

Ponkar Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-13-1983

Reported in : 1983WLN(UC)580

Judge : M.C. Jain and; S.C. Agrawal, JJ.

Appeal No. : D.B. Criminal Jail Appeal No. 641/73

Appellant : Ponkar

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Doongarsingh, Mr. Doongar Singh, Mr. Doongarsingh, Mr. Doongar

Disposition : Appeal dismissed

Judgement :

M.C. Jain, J.

1. The appellant Pokar was prosecuted for the offences under Sections 302, 392 and 201, IPC, and was convicted of the said offence, under Section 302, IPC, he was sentenced to imprisonment for life and to pay a fine of Rs. 300/-, in default of payment of fine to undergo further rigorous imprisonment for 3 months and under Section 392, he was sentenced to four years rigorous imprisonment and to pay a fine of Rs. 200/-, in default of payment of fine to undergo further rigorous

imprisonment for two months. No separate sentence was awarded under Section 201, IPC. The substantive sentences on the first two counts, were ordered to run concurrently. He was acquitted of the offence under Section 120-B, IPC by the learned Sessions Judge, Balotra by his judgment dated September 26, 1973. The other accused Bakta was acquitted of the offences under Sections 392/120-B, 120-B and 201, IPC.

2. The prosecution case is that, on 26-5-73, the deceased Lakhiya son of Surta Jat (a boy aged about 13 years) resident of village Sanawara had gone to the village Hathitala, which is at a distance of about 5 miles, where his sister Mst. Nathu was married with one Deva. The deceased had left his house in the day. When he did not return from Hathitala for about 6-7 days, his father Surta (PW 5) went in search of him, He went to his daughter Mst. Nathu at Hathitala, where he was informed that Lakhiya had returned after staying one night at her place. Thereafter, PW 5 Surta visited Viriya, and Jagroop, but he did not find any trace. Then he went to the house of Bhera Jat (60), Ward Panch of Sanawara (PW 6). There his son Gordhan met him who told him that Chimaram (PW 1) and Mst. Jiya (PW 2) had come to his house and had disclosed to his father Bhera that the appellant Pokar killed Lakhiya. Thereupon, Bhera went to the house of PW 1 Chima Ram Jat of Sanawara, who told him that the appellant had killed Lakhiya. Then Bhera took Chimaram with him and went to the house of the appellant. On being asked the appellant confessed that he had killed Lakhiya, on being asked to do so by Bakta (Mst. Nathu's husband's younger brother). The appellant also told that he along with Bakta had buried the dead body of Lakhiya. He became tearful and when he was returning to his house, his brother Kirta (PW 4) met him on the way. He told his brother that the appellant and Bakta had killed Lakhiya, so he may proceed to report the matter to the police. Thereupon, PW 4 Kirta went to the police station, Barmer and lodged the report on 4-6-73 at 5 p.m. In the report, he stated that when Lakhiya did not return then his brother PW 5 Surta went in search of him and on 3-6-73 when he was also proceeding to the Dhani of Deva, his brother Surta met him in the field of Deva Jat coming from opposite direction. When he asked about Lakhiya, then he started crying and disclosed that Pokariya son of Lachha Jat of Hathitala had killed Lakhiya in the morning of 27-5-73 in the field of Bhera son of Sadula Jat of Sanawra (PW 6). He was killed in order to remove a pair of

Murkies and a pair of Sankli made of gold and other silver ornaments, which the deceased was wearing on his person. Pokariya along with Bakta had concealed the dead-body somewhere. It was further stated by Kirta in his verbal report that Chima son of Ratna Jat and Mst. Jiya wife of Shera Jat had seen the appellant killing Lakhiya, when they were coming from Hathitala to the Dhani of Chimaram. Thereafter, he (Kirta) went to Birdha Mahajan, Nyaya Panch and Maga son of Kesra and also informed them about the incident and thereafter he went to the police station. PW 1 Chimaram had gone from Sanawara to Mst. Jiya in order to bring her as spirit of Rani Bhatiyani comes in her. He wanted her ailing mother to be treated by her. Both of them started in the morning of Jeth-Badi 10 from Hathitala and when they had reached near the field of Narana Jat, Chima stayed back for urination, Jiya continued to proceed ahead. According to Chima, he heard cries. Thereupon, he went up the sand dune and saw the accused and a boy lying there. On being asked by him, the accused disclosed his identity as well as the identity of the victim. He also identified the appellant. The appellant also invited him for removal of the ornaments and expressed that they will share half and half. Out of fear, he did not go to him as he had killed the boy. Mst. Jiya asked him as to how he has taken so much time. Thereupon, Chima told her that Lachha's son Pokariya (appellant) had killed Surta's son. Thereafter, they first went to the Ward Panch Shri Bheraram of Sanawara (PW 6) and disclosed the occurrence to him. Then they went to the house of Chimaram (PW 1)

3. On report (Ex. P/13), case under Sections 302, 392 and 201, IPC, was registered. The SHO Hemraj (PW 10) visited the spot, which was at a distance of 10 miles from the police station. He prepared the site-plan Ex. P/9 and site-note Ex. p/10. The appellant was arrested on 5-6-73 vide arrest memo Ex. p/6 and Bakta was arrested on 6-6-73 vide arrest memo Ex. p/1. While in the police custody, the appellant gave information in respect of the dead-body, the information memo whereof is Ex. P. 14. In pursuance of the information, the dead-body was recovered on the same day vide recovery memo Ex. P/7. The dead-body was recovered from the field of Jagta Jat of Hathitala at a distance of 2 miles from the field of Narana. The dead-body was identified by Surta, the father of the deceased. Then Furd Surat Hal Lash Ex. P/8 was prepared, an Autopsy on the dead-body was got conducted and clothes of the deceased were seized by memo

Ex. P/9. Then, the deadbody was handed over to PW 6 Surta vide Ex. P/20. The accused further gave information regarding the ornaments recovered on the same day by the ornaments on 6-6-73, the information memos Ex. p/15 & got the recovery memo Ex. P/2. An axe was also recovered on the information and at the instance of the accused on 6-6-73 vide information memo Ex. P/16 and recovery memo Ex. P/3. At the time of arrest of the appellant, some injuries were noticed on his person. His injuries were got medically examined on 6-6-73. The injury report is Ex. P/5. On 8-6-73 the SHO Shri Hemraj submitted an application for recording of confession of the appellant. On that application, the Magistrate remanded the appellant to judicial custody and ordered the Sub-Jailer to produce him on 9-6-73. The accused was produced at 9 a.m. and his statement was recorded at 11.00 A.M. and completed at 12 20 p.m. The confession of the accused is Ex. P/18. Investigation was conducted from the witnesses and after completion of the investigation, challan was presented in the court of Judicial Magistrate, Banner, who after committal enquiry under Section 207-A, Cr. PC (Old) committed the accused for trial to the court of Sessions Judge, Balotra. The statement of the accused was recorded during the committal enquiry, wherein he retracted his confession and has stated that he confessed the guilt out of the fear of the police. The learned Sessions Judge, Balotra charged the accused-appellant under Sections 120B, 302, 201 and 392, IPC. The accused, however, pleaded not guilty to the charge and claimed to be tried. At the trial, the prosecution examined PW 5 Chimaram, PW 2 Mst. Jiya, PW 3 Smt. Bali (mother of the deceased) PW 4 Kirta (uncle of the deceased), PW 5 Surta (father of the deceased), PW 6 Bhera Jat (Ward Panch of Sanawara), PW 7 Heeralal Oswal (43) (motbir of recovery of the ornaments), PW 8 Dr. Harak Raj Mathur, PW 9 Bhersingh Rajput of Hathitala (motbir of arrest of the accused and of the recovery of the dead-body), PW 10 Hemraj. SHO and PW 11 Thansingh, Sub-Divisional Magistrate, Barmer (who recorded the confession). The statement of the accused was recorded, in which he denied the prosecution case. After hearing the argument, the learned Sessions Judge convicted and sentenced the accused as aforesaid, relying on the testimony of PW 1 Chimaram, PW 2 Mst. Jiya w/o Shera, PW 5 Surta and PW 6 Bhera. The learned Sessions Judge also relied on the evidence of recovery of the dead body and recovery of the gold and silver ornaments on the information and at the

instance of the accused and reliance was further placed on the confession (Ex. P/18) of the accused recorded by the Sub-Divisional Magistrate, Shri Thansingh PW 11. Dissatisfied with the conviction and sentence, the accused Pokar has preferred this appeal through jail.

4. We have heard Mr. Doongarsingh, learned Counsel for the appellant Pokar and Dr. S.S. Bhandawat learned Public Prosecutor for the State.

5. Mr. Doongarsingh, learned Counsel for the appellant urged that the first information report in this case is a post investigation document. A perusal of the first information report, would show that it makes reference that the occurrence took place on 27-5-73 in the morning in the field of Bhera son of Sadula Jat of Sanawra and the murder was committed for removal of the ornaments from the person of the deceased. It also makes reference that Chima PW 1 and Mst. Jiya PW 2 had seen the accused murdering Lakhiya. The source of the information of the informant is his brother PW 5 Surta. who happened to meet him when he was proceeding to the Dhani of Deva in search of Lakhiya. He submitted that the statement of PW 5 Surta and PW 4 Kirta would make it abundantly clear that the above contents of the first information report were not even in the knowledge of the informant PW 4 Kirta. According PW 4 Kirta, what was conveyed to him by his brother PW 5 Surta, was that Pokar and Bakta accused had killed Lakhiya, so he may go and inform the police. He further stated that PW 5 Surta did not disclose the motive of the murder nor he disclosed as to who had witnessed the incident. In the cross-examination as well, he stated that he only informed this much at the police station that Pokariya and Bakta had murdered Lakhiya. Beyond that he informed nothing. PW 5 Surta also stated that when he was returning after the visit to the house of the accused Pokar, he saw his brother Kirta coming from the opposite direction. At that time, he informed Kirta that Pokar and Bakta had killed Lakhiya, so he. asked him to take action.

6. We find substance in the above submission of Mr. Doongarsingh, learned Counsel for the appellant. The version given in the first information report does not get support from the statement of PW 4 Kirta and PW 5 Surta. It is strange that the Public Prosecutor, during the course of examination-in-chief of PW 4 Kirta did not

even refer to the first information report Ex.P/13, to the witness and he simply contented by this statement of PW 4 Kirta that he thereafter went to Barmer and lodged a verbal report. What report was lodged, was not put to the witness. It is true that PW 4 Kirta is an illiterate witness, but the report ought to have been proved by reading out the report to him and in order to prove the report, the Public Prosecutor should have asked him as to whether such a report was lodged by him or not. What was disclosed by PW 5 Surta to PW 4 Kirta was that Pokar and Bakta had killed Lakhiya. But the version, which Kirta gave in his report is that the accused Pokar killed Lakhiya for the purpose of removal of the ornaments front his person and then he along with Bakta concealed the dead-body somewhere. It is neither the statement of Surta nor the statement of Kirta that it Was only Pokar alone, who killed the deceased and buried the dead-body somewhere. Besides that, it is note worthy that the names of the Witnesses, who had witnessed the incident, were not given out by Kirta to the police as specifically stated by PW4 Kirta. He, did not inform the police any other fact except that Pokar and Bakta had killed Lakhiya. How Kirta could have given out the names of the witnesses when the names of the witnesses were not even communicated to him by Surta. In connection with the first information report, one important circumstances, which casts a serious suspicion in the truthful nature of the information is that the first information report Ex.P/13 reached the Munsif Magistrate Barmer on 9-6-73. The report would have been sent to the court of Munsif & Judicial Magistrate, Barmer forthwith after registration of the case. How it took 5 days to reach the court of Munsif & Judicial Magistrate, Barmer when the police station was located at the same place. Mr. Doongar Singh, learned Counsel for the appellant submitted that this aspect of the prosecution case that the first information report introduces the facts, which were beyond the knowledge of the informant throws considerable doubt on the entire investigation. So the whole investigation should be viewed with suspicion, while examining the other evidence on record. It is true that the above mature of the first information report would demand from us to scrutinise the evidence with care, caution and circumspection and particularly, the evidence relating to the investigation, which has been conducted by the S.H.O. Hemraj in the present case. It may be that an attempt might have been made, to introduce the prosecution case beyond what was in the knowledge of the informant.

7. The learned, Public Prosecutor' submitted that if the police wanted to introduce the prosecution case in the first information report, it would not have introduced the field of PW 6 Bhera, where the occurrence is said to have been stated by the informant and the police would have further introduced its case to the effect that PW 1 Chima and PW 2 Mst. Jiya, after the occurrence, visited the house of PW 6 Bhera and informed him of the incident and that while making search of the deceased PW 5 Surta visited the house of PW 6 Bhera, where his son Gordban informed him of the visit of PW 1 Chima and PW 2 Mst. Jiya and narration of the incident by them to his father and the police, would have further introduced in the first information report that PW 5 Surta then went to PW 1 Chima and both of them visited the house of Pokar accuseds who confessed the guilt before them. By 5-6-73 every thing was known to the police and the police would have introduced the entire prosecution case in the first information report,

8. It is true that the whole of the prosecution case does not find mention in, the first information report Ex.P/13but on that account, it can not be said that the version given in the first information report, is the version of the informant. , If the first information report is examined in the light of the statement of PW 4 Kirta and PW 5 Surta, it would be abundantly clear that the facts and matters, which were not in the knowledge of the informant find mention in the first information report and in that view of the matter, it can be concluded, that something has been embodied in the first information report, which was narrated by the informant. That only lends to a clear inference that the contents of the first information report is not a clean version of the informant and it appears to be an attempt On the part of the Investigating Officer to introduce some facts, which have come to his knowledge during investigation. The circumstances of considerable delay in reaching of the first information report to the court of Munsif and Judicial Magistrate, Banner, further lends support to that aforesaid conclusion. Thus, the first information report can not be pressed into service by the prosecution for any purpose and it is not admissible in evidence.

9. Mr. Doongarsingn, learned Counsel for the appellant, next contended that much reliance has been placed on the confessional statement Ex. P/18 of the accused. He pointed out that the confessional statement is neither a voluntary statement nor

a truthful statement. According to him, there are tale-telling circumstances, which clearly go to indicate that the statement has been extracted and third degrees methods were resorted to by the Investigating Agency in the present case. The appellant was arrested on 5-6-73 vide arrest memo Ex. p/6 and in the arrest memo, certain injuries on the chest, on both the hands, and knees were noted and the appellant was also got medically examined vide injury report Ex. P/5 dated 6-6-73, in which, Medically Officer Dr. Harakraj Mathur (PW 8) noted as many as 8 abrasions with scars and it was further pointed out by Mr. Doongarsingh that till 8-6-73 the accused was in the Police custody. On 8-6-73, the accused Pokar was produced before the Magistrate along with an application for sending him in the judicial custody and for recording of the confessional statement and thereupon the Magistrate directed the Assistant Jailor to produce the appellant on 9-6-73 at 9 a.m. The appellant was remanded to the judicial custody before being produced before the Magistrate for giving the confessional statement for less than 24 hours. According to Mr. Doongarsingh, the time of the judicial custody was much less. During this little time, the fear of the police had not wiped off. The possibility that the accused gave the statement out of fear of the police, can not be ruled out. Mr. Doongar Singh, learned Counsel for the appellant, also submitted that the statement of the accused commenced at 10.30 a.m. and very little time was given for reflection after recording answers to the preliminary questions and the actual confessional statement commenced at only 11 a.m. The learned Magistrate, who recorded the confessional statement, did not even care to look to the injuries on the person of the accused Pokar. He wrongly recorded that there were no marks of injuries on the person of the accused. Had he seen the scars or abrasions on the person of the accused, he would have asked explanation relating to them from the accused or in any case, the observation of the scars would have put him on the guard, while recording the confessional statement. After observing the scars and abrasions, the Magistrate might have further remanded the appellant to the judicial custody for further reflection as well as for removal of any fear, which he might have felt on the observation of the scars. It appears that the learned Magistrate having asked the appellant as to how the police behaved with him to which the appellant replied that the police did not thrash him & discovered that there were no injuries on the accused. Mr. Doongar Singh also pointed out that the

prolixity of the confessional statement embodying unnecessary details and not narrating as to what conspired between the appellant and Bakta and further embodying the fact that PW 1 Chima had even informed the incident to PW 6 Bhera, clearly go to suggest that the statement is neither voluntary nor truthful. It must have been given at the instance of the police. Introduction of the name of PW 6 Bhera to have been informed by PW 1 Chima is a pointer that the accused has given his statement at the instance of some one, who had tutored him. Mr. Doongar Singh further pointed out that at the earliest opportunity, the appellant retracted the confessional statement before the committing court. His statement (Ex P/19) was recorded in the committing court on 3-7-73, in which, he clearly stated that he confessed before the Magistrate out of fear of the police. In the light of the above criticism, Mr. Doongarsingh submitted that reliance should not be placed on Ex P/18.

10. On the other hand, Dr. S.S. Bhandawat, learned Public Prosecutor for the State, submitted that the confession has not been extracted as a result of torture. Whatever injuries and scars on the person of the accused were noticed at the time of his arrest, mention thereof was made in the arrest memo and on the next day, the appellant was medically examined, so there is no question of any torture of the appellant by the police. The appellant remained in judicial custody for about 24 hours. The Magistrate gave sufficient time to the appellant for reflection. Simply because, the Magistrate had observed that there are no injuries on the person of the accused, it can not be said that proper care was not taken by the Magistrate, while recording the confessional statement. Dr. S.S. Bhandawat submitted that the details given by the accused in his statement rather is a circumstance, which lends assurance to the fact that the statement is both voluntary and truthful. If the accused would have been tutored to give the particular statement, the tutored statement would not have been so lengthy and a detailed one. The accused in his statement has given the details of his activities, which only betrayed that the statement is voluntary and truthful. With regard to the introduction of the name of PW 6 Bhera in Ex. P/18, Dr. S.S. Bhandawat submitted that this fact might have otherwise come to the knowledge of the accused that PW 1 Chima had informed Bhera and on that basis, the accused mentioned the same in his statement. On account of the introduction of this fact, the whole of the confessional statement

should not be considered to be involuntary and untrue.

11. Having given our anxious consideration, we find the submissions of Mr. Doongarsingh, learned Counsel for the appellant weighty and forceful. Before dealing with the submissions, we may refer to the law on the subject. In *Shankaria v. State of Rajasthan* AIR 1978 SC 1248, their Lordships of the Supreme Court laid down as under:

It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded as under Section 164, Cr. PC, the Court must apply a double test:

(1) Whether the confession was perfectly voluntary?

(2) If so, whatever it is true and trust-worthy?

Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the Court must before acting upon the confession, reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even, so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.

On the question of time, to be given for reflection, their Lordships further observed as under:

There is no statutory provision in Section 164, Cr. PC or elsewhere, or even an executive direction issued by the High Court, that there should be an interval of 24 hours or more between the preliminary questioning of the accused and condition precedent for recording a confession by the Magistrate in the course of Police investigation is that the Magistrate should not record any confession, unless upon questioning the accused-person making it, he has reason to believe that it is being made voluntarily. How much time for reflection should be allowed to an accused person before recording his confession, is a question which depends on the circumstances of each case. The object of giving such time for reflection to the accused, is to ensure that he is completely free from Police influence. If immediately before the recording of the confession, the accused was in judicial custody beyond the reach of the investigating police for some days, then such custody from its very nature may itself be a factor dispelling fear or influence of the police from the mind of the accused. In such a case, it may not be necessary to send back the accused person for any, prolonged period to jail or judicial Lockup.

12. In that case, there was a judicial custody of the accused of 38 to 40 hrs and 15 minutes time was given for reflection between the preliminary questioning and the recording of confession. It was held that the interval was sufficient.

13 As a matter of law, there is no hard and fast rule that before recording the confession of the accused, he should remain in judicial custody for some days, in any case, not less than 23 days. Similarly, it can not also be said that the interval between the preliminary questioning and the recording of confession should always be at least of some hours. Much would depend on the satisfaction of the Magistrate. In the present case, it appears that there was lack of proper care on the part of the Magistrate in observing the body of the accused. When abrasions were noticed by the Investigating Officer on the person of the accused at the time of his arrest and when they were also present at the time, he was medically examined, it is really strange that the Magistrate observed no marks of injuries on the person of the accused. Had he cared to examine the person of the accused, the scars or abrasions would have been visible and that would have put him on the guard for his satisfaction on the question as to whether the statement is being voluntarily made. This lack of care on the part of the Magistrate Shri Thansingh

(PW 11) throws some doubt on the voluntary character of the confessional, statement. Had he noticed the injuries, the Sub-Divisional Magistrate might have further remanded him to judicial custody or would have given more time for reflection to the accused or in any case, he would have asked as to how those abrasions or scars were present on his person, then the accused might have come out with the version of his torture. The motbir of the arrest, PW Bhersingh, in the cross-examination stated that there were no marks of injuries on the person of the accused at the time, of his arrest. There were old Zhurtiye (abrasion). How old they, he can not say. It may be that there may be some old abrasion on the person of the accused at time of his arrest still questioning in relation to these abrasion, in facts and circumstances of the case was very material. What abrasions, were old and what abrasions were not old, if the accused would have been questiond and if the accused would have been afforded an opportunity, perhaps be would have given out some version other than what he stated in his confessional statement while he was put the preliminary questions. Besides that, introduction of this fact in' the confessional statement that PW 1 Chima had told Bhera son of Sadula of Sanawra that a boy has been killed, shows that this statement must have been made by the accused at the instance of some one else. Had this fact come to the knowledge otherwise, he would have mentioned in his statement as to how he had come to know of this fact. The, introduction of this fact only shows an anxiety on the part of the Investigating Officer that the confessional Statement may get corroboration from the prosecution case in this regard. The lengthy character of the confessional statement may or may not reflect its voluntary nature, but it can not be doubted that the statement contains unnecessary details. As regards the truthful nature, of the confession one significant fact can not be lost sight of and that is this, that the accused, to our mind, has concealed the story as to how he and Bakta conspired to kill Lakhiya. The appellant simply gave out that some 15-16 days ago at the time of sun-set, he met Bakta, who is. his uncle's son, he was milking she-goats. When he reached near Bakta, he told him to kill Lakhiya in the morning. Then he expressed that be would not be able to do so. Then Bakta told to kill him by throttling. According to the accused, this conversation took place, then at some distance Lakhiya. son of Surta, Chokha son of Kesha and Bakta brother were there and Deva's wife Smt. Nathu was also milking the cow. None of

them heard the conversation and the conversation took place at the Dhani of Bakta accused. In our opinion such a conversation would not have taken place when these persons were present and besides that without any prior meeting, in the first meeting, it could not have been said by Bakta to kill Lakhiya in the morning. It is also pertinent to note that on 3-7-73, the appellant retracted his confession before the committing, court.. The aforesaid circumstances, in our opinion, reasonably lead to an inference that the confessional statement is neither voluntary nor truthful. In order to bring home the guilt to the accused, this confessional statement deserves to be excluded from consideration.

14. Having rejected the confessional statement, as well as the first information report, it is to be seen as to whether there is other evidence' on record, which may connect the accused with the commission of the offence. In our opinion, the most material evidence in the case consists of the statement of PW 1 Chimaram corroborated by the statement of PW 2 Mst. Jiya. PW 1 Chimaram had visited Mst. Jiya at Hathitala, who is known as 'Bhopi' in whom the spirit of Rani Bhatiyaniiji comes. The purpose of the visit of PW 1 Chimaram to Mst. Jiya was to bring her for the treatment for her ailing mother. Both of them have stated that they started from the village Hathitala in the morning and on the way PW 1 Chimaram stayed in the field of Narana for urination and he heard some cries, then he went up the stand dune and at a distance of about 40 Pawandas, he saw a boy lying and the accused was standing nearby. On being asked by PW 1 Chimaram as to who he is The accused replied that he is Pokar s/o Lachha whom he knew. He also asked him, who is the lying boy, thereupon, the accused told that he is son of Surta and he is his thief. Then the accused invited him for removal of the ornaments and to share them half and half. But he did not go near him out of fear as he had killed the body. The accused also asked him not to reveal the matter of any body else. On being asked by PW 2 Mst. Jiya he immediately divulged that Lachhar's son Pokar had killed Surta's son Lakhiya, Thereupon, he went to the Dhani of the Ward Panch. In the cross-examination the witness stated that he did not see the accused beating the deceased but the accused told that he had killed Lakhiya. The deceased was lying prostrate. He further stated in cross-examination that he did not narrate the incident to any one else other than Jiya, Bhera and Surta. The statement of PW 1 Chimaram gets corroboration Tram the statement of PW 2 Mst.

Jiya. The incident was first narrated to her when she asked as to how so much time was taken by him and then Chima also narrated the incident to Bhera, when they visited the Dhani of Bhera. In cross-examination she also stated that she did not narrate the incident to any one else other than Bheta. She did not hear any cries, but when she turned back, then she saw Pokar standing. It can not be said that their testimony is rendered untrustworthy and incredible. The statement of Mst. Jiya is very natural. It was natural for Mst. Jiya to have asked PW Chimaram, when he stayed back for urination for a longer time and it took him longer, because not only he passed urine, but beyond that, he also clitned the sand dune and saw the incident and had the conversation with the accused as deposed by him. It is true that both these witnesses are the chance witnesses, but as to how they happend to be there inspire confidence. Their testimony can not be discredited only on that basis. Both of them are independent witnesses. They are neither interested in the deceased nor inimical and hostile to the accused, A suggestion was made to Chimaram in the cross-examination, but he emphatically stated that he had no enmity with the family of the accused, Mst. Jiya is aged about 50 years and is a resident of Hathitala. There was no reason for her to have falsely come out with the version as stated by her in her deposition. Mr. Doongarsingh, learned Counsel for the appellant strenuously urged that the conduct of the witnesses was abnormal, in as much as, they admit that they did not narrate the occurrence to any one other than Bhera by both of them and Surta by Chimaram. Had PW 1 Chimaram been present at the stated time and place, he would have certainly made it known to the entire village of Sanawara and similarly, if the incident would have been disclosed to Mst. Jiya, she would have also made it known to all at Sanawara as well as Hathitala. This conduct of both the witnesses, makes their testimony unreliable. We are unable to agree with this submission of the learned Counsel. To us, the conduct of both the witness appear to be very natural and normal. Having come to know of the incident, they did not proceed to Chimaram's house at Sanawara but they first proceeded to the Dhani of Bhera Ward Panch and they did not keep the incident to themselves but they immediately reported to Bhera Ward Panch. This shows their anxiety to inform some person holding some authority. After having informed, Bhera Ward Panch, it may be that they did not think it necessary to inform others and they might have

thought that, when they have informed Bhera, Ward Panch, he will proceed to take necessary action. When Surta contacts Chimaram, Chimaram also informed Surta of the incident. The testimony of Chimaram and Mst. Jiya further gets corroboration from the testimony of Surta and Bhera. PW 6 Bhera has stated that both Chimaram and Mst. Jiya Bhopi had come to him on Jethbadi-10, when the day had risen two 'Gharis' and PW 1 Chimaram told him that Lachha's son Pokariya had killed Surta's son Lakhiya. He had further disclosed that the accused was standing nearby the body of Surta's son Lakhiya and that accused told that he is his thief. The story of Sharing of the ornaments was also disclosed by PW 1 Chimaram. According to this witness, Narana's field is at a distance of 600-700 Pawandas from the dhani of Bhera, Nathu's Dhani is at about 800 Pawandas & Surta's Dhani is about 3 Kos. In cross-examination, this witness stated that he could not go to inform Surta as he was ill and his son Gordhan also could not go because of his illness. The conduct of this witness is also assailed by Mr. Doongarsingh on the ground that this witness keeps the matter to himself and did not care to inform Surta. He could have sent his son. This explanation that he was ill, is unbelievable. If on account of illness, he himself could not inform Surta some one else could have been sent. It is true that it was the duty of Bhera to have taken same steps to inform Surta but it may be that he may not have informed because of his illness and could not have sent his some Gordhan for the same reason. It may be that he might have thought that PW 1 Chima will immediately inform PW 5 Surta, who is the resident of the same village. The conduct of this witness in not informing Surta or any one else in our opinion, does not affect the testimony of PW 1 Chimaram and PW 2 Mst. Jiya.

15. As per the statement of PW 5 Surta, it was Gordhan son of PW 6 Bhera, who informed him about the visit of PW 1 Chimaram and Mst. Jiya Bhopi at the house of Bhera and the narration of the incident by them to Bhera and after receiving this information from Gordhan, he went to Chimaram and along with Chimaram, he went to Pokar. Mr. Doongarsinga submitted that PW 1 Chimaram and PW 2 Mst. Jiya have not stated that the incident was narrated by them to Gordhan at the time of narration of the incident to Bhera, so it was not possible for Gordhan to narrate the incident to Surat PW 5. For this submission, suffice it to say that it may be that Gordhan might be present at the time when the incident was narrated to Bhera

PW 6 or even Bhera might have informed the incident to Gordhan as given out by Chimaram and Mst. Jiya, when they visited the house. Nothing has been elicited in the cross-examination of PW 5 Surta as to whether he questioned Gordhan or not as to how he knows that PW 1 Chimaram and PW 6 Bhera had come to the house and narrated the incident to his father Bhera PW 6. It would have been better, if the prosecution would have examined Gordhan, but non-examination of Gordhan, in our opinion, does not affect the credibility of the testimony of PW 5 Surta. PW 5 Surta happened to visit the house of PW 9 Bhera, while he was making search of Lakhiya. The testimony of PW 5 Surta as well as PW 6 Bhera further lends support and assurance to the credibility of the version given by PW 1 Chimaram and PW 2 Mst. Jiya. Thus, in our opinion, the evidence of these four witnesses; namely, PW 1 Chimaram, PW 2 Mst. Jiya, PW 6 Bhera and PW 5 Surta is reliable and it can be found on the basis of this evidence that the accused Pokar had done to death Lakhiya.

16. There is further evidence of extra judicial confession said to have been made to Surta and Chimaram, when they visited the accused. Surta had stated that he along with Chimaram went to the house of the appellant and on being questioned, the appellant told that he had killed Lakhiya on being asked to do so by the accused Bakta. He also stated that both of them buried the dead-body of Lakhiya. PW 1 Chimaram had also supported the version of Surta. His statement is that the accused Pokar confessed that he had killed Lakhiya son of Surta. PW 1 Chimaram does not state that Pokar also told that he did so at the instance of Bakta and that, both of them buried the dead-body of Lakhiya. On account of this variation in the testimony of these two witnesses, the confession made by the accused is not in any way affected. Pokar must have so confessed as Surta (PW 5) was accompanied by Chima. Had Chimaram not accompanied Surta, perhaps, the appellant would not have confessed before PW 5 Surta alone. The appellant might not have dared to deny the incident because he knew that he was seen by PW 1 Chima. It was urged by Mr. Doongarsingh that it is highly improbable for the appellant to have blurted out the confession to none else other than the father of the deceased, so on the touch stone of probability, this evidence does not stand scrutiny. In our opinion, normally, it would have been so, but as PW 1 Chimaram accompanied Surta, it was probable for the accused to have confessed the guilt.

before PW 5 Surta. It has not been elicited in the cross-examination of PW 5 Surta as to why he along with Chima visited the house of the appellant. When the fact of murder came to the knowledge of Surta in order to verify the same, he might have visited the house of the accused with PW 1 Chimaram. The credence to this part of the statement of PW 5 Surta, in our opinion, can be attached as it finds corroboration from the testimony of independent witness Chimaram. We would have discarded the evidence of PW 5 Surta, if there would have been no support of it, but when Chimaram supports the evidence relating to extra-judicial confession, it is rendered reliable. Even if, this evidence for any reason is not believed, still on the basis of the testimony of PW 1 Chima Ram and PW 2 Mst. Jiya is corroborated by the testimony of PW 5 Surta and PW 6 Bhera. Offence under Section 302, IPC., is amply brought home to the appellant.

17. Apart from the oral evidence, there is the circumstantial evidence of recovery of the dead-body on the information, and at the instance of the accused Pokar as already stated. The accused. Pokar gave information Ex P/14 on 5-6-73 that he along with Bakta have buried the dead-body of Lakhiya in the field of Jugta and he will get the same unearthed. In pursuance of the information, the accused got the dead-body recovered from the field of Jugta vide recovery memo Ex.P/7. The information has been proved by Shri Hemraj, SHO and recovery of the dead-body by the accused has been proved by PW 10 Hemraj, SHO and the motbir witness Shri Bhersingh (PW 9). PW 9 Bhersingh has stated that the accused went to the field of Jugta and dug the earth and got the dead body recovered. PW 10 Hemraj has stated that the accused carried them to the field of Jugta and dug the earth to the extent of 3 1/2 ft. deep, 3ft. wide and got the dead-body recovered in a tied condition. PW 10 Hemraj stated that the body was identified by PW 5 Surta. Both the witnesses have also stated that there were clothes; namaly, Potiya (Ex. 7), Shirt (Ex. 8), Adayata (Ex. 9) & Angochha (Ex. 10). In connection with the evidence of recovery of the dead-body, Mr. Doongarsingh submitted that the fact of burying of the dead-body was even known to Bakta and so, the police must have known the place, where the dead-body was buried and recovery of the dead-body, has been shown on the information and at the instance of the accused Pokar. The place of burying of the dead-body was not in the exclusive knowledge of the appellant and so the recovery of the dead-body is a circumstance, which is

of no avail to the prosecution. Mr. Doongarsingh also pointed out that the burying of the dead-body in the field, of Jugta is some what mysterious and there was no reason to have carried, the dead-body to a distance of about 2 miles from the place of the incident. In the FIR, the incident is alleged to have taken place in the field of Bhera. PW 6 Bhera may have some complicity and so, in order to save Bhera, the burying of the dead-body in the field of Jugta appears to be concocted. We are unable, to agree with this contention of Mr. Doongarsingh, learned Counsel for the appellant. Accused Bakta was arrested on 6-6-73. The dead body has been recovered soon after the arrest on 5-6-73. No such suggestion has been given to Hemraj, SHO that before the arrest of Bakta was shown Bakta informed about the place of burial of the dead-body. As regards the removal of the dead-body to a distance of 2 miles, we may state that it might have been removed by the appellant & Bakta towards the north of the place of the incident. It appears that the dead-body was buried in accordance with the course of action which the appellant singly or along with accused Bakta thought it best. Mentioning of name of Bhera's field as the place of incident, in our opinion, does not affect the evidence of recovery of the dead-body. Even in the first information report, it is stated that the dead-body has been buried some where jointly by Pokar and Bakta accused. Mr. Doongarsingh further contended that the dead-body was not identifiable. PW 9 Bhersingh, in cross-examination has stated that the deadbody was not identifiable. Dr. Harakraj Mathur stated that the dead-body was decomposed, but PW 5 Surta identified the dead-body. It is true that no question was put to Surta regarding the identification of the dead-body still in our opinion, there is satisfactory evidence on record, on the basis of which it can be found that the dead-body was identified by PW 5 Surta. Dr H.R. Mathur and Hemraj have stated that PW 5 Surta identified the dead-body. P W 6 Bhera stated that Surta might have identified the body after looking to the clothes of the deceased. PW 9 Bhersingh has not stated that PW 5 Surta had not identified the dead body. He simply assigned the basis by which Surta might have identified the dead body. Apart from this evidence, the clothes, which were recovered from the dead body have been identified to be of the deceased by the mother of the deceased Mst. Bali (PW 3). She had identified the clothes (Ex. 6 to Ex. 10). Thus, the evidence relating to the recovery of the dead body at the instance of the accused, in our

opinion, suffers from no infirmity.

18. Another circumstance is the recovery of the ornaments of the deceased on the basis of the information Ex P/15 and recovery thereof at the instance of the accused vide recovery memo Ex.P/2. The prosecution had examined the motbir witness Shri Heeralal Oswal (PW 7). Besides this, there is the testimony of Hemraj (Investigating Officer) (PW 10), The accused gave information that he had concealed the ornaments mentioned in the information memo in his Bara. The accused took the witnesses to his Bara, which is at a distance of 15 Pawandas from his Dhani and got the ornaments-pair of Murkies Ex.1, pair of Sankali Ex.2, Phool Ex. 3. Two Harkiya Ex. 4, Tatiya Ex. 5 and Hansali Ex. 6 recovered. They were wrapped in a cloth. These articles were packed and sealed. Mst. Bali (PW 3) has stated that when the deceased went from the house, he was wearing the various ornaments. The witness identified the ornaments in court. There is no reason to disbelieve the testimony of Mst. Bali. The statement of Mst. Bali also gets corroboration from the testimony of Surta, who has also identified the aforesaid ornaments. It is true that no identification parade was conducted but for that reason, the evidence of Mst. Bali and Surta can not be disbelieved. The accused in his statement, has simply denied the evidence relating to information of the ornaments and their recovery and that the deceased had these ornaments on the person when he left the house. In our opinion, it is proved from the evidence of Hemraj and Heeralal that on the basis of the information furnished by the accused, the ornaments were got recovered by him and the ornaments recovered were those, which the deceased was wearing.

19. There is further evidence of recovery of an axe but this circumstance of recovery of an axe is not of any help to the prosecution as there is nothing Incriminating in it.

20. In our opinion, on the basis of the evidence of PW 1 Chimaram and PW 2 Jiya corroborated by the evidence of PW 6 Bhera and PW 5 Surta and on the basis of the evidence of extra-judicial confession to PW 5 Surta and PW 1 Chima and even otherwise, coupled by the circumstances of recovery of the dead-body and the ornaments, offence under Sections 302, 392 and 201, IPC is amply brought home

to the accused-appellant and he has been rightly convicted of the same.

21. In the result, this appeal has no force, so it is hereby dismissed. The appellant Pokar is on bail, he shall immediately surrender and the learned Sessions Judge, Balotra is further directed to effect his arrest to serve out the sentence as awarded to by him.

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