direct evidence and rather hinges upon circumstantial evidence casts an onerous duty on this Court to find out the truth by separating grain from the chaff. In other words, it has to be determined that the facts of the case and the evidence available on record

constitute the commission of an offence punishable under Section 302 IPC against the accused or not. However, before coming to answer this poser,

it is desirable to take note of legal provisions constituting an offence punishable under Section 302 IPC. A reference in this regard can be made to the

provisions contained under Section 300 IPC. As per the Section *ibid*, culpable homicide is murder firstly if the offender is found to have acted with an

intention to cause death or secondly with an intention of causing such bodily injury knowing fully well that the same is likely to cause death of someone

or thirdly intention of causing bodily injury to any person and such injury intended to be inflicted is sufficient in the ordinary course of nature to cause

death or if it is known to such person that the act done is imminently so dangerous that the same in all probability shall cause death or such bodily

injury as is likely to cause death.

14. Culpable homicide has been defined under Section 299 IPC. Whoever causes death by way of an act with the intention of causing death or with

the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death can be said to

have committed the offence of culpable homicide. Culpable homicide is murder if

the act by which death is caused is done with the intention of causing death. Expression 'intent' and 'knowledge' postulate the existence of a positive mental attitude which is of different degree. We are drawing support in this regard from the judgment of Apex Court in Jagriti Devi vs. State of Himachal Pradesh, AIR 2009 SC 2869.

15. The ingredients of culpable homicide amounting to murder, therefore are: (i) causing death intentionally and (ii) causing bodily injury which is likely to cause death. Rather the present is a case where the evidence available on record is suggestive of that it is the accused who had caused the death of deceased baba with axe by inflicting injury on his head with axe Ext. P-2 and such an act on his part amounts to culpable homicide amounting to murder or not, needs re appraisal of the evidence available on record. However, before that it is deemed appropriate to point out that if the accused had motive to cause death of deceased, the eye witness count of the occurrence may not be required, however, where the motive is missing, the prosecution is required to prove its case with the help of testimony of eye witnesses.

16. The present being a case of circumstantial evidence, the Court seized of the matter has to appreciate such evidence in the manner as legally required. We can draw support in this regard from a judgment of Division Bench of this Court in Sulender vs. State of H.P., Latest HLJ 2014 (HP)

550. The relevant extract of this judgment is re-produced here as under:-

'21. It is well settled that in a case, which hinges on circumstantial evidence, circumstances on record must establish the guilt of the accused alone and rule out the probabilities leading to presumption of his innocence. The law is no more res integra, because the Hon'ble Apex Court in Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, has laid down the following principles:

'It is well remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far

complete as not to leave any reasonable ground for a conclusion

consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the

accused.â??

22. The five golden principles, discussed and laid down, again by Honâ??ble Apex Court in Sharad Birdhichand Sarda vs. State of Maharashtra,

(1984) 4 SCC 116, are as follows:

(i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely â??may beâ?? fully established,

(ii) 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,

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) They should exclude every possible hypothesis except the one to be proved, and

(v) 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.â??

17. Similar is the ratio of judgment rendered again by this Bench in State of Himachal Pradesh vs. Rayia Urav @ Ajay, ILR 2016 (5) (HP) 213. This

judgment also reads as follows:-

â??10. As noticed supra, there is no eye- witness of the occurrence and as such, the present case hinges upon the circumstantial evidence. In such

like cases, as per the settled proposition of law, the chain of circumstances appearing on record should be complete in all respects so as to lead to the

only conclusion that it is accused alone who has committed the offence. The conditions necessary in order to enable the court to record the findings of

conviction against an offender on the basis of circumstantial evidence have been detailed in a judgment of this Court in Devinder Singh v. State of

H.P. 1990 (1) Shim. L.C. 82 which reads as under:-

â??1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

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.

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.

11. It has also been held by the Honâ??ble Apex Court in *Akhilesh Halam v. State of Bihar* 1995 Suppl.(3) S.C.C. 357 that the prosecution is not

only required to prove each and every circumstance as relied upon against the accused, but also that the chain of evidence furnished by those

circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The relevant

portion of this judgment is reproduced here as under:-

â??.....It may be stated that the standard of proof required to convict a person on circumstantial evidence is now settled by a series of

pronouncements of this Court. According to the standard enunciated by this Court the circumstances relied upon by the prosecution in support of the

case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable

ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to

be inferred, should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and the same should not be capable of

being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only

irresistible conclusion that the accused is the perpetrator of the crime.â??...

18. The guilt or innocence of the accused has to be determined in the light of above legal parameters as well as the evidence available on record. We

have already detailed the circumstances as relied upon by the prosecution and considered by learned trial Court to bring guilt home to the accused. It

is now to be seen in the light of the evidence available on record as to whether the chain of evidence furnished is so complete as not to leave any

reasonable ground for a conclusion consistent with the innocence of the accused and in all probability show that it is accused alone who has murdered

the deceased baba with axe Ext. P-2.

19. It is in this backdrop, we now proceed to discuss the evidence available on record.

20. The first and foremost circumstance relied upon against the accused is that he having went to the house of the complainant PW-1 and asked for

axe from Champa Devi, PW-13 his wife and the purpose to have axe by him was disclosed that the same was required for providing fencing to the

temple and kutia of the deceased. Nothing, however, has come in the prosecution evidence as to at what time, he went to the house of PW-1 to have

axe. On the other hand, he reported for duty at the pump house at 2.00 p.m. It is stated so by DW-2, the Sub-Divisional Officer, I&PH, Sub-Division,

Dharampur. According to DW-2, the accused was present on duty and signed the attendance register at 2.00 p.m. Even if the testimony of PW-13

Champa Devi that the accused had taken away axe from her is believed to be true, it alone is not sufficient to conclude that the accused had done

away with the life of deceased by inflicting injuries on his head with axe. As noticed hereinabove, the time when the axe was taken by the accused

does not find mention in the statement of PW-1. On the other hand, the accused had reported for duty at 2.00 p.m. The probable time when the

deceased was murdered is not establish from the prosecution evidence. In the village no-one could know about the death of baba in the temple till 8.00

p.m when the accused has allegedly revealed this fact to PW-1. The accused was on night duty, perhaps from 2.00 p.m to 10.00 p.m as can be

noticed from the statement of DW-2 Yashpal Sharma, the Sub-Divisional Officer, I&PH, Dharampur.

21. As a matter of fact, the accused has not taken the plea of alibi, however, it emerges from the trend of cross-examination of prosecution witnesses

conducted on his behalf that he was on night duty and has never committed the alleged offence nor met PW-1 and disclosed him that baba was

murdered by him. The defence so emerges on record seems to be probable because as per the evidence discussed supra, the deceased was on night

duty at pump house. No doubt PW-2 has admitted the suggestion given to him by learned Public Prosecutor that in the evening on 8.5.2015, the

accused was not physically present at the pump house, hence on duty. Even if it is believed to be true, hardly of any help to the prosecution case

because the pump house was situated in village Sakoh itself to which the accused belongs. Therefore, even if he was not there throughout and his

absence therefrom cannot be taken to believe that he had killed the baba with the axe, particularly, when there is no iota of evidence to suggest as to

at what time the axe was taken by the accused from the house of PW-1 and the probable time when the baba was killed. On the other hand, the

possibility of accused having come to his house from pump house to have food etc, or coming to his house and going to the pump house intermittently

in view of the pump house is situated in village Sakoh itself, cannot be ruled-out. Therefore, mere taking away the axe Ext. P-2 from the house of

PW-1 is not at all sufficient to connect the accused with the murder of the baba.

22. Interestingly enough, the motive to cause death of baba by the accused is totally missing in this case. What was the motive to kill the baba is even

not remotely established on record. Therefore, the present case hinges upon the circumstantial evidence, which also not inspire any confidence, the

accused could have not been convicted.

23. Now if coming to the another circumstance that accused in the evening (8.00 p.m.) came to PW-1 and told him that baba is calling him to come to

temple and that PW-1 accompanied the accused, the later on the way disclosed that he had killed the baba with the axe and kept the dead-body in the

courtyard outside the kutia again hardly inspire any confidence for the reason that in view of the judgment of this Court in Sulender's case cited

supra, an extra judicial confession by the accused is always made before a close relative, a trusted person and his well wisher and not before any

person like PW-1, the complainant in this case, who as per plea raised by the accused in his defence was inimical to him. Therefore, the story that

accused had made extra judicial confession before PW-1, cannot be believed to be correct by any stretch of imagination.

24. Interestingly enough, as per the very first version of the complainant qua this incident find mention in his statement (Ext. PW-1/A) under Section

154 Cr.P.C., the accused disclosed so and fled away. However, as per his statement under Section 164 Cr.P.C Ext. PW-1/B recorded by Judicial

Magistrate, Court No.2, Sarkaghat, the accused accompanied him upto kutia and

there shown the dead-body which was covered under a tin shed and thereafter they both returned to home. Although, similar is his version while in the witness box as PW-1, yet in view of variation in his statements recorded under Section 154 Cr.P.C and 164 Cr.P.C and he having contradicted his earlier version that the accused fled away after disclosing that he had killed the baba on the way to kutia, such contradiction in the prosecution evidence goes to the very root of the prosecution case.

25. It is doubtful that accused came to PW-1 in the evening (8.00 p.m.) because as per the version of PW-1 in cross-examination, he was on field

duty in village Seyoh on that day, where the tarring work was in progress upto 5.00 p.m. He was at place namely Beri till 5.00 p.m. The bus facility, as

per his own version, was not available from Beri at that time. How he had covered the distance from Beri to Sakoh, which is 16 kilometers, remained

unexplained. On the other hand, as per his version, he had taken lift from Seyoh to Sidhpur. Again, at what time, there is no explanation. When he

came to Sidhpur from Seyoh and when he reached at Sidhpur and at what time in his house at Sakoh, there is again no explanation in this regard.

Being so, there is no legal and acceptable evidence to believe that he reached in the house at 8.00 p.m. Similarly, it cannot also be believed that the

accused came to him at 8.00 p.m. The link evidence as to by what mode he reached at village Seyoh from Beri and what time he started from Seyoh

to Sidhpur and by which bus he reached at Sidhpur, again there is no explanation. There is again no explanation as to at what time he left Sidhpur for

his native place at village Sakoh and when he reached there. The story, as such, has been concocted and engineered to implicate the accused falsely

to the reasons best known to PW-1 and the Investigating Officer. Therefore, there is no iota of evidence to believe that the accused came to the

house of PW-1 and on the way disclosed that he had killed the deceased with axe.

26. The third circumstance is the disclosure statement Ext. PW-10/B allegedly made by the accused while in the police custody. The material

prosecution witness to prove this part of its case examined by the prosecution is PW- 10 Sandeep Kumar, the then MHC Police Station, Dharampur.

He has simply stated that on 10.05.2015, the I.O. associated him in the investigation of the case and that in his presence the accused made the

disclosure statement qua he having concealed the axe and his blood stained

clothes, which he could only get recovered. The statement Ext. PW-10/B so made was recorded in his presence, however, where the said statement made, nothing has come in the statement of PW-10. He is the only witness examined by the prosecution in this regard. However, as noticed supra, nothing in his statement that the disclosure statement was made and recorded in the police station at such a time when the accused was in custody has come on record. Therefore, the necessary constituents of the disclosure statement that the same should be made by the accused while in custody and in the presence of independent witnesses is not proved at all. Therefore, the possibility of statement Ext. PW-10/B is engineered and fabricated to implicate the accused in this case falsely, cannot be ruled-out.

27. Now if coming to the recovery of axe Ext. P-2, jean pant, Ext. P-12 as well as shirt Ext. P-13 of deceased pursuant to the disclosure statement

Ext. PW-10/B, the same is again not proved because irrespective of PW-10, who is a police official having stated that pant and shirt were taken out

by the accused from behind iron box kept in the room and thereafter handed over to the police. The witnesses to recovery memo, PW-6 Brij Lal and

PW-14 Hem Raj have not supported the prosecution case in this regard at all because as per version of PW-6, the jean pant and shirt were lying in the

house of accused on a bed. There is nothing that the same were blood stained. This witness was subjected to lengthy cross-examination, however, his

testimony remained unshattered as he has denied the suggestions to the contrary that the pant and shirt were not lying on the bed and rather concealed

by the accused behind a tin box, lying in the room. PW-14 Hem Raj though has admitted his signatures over the parcel, however, according to him, the

same was empty at that time. Nothing according to him did happen in his presence nor anything recovered by the police. In his cross-examination

conducted by learned Public Prosecutor while admitting that memos Ext. PW-6/A and Ext. PW-6/D bear his signature, it is denied that he had signed

the same at village Sakoh-Balli.

28. Although, he has admitted the suggestion that the police had brought the accused to village Sakoh on that day, however, it is denied that he led the

police party to a field adjoining to Sakoh-Balli path and taken out an axe concealed beneath leaves in a heap of cow dung. It is also denied that in his

house, the accused had taken out his clothes from the tin box and handed over

the same to the police. It is also denied that the clothes were blood stained. He has also denied that PW-13 Champa Devi identified the axe in his presence at village Sakoh.

29. Now if coming to the statement of PW-13 Champa Devi, although, as per her version the axe Ext. P-2 belongs to them and the accused had taken

away the same from their house for the purpose of fencing â??Hanuman Jiâ?? temple. It is, however, denied that the axe was identified by her at

village Sakoh. The same, however, was got identified from her in the police station. She had admitted her signature on the memo Ext. PW-6/D,

however, denied that the same was signed by her at village Sakoh. It is also denied that she was called to the field adjoining to Sakoh-Balli path in

village Sakoh and got identified the axe Ext. P-2 from her there in the presence of PW-6 Brij Lal and PW-14 Hem Raj. She has also denied that axe

was sealed by the police at Sakoh. It is also denied that Ext. PW-6/D was signed by the accused at Sakoh in her presence and that she has deposed

falsely to save the accused. The statement portion â??Aâ?? to â??Aâ?? and â??Bâ?? to â??Bâ?? in her statement Ext. PW-15/G was not made

by her before the police. Therefore, while PW-10 Sandeep Kumar being a police official is an interested witness, independent witnesses PW-6 and

PW-14 have not supported the prosecution case qua the manner in which pant, shirt and axe were recovered by the police. PW-13 Champa Devi, the

wife of the complainant has not supported the prosecution case in this regard.

30. Interestingly enough, as per own statement of the complainant PW-1, when he noticed dead body lying in one corner outside the kutia, the blood

stained axe was also lying there. There is no evidence as to when the accused had removed the axe from that place and concealed the same in the

heap of cow dung in the field at village Sakoh. It is also not known as to who was the owner of that field and to whom the heap of cow dung belongs.

As a matter of fact, the investigating agency has made an effort to plant the recovery of axe and also the clothes of the accused falsely merely to

implicate the accused with the commission of murder of baba without there being any proof thereto. The conduct of the Investigating Officer is not

above board. Learned trial Judge has not appreciated the evidence available on record in its right perspective and recorded the findings of conviction

against the accused mechanically and without application of mind.

31. True it is that as per medical evidence as has come on record by way of testimony of PW-9 Dr. Dharampal and the post mortem report Ext. PW-

9/B, the cause of death of baba is the head injury. As per further version of the doctor in the cross-examination, the head injury leading to the death of

baba could have been caused with axe Ext. P-2. There is, however, no iota of evidence to show that head injury was inflicted by the accused alone

and none-else.

32. The Seriologist report Ext. PW- 5/E received in this case only speaks about the availability of human blood on the handle of axe Ext. P-2. Blood

was also found on the pants as well as shirt of the accused. However, nothing is there in this report that the blood on the clothes of the accused was

human blood and that of deceased. There is also nothing suggesting that the blood on the handle of axe Ext. P-2 was that of the deceased. The

scientific investigation conducted in this case, as such, is also not suggestive of that baba was murdered by the accused in the manner as claimed by

the prosecution.

33. Learned trial Judge has emphasized much on the plea of so called alibi taken by the accused. As a matter of fact, plea of the accused that he was

on duty could have not been taken as the plea of alibi by any stretch of imagination for the reason that pump house where he allegedly was on duty is

situated in village itself and it is not the prosecution case that after commission of offence he absconded or was not available in the village. On the

other hand, as per the statement of PW-2, Ganga Ram, the then Pradhan of Gram Panchayat, Sidhpur, he contacted the accused on 8.5.2015 at 10.00

p.m over telephone. At that time, he was available in his house. Being so, there is no question of the accused having raised the plea of alibi. The

factum of he being on night duty is established from the testimony of DW-2, the Sub-Divisional Officer, I&PH, Sub-Division, Dharampur.

34. The remaining prosecution witnesses are formal and their evidence at the most could have been used as link evidence had the prosecution

otherwise been able to prove its case against the accused with the help of cogent and reliable evidence that it is he alone who had murdered the baba

with the axe. Therefore, the elaboration of the link evidence as has come on record by way of testimony of formal witnesses would be nothing but to

overload this judgment without there being any necessity to do so.

35. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, accused is acquitted of the charge under Section 302 IPC framed against him. The accused is serving out the sentence. He be set free forthwith, if not required in any other case. Registry to prepare the release warrants accordingly. The amount of fine, if already deposited, be refunded to the accused against proper receipt.