
(2015) 04 SHI CK 0038
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 63 of 2012

Kesang Tamang

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 30, 6
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2015) 04 SHI CK 0038

Hon'ble Judges : Sureshwar Thakur, J.;Rajiv Sharma, J.

Bench : Division Bench

Advocate : Jagdish Thakur, for the Appellant; P.M. Negi, Dy. A.G., Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—This appeal is instituted against the judgment dated 12.10.2011, rendered by the learned Sessions Judge, Kinnaur at Rampur Bhushar, H.P. in Sessions Trial No. 52 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 302 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for six months for causing death of Smt. Shirsahni and master Karsang Tamang.

2. The case of the prosecution, in a nut shell, is that one Mohan Lal, a contractor had taken the soling and tarring work of Nalaban-Olta road. He engaged the complainant as his Munshi. Mohan Lal had also engaged Nepali labourers, namely, Kesang Tamang, Chichi Tamang, Gam Bahdur as well as Sh. Nakley Lama, the Compressor Operator. The wives of the Nepali labourers were also engaged in the work. The labourers had their residences/Deras on the upper side of the road, near Nalaban forest. The complainant and Sh. Jagdish had kept their

residence in Village Chaddi. On 25.7.2010, at about 11:15 PM, the complainant received a call from Nakley Lama, informing that the accused had run away after killing his wife and child. The complainant, alongwith Jagdish went to the Deras of labourers where he was told by Chichi Tamang that at about 11:00 PM, he heard a sound on the roof of Gum Bahadur indicating that someone was moving on their roof. They woke up and came out from their Deras and found that the accused was standing on the roof of Gum Bahadur, having some weapon. He was shouting to have sacrificed his wife and son. Thereafter, the accused jumped from the roof and ran towards jungle with the weapon. They found his wife and children lying dead on the bed in a pool of blood. They had injuries on their necks. The accused was searched but he was not traceable. The site plan was prepared. The dead bodies were sent to CHC Nankhari from where they were referred to IGM, Shimla for post mortem. The accused made disclosure statement regarding the weapon (chhura) on 30.7.2010, on the basis of which chhura was got recovered. The viscera which was taken into possession at the time of post mortem examination was sent to FSL, Junga and report was obtained. The spot was inspected by Patwari Patwar Circle Nankhari. The age of the deceased Smt. Shirsahni aged 33 years and son master Karsang aged 2 ? years. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 17 witnesses. The accused was also examined under Section 313 Cr.P.C. He specifically denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Jagdish Thakur, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M. Negi, Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 12.10.2011.

5. We have heard learned counsel for both the sides and gone through the records of the case carefully.

6. Sh. Ravinder Thakur, PW-1 deposed that on 26.7.2010 at about 7:00 AM, Santosh Kumar came at Nalaban and told him that a Nepali labourer had killed his wife and child and he brought Santosh Kumar in his vehicle to Nankhari where Santosh Kumar informed the police at Police Post, Nankhari.

7. Sh. Kalam Singh, PW-2 deposed that the accused has made disclosure statement vide Ext. PW-2/A to the effect that after committing the murder of his wife and child he had kept Chhura in Nalaban forest.

8. Sh. Hardayal Thakur, PW-3 deposed that the accused while in custody of the police led them to the place where he had kept weapon of offence at Nalaban forest and got the knife (chhura) recovered from underneath the soil and told that it was the same knife with which he used for committing the murder of his

wife and child. The sketch of knife is Ext. 3/A. It was sealed. The knife was taken into possession vide memo Ext. PW-3/C.

9. Sh. Jagdish Chand, PW-5 deposed that he alongwith Santosh had gone to sleep after taking dinner. At about 11:15 PM, Sh. Nakle Lama rang Santosh informing that the accused had murdered his wife and son and for this reason, they should come on the spot. They went to the spot but the accused was not found. They were taken to the spot/Dera of the accused by Sh. Chichi Lama. In the Dera of the accused, there were two dead bodies having cut marks on the throat.

10. Sh. Gum Bahadur, PW-6 is a material witness. He deposed that his Dera was at a distance of 10-12 paces from the Dera of the accused. On 25.7.2010, after taking meals, he along with Sh. Chichi Lama went to sleep. The accused came on the roof of their Dera and proclaimed that he had sacrificed his wife and child and that he was also to sacrifice them. They came out and in the meantime, the accused jumped from the roof and while doing so, gave him push and ran away. They all went to the Dera of Sh. Chichi Lama. The accused was not traceable. In his cross-examination, he deposed that their Dera was 10/12 feet in height. He also admitted that on that day, it was raining and also it was dark. He denied the suggestion that it was not possible to recognize a person even from a distance of one and a half feet.

11. Dr. Rahul Gupta, PW-11 deposed that he alongwith Dr. Piyush Kapila and Dr. H.S. Sekhon, conducted the post mortem on the person of Shirsahni, wife of accused. The cause of death of Smt. Shirsahni was due to chop wound over neck, leading to hemorrhagic shock and death. Time between injury and death was instantaneous and between death and post mortem was around 36 hours. The weapon of offence used was moderately heavy sharp object. They have issued post mortem report Ext. PW-11/C. The injuries mentioned in Ext. PW-11/C were possible with knife (chhura) Ext. P-2.

12. Dr. Abhay Sharma, PW-12 deposed that he alongwith Dr. Piyush Kapila conducted the post mortem on the person of master Karsang, son of accused. The cause of death of master Karsang was due to chop wound over neck, leading to hemorrhagic shock and death. Time between injury and death was instantaneous and between death and post mortem was around 36 hours. The weapon of offence used was moderately heavy sharp object. They have issued post mortem report Ext. PW-12/C. The injuries mentioned in Ext. PW-12/C were possible with knife (chhura) Ext. P-2.

13. Sh. Santosh, PW-13 deposed that he was in his quarter at place Chari. He received a call on his mobile from Nakle. He told that accused has killed his wife and son aged 3 years. He alongwith Jagdish Chand, tractor driver reached at the Dera of the accused and went to the Dera of Chichi Tamang as his residence was adjacent to the Dera of the accused. When he entered in the Dera of the accused alongwith Nakle Lama, Chichi Tamang and Jagdish, he saw the dead bodies of

wife of the accused and his son, stained with blood lying in the blanket. They went to the Police Post in the morning of 26.7.2010 and reported the matter to the police. According to him, the accused had fled away from the spot and Chichi Tamang told them that accused has some weapon in his hand and was crying loudly and was saying "Maine Apne Bibi Aur Bachon Ki Bali Chadha Di Hai Aur Ab Tum Sab Ki Bali Chadha Doonga". At that time, he was standing on the roof and jumped from there and thereafter, he went towards the jungle alongwith the weapon.

14. Sh. Chichi Tamang, PW-14 is another material witness. According to him, the Dera of accused was adjacent to his Dera. All the labourers were residing with their families. On 25.7.2010, during night, they were sleeping than at about 11:00 PM, he heard a noise and saw accused standing on the roof of Gum Bahadur. He was proclaiming that he has killed his wife and child and shall kill all. He was having some weapon in his hand. When they all assembled, accused jumped from the roof and fled away towards the road. The dead bodies were lying in the Dera of the accused stained with blood. In his cross-examination, he admitted that it was raining heavily on that day and it was dark also. There was no street light at the spot. There was only one roof of Dera of Gum Bahadur and his Dera.

15. Insp. Sangat Ram Negi, PW-15 deposed that on 26.7.2010, HC Mohan Joshi informed him telephonically that on 25.7.2010, accused has murdered his wife and son. He visited the spot and prepared the spot map Ext. PW-15/B. Photographs of the spot were taken. He filled in the inquest forms. He took into possession blood stained blanket Ext. P-4, a piece of mattress Ext. P-5 and the same were put in a gunny bag Ext. P-3 vide memo Ext. PW-13/A. It was signed by Santosh Kumar and Mohan Lal. The M.O. CHC, Nankhari, referred the bodies to IGMCI, Shimla for post mortem examination. The accused was arrested on 26.7.2010 vide memo Ext. PW-15/K. In his cross-examination, he deposed that accused was arrested at a distance of 200 meters from the place of occurrence. The clothes of the accused were not taken into possession. He has not noticed blood on the clothes of the accused because the clothes were wet due to rain.

16. ASI Devi Singh, PW-16 deposed that the accused has made disclosure statement in the presence of Pratap Singh and Kalam Singh stating that on 25.7.2010, he kept concealed one knife Ext. P-2 in Nalaban jungle in the bushes and only he can get the same recovered. The statement was recorded vide Ext. PW-2/A. He along with accused proceeded to the spot and on the way associated Hardayal Singh and Surjan Singh. In the presence of these witnesses, the accused identified the place and got knife Ext. P-2 recovered which was hidden in the bushes which was half buried in the soil.

17. HC Liaq Ram, PW-17 deposed that on 28.7.2010, Insp. Sangat Ram Negi deposited one sealed parcel sealed with seal bearing impression "B" alongwith sample of seal. He entered the same in the malkhana register at Sr. No. 742. On 30.7.2010, HHC Duni Chand deposited 12 sealed parcels duly sealed with seal

bearing impression DKG alongwith letter with him. He entered the same in the malkhana register at Sr. No. 745. On 31.7.2010, ASI Devi Singh deposited one sealed parcel duly sealed with seal bearing impression "M" alongwith the sample of seal. He entered the same at Sr. No. 746. On 2.8.2010, he handed over the parcels alongwith sample of seals, docket and letter vide RC No. 73/2010 to Surender Singh for depositing the same at FSL, Junga who after depositing the same in the laboratory handed over the receipt to him.

18. The case of the prosecution is entirely based on the circumstantial evidence. The case of the prosecution, precisely, is that the accused after killing his wife and son came to the roof of Dera of Gum Bahadur, PW-6 and proclaimed that he has scarified his wife and son and he would also sacrifice them. Thereafter, he jumped from the roof and went towards the forest with the weapon of offence i.e. knife Ext. P-2. It has come in the statement of Sh. Gum Bahadur, PW-6 and Sh. Chichi Tamang, PW-14 that all of them were living in Deras. According to Sh. Gum Bahadur, PW-6 the Dera of the accused was at a distance of 10-12 paces from his Dera. Sh. Gum Bahadur, PW-6 further deposed that he alongwith Sh. Chichi Tamang, went to sleep on 25.7.2010. The accused came on the roof of their Dera and proclaimed that he has sacrificed his wife and child. Similarly, Sh. Chichi Tamang, PW-14 deposed that they had gone to sleep on 25.7.2010, during night, at about 11:00 PM, he heard a noise and saw accused standing on the roof of Gum Bahadur. He was proclaiming that he has killed his wife and child and shall kill all. He was having some weapon in his hand. It is not believable that the accused after killing his wife and son would have climbed the roof of Sh. Gum Bahadur, PW-6. The normal human conduct of the accused would have been to escape from the spot with the weapon of offence instead of climbing on the roof of Sh. Gum Bahadur, PW-6. Sh. Gum Bahadur, PW-6 in his cross-examination, admitted that height of their Dera was 10-12 feet and on that day, it was raining. At that time, it was dark also. Sh. Chichi Tamang, PW-14 has also admitted that it was raining heavily on that day and it was dark in the night. The learned trial Court has convicted the accused by treating the proclamation made by the accused that he has killed his wife and son from the roof of Sh. Gum Bahadur, PW-6 as extra-judicial confession. The accused has not confided to a respectable person in the locality, either before Panch or Pradhan or even his employer.

19. Their lordships of the Hon"ble Supreme Court in the case of Ratan Gond Vs. The State of Bihar, , have held that usually and as a matter of caution courts require some material corroboration to an extra-judicial confessional statement. It has been held as follows:

"8. Excluding the statements of Aghani, what then is the evidence against the appellant? Firstly, we have the extra-judicial confession. Then, we have the following circumstances which the courts below have held to have been clearly established against the appellant, namely, (a) recovery of the blood-stained "balua" from a room of the appellant, (b) recovery of the blood-stained strands of hair from a place pointed out by the appellant and (c) disappearance of the

appellant from the village immediately after the murder and his arrest in village Karmapani in circumstances mentioned by Maheshwar Sai (P.W. 6). Lastly, there is another adverse circumstance which arises out of the total denial by the appellant of the recovery of the blood-stained "balua" and of his arrest in village Karmapani. As to the extra-judicial confession, two questions arise: is it voluntary, and, if so, is it true? The appellant denied at a later stage that he had made a confession, but it is not necessary to consider in this case the abstract question as to whether, as against its maker, a conviction can be based on a confession which is found to be voluntary and true. It is enough to state that usually and as a matter of caution, courts require some material corroboration to such a confessional statement, corroboration which connects the accused person with the crime in question, and the real question which falls for decision in the present case is if the circumstances proved against the appellant afford sufficient corroboration to the confessional statement of the appellant, in case we hold that the confessional statement is voluntary and true." 20. Their lordships of the Hon'ble Supreme Court in the case of State of Rajasthan Vs. Kashi Ram, , have held that extra-judicial confession must be proved like any other fact. In this case, accused allegedly made confession before a person known to deceased's brother but he was neither Sarpanch nor a ward member of the village and also before another person who admitted that he was not even acquainted with the accused. Thus, there was nothing to show that the accused had reasons to confide with these persons. It has been held as follows:

"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 extra-judicial confession before P.Ws. 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist chord used for strangulating Kalawati (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 P.Ws. 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 extra-judicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra-judicial 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 extra-judicial confession before PWs-3 and 4 must be rejected." 21. Their lordships of the Hon^{ble} Supreme Court in the case of Sahadevan and another Vs. State of Tamil Nadu, have laid down the following principles regarding admissibility and evidentiary value of extra-judicial confession as under:

"13. There is no doubt that in the present case, there is no eyewitness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution.

14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the 8 Page 9 court would be fully justified in ruling such evidence out of consideration.

16. Upon a proper analysis of the above-referred 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. The Principles (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution. 13 Page 14(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."

22. Their lordships of the Hon^{ble} Supreme Court in the case of Tejinder Singh @ Kaka Vs. State of Punjab, , have held as under:

"22. Further, the learned senior counsel has rightly placed reliance upon the testimony of PW-7 to whom, according to him, the accused persons namely, Gurdeep Singh, Harnek Singh and Sunny Lal Paswan, co-accused, made a disclosure statement describing the whole incident to him on 12.06.2000 who

has neither recorded the alleged extra judicial confession nor made the disclosure of the said statement within reasonable time but 16 days to disclose the extra judicial confessions made by the accused persons to inform to the jurisdictional police. The delay in informing the police regarding the extra judicial confessional statement alleged to have made to him by some of the accused has not been explained by PW-7 and the reason sought to be given by him for non disclosure of the same to the police cannot be accepted by this Court as it is not natural and also not satisfactory.

23. Further, the learned senior counsel Mr. Tulsi has rightly placed reliance upon the judgment of this Court in Dwarkadas Gehanmal's case (supra) with regard to the conduct of the witness in the said case which is inconsistent with the conduct of an ordinary human being. The observations made in the abovementioned case with all fours applicable to the facts situations of the case in hand, that if extra judicial confessional statement was made by the accused as stated by him in his statement before the trial court were to be true, it was his duty to disclose the same immediately to the police or to the relatives of the deceased. That has not been done by him and therefore his evidence is not believable.

24. The extra judicial confession is a weak form of evidence and based on such evidence no conviction and sentence can be imposed upon the appellants and other accused. In support of this proposition, the relevant paragraphs of Pancho's case are extracted hereunder:

"16. The extra-judicial confession made by A-1, Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In Gopal Sah v. State of Bihar this Court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of a chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether the extra-judicial confession of A-1, Pratham inspires confidence and then find out whether there are other cogent circumstances on record to support it.".....

25. This Court further noted that: (Kashmira Singh case, AIR p. 160, para 10) "10. ...cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept." ?????.

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."

25. Further, relevant paragraphs from Sahadevan's case are extracted hereunder:

"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."

26. Reliance placed upon the decisions of this Court in the case of Sahadevan's case (supra) supports the case of the appellant herein. Hence, the reliance placed upon the evidence of PW-7 by both the Additional sessions judge and the High Court to convict the appellant and sentencing him for the offence under Section 201 I.P.C. is erroneous in law for the reason that they have not appreciated the testimony of PW-7 in the backdrop of the legal principles laid down by this Court in the above referred cases on the question of extra judicial confession said to have been made by some of the accused to him. Non disclosure of the same either on the same day or within reasonable time either to the police or to the family members of the deceased does not inspire confidence to be accepted as testimony to sustain the conviction and sentence. After 16 days he had disclosed it to the jurisdictional police which would clearly go to show that the conduct of the said witness is unnatural and improbable to believe and his conduct is not that of an ordinary human being."

23. Their lordships of the Hon'ble Supreme Court in the case of Pargan Singh Vs. State of Punjab, , have held that where extra-judicial confession is warranted by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It has been held as follows:

"24. In any case, we are of the opinion that both the courts below have believed the statement of PW-1 who was the Pradhan of his Mohalla and not only a respectable person and had no axe to grind. We see no reason to differ with the conclusions of the two courts below accepting the statement of PW-1 to the effect that these two appellants had made extra-judicial confession before him. More so, we find that his version is corroborated by the two eye-witnesses namely PW-1 and PW-2. We are conscious of the fact that extra-judicial confession by its very nature is rather a weak type of evidence and requires

appreciation with great deal of care and caution. Where an extra-judicial confession is warranted by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It is for this reason that Courts generally look for independent reliable corroboration before placing any reliance upon such a confession. (See Balwinder Singh Vs. State of Punjab, , which was cited by the counsel for the appellants). However, we find that his statement is corroborated not by any circumstantial evidence but cast iron evidence in the form of two eye-witnesses. Furthermore, even if for the sake of arguments, we discard the testimony of PW-1, the evidence of two eye-witnesses who are found to be credible, is sufficient to uphold the conviction of the appellants." 24. In the case of Jadumani Khanda Vs. State of Orissa, , the Division Bench of the Orissa High Court has held that confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed someone. It has been held as follows:

"6. The learned Sessions Judge relied on the evidence of P.Ws. 3 and 6 with regard to the extra judicial confession. On going through the evidence of these two witnesses we find that since they did not support the prosecution case, they were permitted to be cross-examined by the P.P. The learned Sessions Judge in para-11 of his judgment has observed that these two witnesses did not state anything about the confession but we are really surprised to note that the learned Sessions Judge utilised the statement of these witnesses recorded under Section 161, Cr.P.C. as substantive evidence before the Court. This is against the fundamental principle of procedural law. All that the learned Sessions Judge has found is that these witnesses saw Bayani entering the house of the appellant and the appellant chasing Bayani towards the jungle and thereafter coming back from the jungle, giving out to have killed Bayani. All these are found to be the statements recorded by the investigating officer under Section 161, Cr.P.C. which are wholly inadmissible and accepting them as evidence is utterly erroneous. Thus we hold that there was no extra judicial confession before P.Ws. 3 and 6.

The learned Sessions Judge also relied on the evidence of P.W. 2 and while so relying observed that P.W. 2 was related to the appellant as his sister. She stated in her evidence that on the date of occurrence it was about noon time when she along with some other children was playing near the mango tree close to the village tank. At that time the appellant came from the village side and passed by that way and while so passing by that way, he was giving out "MU AJI BAYANIKU KOTAL KOLT". At that time, the appellant was holding an axe. We have gone through the evidence of this witness. She admitted not to have asked anything to the accused about the incident. She admitted that on the following morning, she told her father that the accused killed Bayani. On going through the evidence of this witness we find no reason to believe her statement as to extra judicial confession firstly because she is found to be a child witness aged only 14 years and secondly, the evidence clearly indicates that the appellant did not make a confession to this witness, but on the other hand, the witness heard the accused while passing by that way giving out to have killed Bayani. We cannot consider

this as an extra judicial confession before P.W. 2, because it is well settled that the confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed some one. No reliance can be put on the evidence of P.W. 2 which has been so held by the learned Sessions Judge and the finding being erroneous cannot be sustained. The learned Sessions Judge has treated this statement of the accused as relevant under Section 6 of the Evidence Act and has found to be a corroborative piece of material to the extra judicial confession made before P.W. 2.

So far as Section 6 of the Evidence Act is concerned, the principle laid down is that to form a particular statement as a part of the same transaction, utterance must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. (Vide decision reported in *Hadu Vs. The State*, .

In the present case, the learned Sessions Judge was oblivious to give a finding as to whether the declaration by the accused to have killed the lady was either at the time of commission of the crime or immediately thereafter so as to form the same transaction. There is no material at what time the appellant committed the act and how long after commission of the act he disclosed this fact by way of extra judicial confession before P.W. 2. In the absence of any such material we cannot consider such utterances by the accused as relevant under Section 6 of the Evidence Act. Therefore, we hold the statement as inadmissible."

25. While appreciating the extra-judicial confession, the Court has to see: i) to whom it was made; ii) the time and place of occurrence; iii) the circumstances in which it was made and iv) the Court has to look for any suspicious circumstances. In the instant case, there was no occasion, as noticed by us hereinabove, for the accused to make confessional statement by climbing on the roof of Sh. Gum Bahadur, PW-6 and that too during the night when it was raining heavily.

26. Mr. P.M. Negi, learned Dy. Advocate General, has drawn the attention of the Court to the statement of Sh. Santosh, PW-13. The statement of Sh. Santosh PW-13 is also hearsay. He has not heard the words "Maine Apne Bibi Aur Bachon Ki Bali Chadha Di Hai Aur Ab Tum Sab Ki Bali Chadha Doonga", uttered by the accused. It was told to him by Sh. Chichi Tamang, PW-14.

27. The accused, as per the statement of Insp. Sangat Ram Negi, PW-15, was arrested on 26.7.2010 at a distance of 200 meters from the place of occurrence. He has not noticed any blood on the clothes of the accused since, according to him, the clothes were wet due to rain. Mr. P.M. Negi, Dy. Advocate General, for the State has argued that as per Ext. PW-15/L, human blood of group "O" was detected on Ext. P-2, knife. The disclosure statement was made by the accused on 30.7.2010, on the basis of which, knife Ext. P-2 was recovered. It has come in the evidence that it was raining heavily on that day and if it was raining heavily, there could not be any blood stains on the weapon of offence Ext. P-2. There was

some possibility of the blood to be found on the clothes of the accused but not on the weapon of offence i.e. metallic knife.

28. In the case based on circumstantial evidence, the motive is very vital. The prosecution has failed to point out as to what could be the motive of the accused to kill his wife and son. The whole of the case of the prosecution is that the accused killed his wife and son and climbed on the roof and proclaimed that he has sacrificed his wife and son. There is no material on record that the behavior of the accused was abnormal before the alleged incident. There is no evidence how the accused has climbed 10-12 feet to reach the top of the roof of Sh. Gum Bahadur, PW-6. In case, the accused had jumped from the roof, he would have definitely sustained injuries.

29. According to Sh. Gum Bahadur, PW-6, the accused has fled away from the spot towards jungle carrying weapon of offence, however, according to Sh. Sangat Ram Negi, PW-15, the accused was arrested at a distance of 200 meters from the place of occurrence. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

30. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 12.10.2011, rendered by the learned Sessions Judge, Kinnaur at Rampur Bushahr, H.P., in Sessions trial No. 52 of 2010, is set aside. The accused is acquitted of the charges framed under Sections 302 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

31. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.