

Rahimatullah Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-02-1986

Reported in : 1986WLN(UC)293

Judge : Shyam Sunder Byas and; Jas Raj Chopra, JJ.

Appeal No. : D.B. Criminal Appeal No. 285 of 1980

Appellant : Rahimatullah

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. M.C. Bhandari

Disposition : Appeal allowed

Judgement :

Shyam Sunder Byas, J.

1. By his judgment dated April 30, 1980, the learned Additional Sessions Judge, Bhilwara convicted and sentenced the accused appellant and his associate accused Fakir Mohammed as under:

S. No. Name of accused Offence Under Section Sentence awarded

(1) Fakir Mohammed 302, IPC Imprisonment for life;

364, IPC Ten years' rigorous

imprisonment with a

fine of Rs. 200/-, in

default, four months

rigorous imprisonment;

(2) Rahimatullah 302/34, IPC Imprisonment for life;

364, IPC Ten years' rigorous

imprisonment with fine of

Rs. 200/-, in default,

four months rigorous

imprisonment.

Accused Rahimatullah has come-up in appeal and challenged his conviction.

2. Succinctly stated, the prosecution case is set-up during trial, is that the appellant Rahimatullah and the co-accused Fakir Mohammed are first cousins. The deceased Surya Prakash, aged about 22 years, was the elder brother of PW 18 Chandra Prakash. All of them reside (d) in the town of Jahajpur (district Bhilwara). The deceased was a photographer by profession and operated 'Laxmi Photo Studio' for that purpose in the market of the town. At about 2.00 p.m. on March 6, 1979, the two accused Fakir Mohammed and Rahimatullah went together to the deceased's studio and requested him to take their photographs. The deceased asked them to wait. After sometime, accused Fakir Mohammed asked the deceased to go with them to the fort and to take their photographs there. The deceased accepted the request and accompanied them with his camera (Article 1) and Flash-gun (Article 3). He was then wearing wrist watch (Article 4). Accused Fakir Mohammed had a bag containing one nylon cord along with a Chaddar (bed-sheet). In the way, the party met some persons, who also requested the deceased

to take their photos. The deceased told them that he were take their photographs on return. The party reached the Sheetlamata temple situate on the fort. There the deceased took two photographs of the appellant and one photograph of the accused Fakir Mohammed. While the deceased was taking the third photo of the appellant, accused Fakir Mohammed suddenly spread his Chaddar on his (deceased) head. The appellant took out the nylon cord (here in after to be referred to as 'the cord) from the bag and tied the hands and feet of the deceased. Accused Fakir Mohammed felled the deceased down and sat on his chest. He thereafter pressed his threat and continued to press it till the deceased breathed his last. The two culprits collected the camera, flash-gun and the wrist watch of the deceased and then placed the in a corner. After sun-set, when it became dark, the two miscreants took the victim's dead body and placed it in a ditch near the fort. The cord with which the hands and feet of the deceased were tied, was removed and was taken away by the accused Fakir Mohammed. The camera, flash-gun and the wrist watch of the victim were also taken away by accused Fakir Mohammed. The two accused thereafter disappeared. At about 9.30 a.m. on March 7, 1978 Police constable Mohan Lal (PW 7) noticed the victim's dead body lying in the ditch. He presented written report Ex. P 10 in this connec ion before the Station House Officer, Police Station, Jahajpur. The police registered a case and proceeded with investigation. The S.H.O Shyam Sunder (PW 24) arrived on the spot where the victim's dead body was lying and prepared the inquest report Ex. P 11. He also prepared the site plan Ex.P II. He also found nylon cord (Article 9) near the Sheetlamata's temple. It was seized and sealed. The victim's clothes were also seized and sealed. The medico-legal autopsy of the victim dead body was conducted on March 7, 1979 by PW 21 Dr. Ram Gopal the then Medical Officer Incharge, Government Dispensary, Jahajpur. The doctor noticed the following ante-mortem injuries on the victim's dead body:

External--

(1) One abrasion of irregular margin 4 x 1/2 c.m. on lateral side of left lower leg 4' above left lateral malleolous;

- (2) Six bruises of 1 to 1.5 c.m. long, thin, crescentic, irregularly placed on right side of neck and three such bruises on left side of neck;
- (3) Two linear bruises of 1.5 c.m. seen on both side of nose and two on the forehead and one on each cheek;
- (4) One ligature mark of 6 x 1/4 c.m. on dorsum of left wrist and two ligature marks of 5 x 1/4 c.m. around upper dorsum of right hand;
- (5) Two ligature marks of 7 x 1/4 c.m. around lateral side of right lower leg one inch apart and three inches above right lateral malleolous;
- (6) One ligature mark of 7.5 x 1/4 cm. around lateral side of left lower leg.

In the opinion of Dr. Ram Gopal, the cause of death was asphyxia due to throttling. The post-mortem report prepared by him is Ex. P 23. Accused Fakir Mohammed was arrested on March 10, 1979 vide arrest memo Ex. P 21 while accused Rahimatullah was arrested on March 11, 1979 vide arrest memo Ex. P 3. In consequence of the information furnished by accused Fakir Mohammed whilst under police custody, camera (Article 2), flash-gun (Article 3) and wrist watch (Article 4) were recovered from different places. In consequence of the information furnished by accused Rahimatullah, nylon cord (Article 4) was recovered. Both the accused were lodged in judicial custody. On March 17, 1979 accused Rahimatullah made a confession before the Judicial Magistrate Mr. C.L. Bajaj (PW 25). The confession was reduced into writing in Ex. P 32. On March 19, 1979, accused Fakir Mohammed made a confession before the Judicial Magistrate Mr. Parupal (PW 23). The confession was reduced into writing in Ex. P 28. In the test identification, the camera, flash-gun and the wrist watch were correctly identified to be of the victim by his younger brother Chandra Prakash (PW 18). When the camera was re-opened, it contained reel (Article 5) containing some negatives. The postive of the negatives are Ex.P 6, Ex. P 7 and Ex. P 8. These photos are of the two accused Fakir Mohammed and Rahimatullah. On the completion of investigation, the police submitted a challan against accused Rahimatullah and Fakir Mohammed in the Court of Munsif and Judicial Magistrate, Jahajpur, who, in his turn, committed the case for trial. The case came for trial before the learned

Additional Sessions Judge, Bhilwara, who framed charges under Sections 302, 302/34 and 304, IPC against both the accused person, to which they pleaded not guilty and demanded the trial, In their statement recorded under Section 313, Cr.PC they retracted their judicial confession and stated that they were extracted from them by exercising physical torture. In support of its case, the prosecution examined 27 witnesses and filed some documents. In defence, no evidence was adduced. On the conclusion of the trial, the learned Additional Sessions Judge found the charges duly proved against the accused persons. They were consequently convicted and sentenced as mentioned at the very out-set. Aggrieved against his conviction, accused Rahimutallah has taken this appeal. The other accused Fakir Mohammed filed no appeal and his conviction is, thus final for our purpose.

3. We have heard Mr. M.C. Bhandari learned Counsel for the appellant and Mr. Niyazuddin Khan the learned Public Prosecutor. We have also gone through the case file carefully.

4. Admittedly, there is no ocular witness of the incident. The prosecution case depends entirely on the circumstantial evidence. The circumstantial evidence aduced by the prosecution against the appellant may, for ease and convenience, be classified as under:

- (1) Judicial confession Ex. P 32 of the appellant Rahimatullah;
- (2) Judicial confession Ex. P 28 of the co-accused Fakir Mohammed;
- (3) Recovery of nylon cord (Article 1) at the instance of the appellant;
- (4) Recovery of camera (Article 2), flash-gun (Article 3) and wrist watch (Article 4) at the instance of the co-accused Fakir Mohammed;
- (5) Recovery of nylon cord (Article 9) lying near about the site of occurrence. An attempt was made that the nylon cord (Article 1) and nylon cord (Article 9) are the pieces of one and the same cord; and
- (6) the deceased and the accused persons were seen going towards the fort.

5. The learned Sessions Judge disbelieved the prosecution evidence relating to the recovery of nylon cord (Article 1) at the instance of the appellant Rahimatulla. He however, further held that even if the recovery of nylon cord (Article 1) at the instance of the appellant was taken as proved, there was no evidence to show that nylon cord (Article 1) and nylon cord (Article 9) were the pieces of the same nylon cord. He, therefore, rejected this part of the prosecution evidence. On the basis of the other parts of the judicial circumstantial evidence, he held the charges duly proved against the accused persons.

6. In assailing the conviction of the appellant, it was strenuously contended before us by Mr. Bhandari that there was absolutely no evidence to connect the appellant Rahimatullah with the murder of the victim. It was argued that the whole approach of the learned Sessions Judge was erroneous and unsustainable. He has assailed the findings of the Court below on the judicial confession of the appellant as well as the confession of the co-accused Fakir Mohammed. It would be proper to deal with his contentions at seriatim.

7. In assailing the judicial confession Ex. P. 32 alleged to have been made on March 17, 1979 by the appellant before the Judicial Magistrate Mr. Bajaj (PW 25) it was argued that Ex. P 32 contains no confession. There is nothing in Ex. P 32 to show that the appellant had made confession to have committed the murder of the victim. It was argued that in Ex P 32 what has been admitted by the appellant is that he had accompanied the co-accused Fakir Mohammed. Ex P 32 does not show that the appellant did anything to commit the murder or helped the co-accused to facilitate the task of the murder of the victim. It was argued that when Ex P 32 does not amount to a confession, it furnishes no incriminating material to the prosecution. Reliance in support of the contention was placed on the often cited case Narayan Swami v. The Emperor AIR 1939 PC 47. It was, on the other hand, submitted by the learned Public Prosecutor that when Ex. P 32 is read as whole, an inference can be easily drawn that the appellant and the co-accused Fakir Mohammed had designed a plan to put the victim to death. We have taken the respective submissions into consideration.

8. The pertinent question requiring deliberation is whether Ex.P 32 amounts to a 'confession' Now 'confession' has been defined no where. There is no definition of 'confession' either in the Evidence Act or in any other statute. However, there are various judicial decisions of the Privy Council and the Supreme Court wherein occasions have arisen to define the term 'confession'. In Narayan Swami's case (supra), it was observed by the Privy Council:

The word 'confession' as used in the Evidence Act cannot be construed as meaning a statement by an accused "suggesting the inference that he committed' the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession

9. These observations were quoted with approval by their Lordships of the Supreme Court in Balvindra Kaur v. State of Punjab : 1953 CriLJ154 and Veer Ibrahim v. State of Maharashtra : 1976 CriLJ860 . Thus, the confession is a direct admission of the guilt by a culprit who has committed the crime. The confession must contained substantially all the facts constituting the offence.

10. We have carefully gone through Ex. P 32 in our endeavour to see whether it all amounts to a confession. In Ex. P 2, the appellant stated that at about 12.30 in the noon on March 6, 1979, he was taking his meals at his house. Co-accused Fakir Mohammed came and asked him to accompany him upto the bus-stand. He accompanied the co-accused Fakir Mohammed. Both of them went to the shop of the victim. The co-accused Fakir Mohammed asked the deceased Surya Prakash to take his photos at the fort. The victim took his camera and other articles and accompanied the co-accused. He (appellant) also followed them. The party of the three reached the Sheetlamata's temple near the Burj of the fort. There the victim took three photographs. When the victim was taking his (appellant's) photograph, the co-accused Fakir Mohammed suddenly spread a Chaddar on the victim's head. The co-accused thereafter asked him (appellant) to take out the nylon cord and directed him to tie the hands and feet of the victim. It would be proper to reproduce this part of the statement Ex P 32 as it relates to the commission of the acts by the appellant:

fQj Ckkn es dwus es eS vyx iyFkh ekjdj cSBk vkSj esjh QksVks [khpus yxk A esjh QksVks [khph vkSj Qdhj eksgEen us mlds lj ij pknj yisV fn;k vkSj esjs dsk cksyus yxk fd lykfLVd dh lhUnjh fudky Fksys es ls A eSus dg fd D;sk A esjs gkFk ikao /kwtus yxs vkSj dqN Hkh dke ugh djus yxs A eq>dks dgus yxk fd jLlh fudky QV A fQj ckn es dgus yxk fd iklk yxk A eSus dgk gfd iklk yxkuk ugh tkurk gwW A mlus dgk fd tSlk pkgsk oSlk gh yxk nks A fQj eq>s dgus yxk fd bl gkFk ls] bl gkFk ls cxyks ls b'kkjks ls crk;k jLlh M+ky A fQj ckn es iSj Mkydj mls uhps iVd fn;k A fQj og QksVksxzKQj dgus yxk fd HkbbZ lkgc NksM+ nks fd esjs ls D;k xyrh gks xbZ A QksVksxzKQj dgus yxk fd tks pkgks ys yks eq>dks er ekjks] rqEgkjs /kksd nw] rqEgkjs ikao iMw AQdhj eksgEen uas dgk u rks esjs dks /kksd pkfg, Fkk u dqN pkfg, A mldh Nkrh ij c SB x;k A xyk idM+ fy;k nksuks gkFkks ls Qdhj us A Qdhj eksgEen us esjs ls dgk fd rw dqN Hkh dgsxk fpYyk;sxk] rsjs dks Hkh tku ls [kRe dj Mkywxka A eS Hkh Mj ds ekjs pqipki c SB x;k A ,slk djrs &djrs; mldk ne fudky fn;k A

When the aforesaid portion is read carefully, it does not show that the appellant had carried out the command given to him by co-accused Fakir Mohammed. This portion does not support that the appellant had tied the hands and feet of the victim by the nylon cord. On the other hand, this portion of the statement Ex. P 32 shows that it was the accused Fakir Mohammed who did every criminal act and throttled the victim to death.

11. A confession is to be read and considered as a whole. Neither should be added by the Court in reading a confession. Attempt should not be made to read what is not there in the confession. Artificial inference to add the missing links should not be raised on the ground that they are the natural inferences.

12. In Ex. P 32 we are unable to read that because the appellant was directed to tie hands and feet of the victim by the co-accused Fakir Mohammed, the appellant carried out his command and tied the hands and feet of the victim. The role of the appellant becomes criminal only when he had tied the hands and feet of the victim on the directions of the co-accused Fakir Mohammed. In Ex. P 32, the appellant does not state that he had tied the hands and feet of the victim. It would be absolutely unjustified to draw the inference that the appellant had tied the hands

and feet of the victim by the nylon cord. The question whether the appellant had tied the hands and feet of the victim, is a question of fact. This fact has not been admitted by the appellant in his confession Ex. P 32. This fact being the core of his confession must have been stated in Ex. P 32 by the appellant in order to render it to a confession. The confession, in the opinion of the Privy Council, should not be construed as meaning a statement suggesting the inference that the accused committed the crime. Even the admission of a gravely incriminating fact even a conclusively incriminating fact, is not confession. In Ex. P 32 the appellant has started nothing inculcating himself in any way. We are, therefore, unable to treat Ex. P 32 as a confession of the appellant for the simple reason that he has stated nothing therein inculcating himself in any way. When the accused makes no statement inculcating himself, such a statement does not amount to a confession. We are fortified in our view by the observations made by their Lordships of the Supreme Court in *Suryaswami and Ors. v. State of Orissa* : 1979 CriLJ959 . Ex. P 32, thus, renders no help to the prosecution. The learned Additional Sessions Judge has clearly erred in treating Ex. P 32 as the confession of the appellant Rahimutallah. Since Ex. p 32 does not inculcate its author (the appellant Rahumatullah), it is not a confession and is therefore, not admissible.

13. The next piece of circumstantial evidence against the appellant is that he and the co-accused Fakir Mohammed were seen going towards the fort with the deceased. The witnesses speaking on this point are PW 2 Govind Lal, PW 3 Babu Lal, PW 5 Mst. Pani, PW 6 Jalil Khan and PW 15 Sadiq. PW 2 Govind Lal deposed that in the afternoon on March 6, 1979 he went to the temple on the fort for offering Pooja. At about 5.15 p.m. when he was returning, he noticed the two accused Rahimutallah and Fakir Mohammed and one more boy near the gate of the fort. The appellant Rahimutallah ran away towards the Mataji temple. He had identified both the accused persons correctly in the test identification parade conducted by a Judicial Magistrate. PW 3 Babu Lal deposed that at about 2.30 p. m. on March 6, 1979 while he was going to take bath in the river, he noticed the deceased and the accused persons going towards the fort. The deceased had camera and flash gun with him. He had also correctly identified both the accused persons in the test identification parade. It is interesting to note that he already knew accused Rahimutallah before the incident and yet he had not disclosed his

name in his police statement Ex. D 3. There was, therefore, no sense and meaning in arranging the test identification parade of the appellant and to call this witness to participate in it. PW 6 Zalil Khan was working in repairing the staircase of the Dargah situate near the fort. He deposed that at about 3.00 p.m. on the day of incident he had seen the deceased and both the accused persons going towards the fort. In his police statement Ex. D 4, he admitted that when the accused persons were arrested by the police and they disclosed his name, he was called by the police for interrogation. It was thereafter that he disclosed the names of both the accused persons in Ex. D 4. PW 15 Sadiq stated that at about 2.30 p.m. on the day of the incident he had seen both the accused persons sitting outside the Laxmi Photo Studio of the deceased. He Stated nothing further. PW 5 Mst. Pani was working with Zalil Khan (PW 6) at the Dargah. She simply stated that she noticed three boys going towards the fort one of whom had a camera with him. In the test identification, she could not identify any of the accused persons. The learned Sessions Judge, on the basis of the testimony of these five witnesses, held that the two accused and the deceased went to the fort. The deceased was then carrying a camera and a flash-gun with him. It was contended by Mr. Bhandari that the evidence of these five witnesses is dubious and inconclusive. We have carefully read the statements of these five witnesses.

14. Now, one of them had not identified the appellant. PW 6 Zalil Khan came forward only when the accused were arrested and his name was disclosed by them. PW 3 Babu Lal did not disclose the name of the appellant in his police statement even though he knew him before hand. His participation in the test identification parade is a farce and has no meaning and sense. PW 15 Sadiq had merely seen them out-side the Laxmi Photo Studio of the deceased. PW 2 Govind Lal did not state that he han seen the two accused with the deceased. Though he stated that he had seen three boys going towards Mataji temple, curiously enough, he did not state that one of them was the deceased victim. He stands contradicted as regards the appellant on many points with his police statement Ex. D 2, recorded during investigation. In view of this sort of evidence, it cannot be said with certainty that the appellant was one of those two boys who had taken the deceased to the fort.

15. Even assuming that the appellant was seen with the accused Fakir Mohammed and the deceased victim going towards the fort, on the basis of what these five witnesses have stated, the pertinent question which arises for deliberation is whether he was a participant in the murder of the victim. There is no evidence as to how the victim was done to death except the retracted confession of the co-accused Fakir Mohammed. As we will presently see that the confession of the co-accused is not a substantial piece of evidence. The evidence of these five witnesses, at the most, simply shows that the two accused and the deceased had gone towards the fort. The evidence of these witnesses does not indicate or suggest that the appellant had a hand in committing the murder of the deceased-victim.

16. Coming to the judicial confession Ex. P 28 of the co-accused Fakir Mohammed, it was argued by Mr. Bhandari that it cannot be read as substantive evidence. It can only be taken into consideration by virtue of the provisions contained in Section 30 of the Evidence Act. It was contended that in Ex. P 8, the accused Fakir Mohammed clearly confessed that it was he who had taken the deceased to the fort. The appellant Rahimatullah merely accompanied them. He further made a clear confession in Ex. P 28 that it was he who throttled the victim to death. The only role assigned by him to the appellant is that he (appellant) tied the hands and feet of the deceased with a nylon cord which he (accused Fakir Mohammed) had taken with him in his bag. The co-accused stated nowhere in his confession Ex. P 28 that he and the appellant had hatched a conspiracy to commit the murder of the deceased. It was argued that there is nothing in Ex. P 28 to suggest that the co-accused had disclosed his plan to the appellant to kill the deceased. As such, the confession Ex. P 28 of the co-accused Fakir Mohammed, even if taken into consideration, is not sufficient to sustain the conviction of the appellant. It was, on the other hand, contended by the learned Public Prosecutor that the appellant had accompanied the accused Fakir Mohammed. Since they were the first cousins, it can be easily inferred that the victim was done to death in furtherance of the common intention of both the accused persons. We have bestowed our anxious consideration to the rival submissions.

17. Section 30 of the Evidence Act speaks that the confession of an accused may be taken into consideration against his fellow accused. The legislature very wisely did not make the confession of an accused as substantive piece of evidence against the co-accused. The reasons are that the confession is not made on oath, nor in the presence of the co-accused and can not be tested by cross-examination. These infirmities induced the legislature not to treat the confession of an accused as a substantive piece of evidence against the co-accused. The confession of co-accused is not evidence in the ordinary sense of the term as defined in Section 3 of the Evidence Act. It can, therefore, be taken into consideration against the co-accused by virtue of the provisions contained in Section 30 of the Evidence Act. It cannot be made the foundation of a conviction and can only be used in support of the other evidence. A retracted confession may be also be taken into consideration (confession Ex. P 28 was later on retracted by accused Fakir Mohammed) as against the co-accused, but cannot be made the basis of his conviction. Section 30 of the Evidence Act provides that the Court 'may take into consideration'. The expression 'may take into consideration' came for judicial scrutiny before their Lordships of the Supreme Court in *Kashmira Singh v. State of Madhya Pradesh* : 1952 CriLJ839 . It was observed by their Lordships:

The proper way is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But 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 that without the aid of the confession he would not be prepared to accept.

18. The position flowing from the provision of Section 30 of the Evidence Act, thus, is that a retracted confession can be taken into consideration but only in support of other evidence and cannot be made the foundation of conviction. If there is evidence to show the complicity of the accused and to connect him with the commission of the crime, the confession of a co-accused may be taken into

consideration as an additional reason for believing that evidence.

19. In the instant case, as discussed above, the evidence of the five witnesses, viz., PW 2 Govindlal, PW 3 Babulal, PW 5 Mst. Pani, PW 6 Zalil Khan and PW 13 Sadiq, even if taken at the highest, merely shows that the deceased and the two accused had gone towards the fort. The evidence of these five witnesses in no way suggests that it was the appellant who had any complicity in the murder of the deceased-victim. If the evidence of these five witnesses had shown that the appellant had any connection with the murder of the deceased, the confession Ex. P 28 of the co-accused Fakir Mohammed could have been pressed into service and could have been taken into consideration to lend assurance. But since the evidence of these five witnesses does not indicate or suggest the complicity of the appellant in the commission of the crime, the confession Ex. P 2 of the co-accused Fakir Mohammed, in no way, helps the prosecution. Confession Ex. P 28 cannot be used to fill-up the gaps in the prosecution evidence. We are, therefore, of the considered opinion that even if the confession Ex. P 28 of the co-accused Fakir Mohammed is taken into consideration, it is wholly insufficient to sustain the conviction of the appellant.

20. We have carefully gone through the confession Ex. P 28 of the co-accused Fakir Mohammed. However in Ex. P 28 he stated that he had disclosed his intention to the appellant to commit the murder of the deceased. There is nothing again in Ex. P 28 that the appellant made any effort to take the deceased towards the fort. Ex. P 28 shows that it was the co-accused Fakir Mohammed who had talks with the deceased and induced him to go to the fort with him. The role assigned in Ex. P 28 to the appellant is that he had tied the hands and feet of the deceased with a nylon cord. But there is no evidence to corroborate this part of the confession of the co-accused.

21. It was stressed by the learned Public Prosecutor that the two accused are cousins and both of them went to the fort along with the deceased victim. The murder was committed at the fort. The appellant's accompanying the co-accused strongly suggests that he had shared a common intention with the co-accused in committing the murder of the deceased. As such, Section 34, IPC was rightly

invoked by the trial Court in convicting the appellant. We are unable to accept the submission of the learned Public Prosecutor. As discussed above, the confession Ex.P 28 of co-accused Fakir Mohd. in no way suggests that he had disclosed his intention to the appellant to commit the murder of the deceased. In Ex. P 28 the co-accused Fakir Mohammed had clearly confessed that it was he who had alone throttled the deceased to death. Merely because one accompanies the other, it cannot be inferred that they had formed a common intention to commit the murder of the deceased and that one had shared the common intention with the other. A very like situation arose in *Gajjan Singh v. State of Punjab* : 1976 CriLJ1640 . It was held that the mere fact that the members of the mob came together armed with rifles is not sufficient to indicate that they had come having shared a common intention to commit the crime.

22. Co-accused Fakir Mohammed had no weapon with him. As such his intention to commit murder of the deceased, if he had any in his mind, cannot be said to have been shared by the appellant. The appellant's merely going with the co-accused and the deceased victim is not sufficient to indicate that he had shared any common intention with the co-accused Fakir Mohammed in committing the murder of the deceased. We may reiterate even at the fault of repetition that there is no acceptable material on record to show that the appellant took any part in the throttling of the deceased. Nor is there anything to show that he had a common intention to murder the deceased along with co-accused Fakir Mohammed.

23. The co-accused Fakir Mohammed was convicted main on the basis of his judicial confession Ex. P 28 and the recovery of the deceased's property in consequence of the information furnished by him whilst in police custody. But there is no such material as against the appellant.

24. The age of the accused appellant, as estimated by the trial Judge, was 16-1.7 years when his statement under Section 313, Cr.PC was recorded on February 18, 1980. He was, thus, hardly 15/16 years in age at the time of the incident. His accompanying the co-accused, even if taken as proved, appears to be innocent.

25. To sum up:

(a) Ex. P 32 was wrongly treated as confession of the appellant;

(b) the evidence of the five witnesses, viz., PW 2 Govind Lal, PW 3 Babu Lal, PW 5 Mst. Pani, PW 6 Zalil Khan and PW 15 Sadiq does not show, suggest or indicate the complicity of the appellant in the commission of the crime; and

(c) the confession Ex. P 28 of the co-accused Fakir Mohammed, even when taken into consideration, is not sufficient to sustain the conviction of the appellant.

26. The prosecution case purely rests on circumstantial evidence. The three circumstances pointed out above, when read and assimilated together, are wholly insufficient to bring home guilt to the appellant. We are, therefore, unable to sustain the conviction of the appellant Rahimatullah.

27. In the result, the appeal of accuser Rahimatullah is allowed. His conviction and sentence under Sections 302/34 and 364, IPC are set-aside and he is acquitted of the said offences. He is under going the sentence and shall be immediately set-forth at liberty if not wanted in any other case.