

SUNIL RAI @ PAUA & ORS.

v.

UNION TERRITORY, CHANDIGARH
(Criminal Appeal Nos.1254-1255 of 2011)

JULY 4, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

Penal Code, 1860:

s.302/34 – Murder – Circumstantial evidence – Extra-judicial confession – Conviction of three accused by trial court – Affirmed by High Court – HELD: The first circumstance of deceased seen being chased by accused not established – The witness who claims that the main accused made confession to him, tried to save one of the accused and implicate another person in his place and thus, his evidence cannot be relied upon – The recovery of blood stained jacket of the main accused is of no consequence as his blood sample was not taken to ascertain his blood group – Theft of money and clothes of main accused cannot be said to make out sufficient motive for him to kill the deceased – Besides, there was nothing on record as against the remaining two accused – On the materials on record, there may be some suspicion against the accused, but, the suspicion, howsoever strong, cannot take place of proof – Conviction of accused persons is based on completely insufficient evidence and, as such, is set aside – Evidence – Circumstantial evidence – Extra-judicial confession – Recovery of blood stained articles – Proving of – Criminal Law – Motive.

The appellants were prosecuted for commission of an offence punishable u/s 302 IPC. The prosecution case was that on 29.3.2001 at about 8:30 p.m., PW-14, PW-9 and one 'JS' were present near the GPO, Sector 17, Chandigarh; accused-appellant no.2 (A-2) was also

A present there. At that time accused-appellant no. 1 (A-1)
and accused-appellant no.3 (A-3) came there. A-1 was
agitated as his money and clothes were stolen. He
accused A-2 of committing the theft and an altercation
took place between them. A-2 told A-1 that he had not
B stolen his money or the other articles and it might have
been the work of 'DR' (the deceased). It was at this stage
that 'DR' also arrived at the scene. A-1 caught hold of
'DR' by his neck and asked him to return his money and
clothes otherwise he would kill him. A scuffle took place
C between the two but 'DR' got himself freed and ran away
from there. The three accused went after him yelling and
shouting that they would not spare him. The following
day, at about 8:30 A.M. 'DR' was found lying injured near
the local bus stand on the rear side of Neelam Cinema,
D situate at Sector 17 market. There were injuries on his
head and face. He was sent to hospital where he died.
The three accused were put on trial for the murder of 'DR'.
The trial court relied on the circumstances: (i) the
deceased was last seen being chased by the appellants
E yelling at him and shouting that they would not spare him
(ii) extra judicial confession of A-1 before PW-10, (iii)
recovery of the blood-stained jacket (Ext. P8) of A-1 from
under the seat of the rickshaw on the basis of the
disclosure statement (Ex. PU) made by him; and (iv)
F motive for the accused to commit the offence. It
convicted all the three accused u/s 302/ 34 IPC and
sentenced them to rigorous imprisonment for life and a
fine of Rs.5,000/- each. The appeals filed by the accused
were dismissed by a division bench of the High Court.
G Aggrieved, the accused filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. From the ante mortem injuries on the
body of the deceased as coming to light from the medical
evidence and the objects found at the spot where the
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body was found lying, it is quite clear that his death was homicidal. But, there is no ocular evidence of the commission of the offence and the prosecution case is based entirely on circumstantial evidence. [para 7-8] [49-C-D]

1.2. On the issue of last seen, the prosecution examined PW-9, PW-14 and PW-15. Though 'JS' had also been cited earlier as one of the witnesses on this point, he was not examined before the court. The first statement of PW-9 suggests that the deceased and the accused had gone in the direction completely opposite to where his body was found 12 hours later. His second statement is that the deceased and the accused had gone in opposite directions. His third statement, in answer to the court question, is of course that the deceased and the accused had gone in the direction of Neelam Cinema. It is also to be noted that in his first two statements he only mentions the names of A-1 and A-2, but does not name 'A-3' whom he mentions only in his third statement in reply to the question by the court. The vacillations in the deposition of PW-9 cannot be brushed aside as "minor discrepancy", as has been done by the High Court, especially when it is to form the basis for life sentences to three persons.[para 10, 13 and 15] [50-C; 51-D-E; 52-A]

1.3. PW-14 was declared hostile and was cross-examined by the prosecution. He was examined on 14-1-2003, 8.4.2003 and 18.9.2003. Each time he gave contrary statements. Thus, he is not a trustworthy witness and no reliance can be placed on his testimony. [para 16-19] [52-B-H; 57-B-C]

1.4. PW-15 did not at all support the prosecution case on the point of last seen and he did not even identify the accused present in court. He was declared hostile by the prosecution. However, significantly, in his cross-

A examination by the defence, he stated that he had
appeared as a prosecution witness in two NDPS cases
(which were investigated by the same police officer who
initially investigated the instant case). He further stated
that the spot where the injured was running did not have
B any light point and that he did not see any person hitting
the injured. [para 20] [53-D-F]

1.5. On a careful consideration of the evidences of
PWs 9, 14 and 15, the accused can not be said to be
connected with the commission of the offence on the
C basis of the quarrel that is said to have taken place in the
evening of 29.3.2001 between A-1 and the deceased. On
the basis of the depositions of PWs 9 and 14 what can
be said to have been established is only that while they
were all present near the GPO, Sector 17, a quarrel and a
D scuffle had taken place between A-1 and the deceased
whom he accused of stealing his money and clothes. But
the further story that when the deceased freed himself
from the grip of A-1 and ran away towards Neelam Cinema
he was pursued by all the accused shouting that they
E would not spare him is completely unacceptable on the
basis of their evidences. The failure to establish that part
of the story leaves a wide gap in the prosecution case
and weakens it considerably. [para 22] [53-H; 54-A-C]

F 2. As regards the extra-judicial confession said to
have been made by A-1 before P W 10, A-1, in his
statement u/s 313 Cr P C, of course, denied having made
any confessional statement. From the evidence of PW-10
it is evident that in the examination-in-chief he was trying
to implicate 'JS' (who was not an accused in the case)
G and was trying to save A-3. He was declared hostile and
was cross-examined by the prosecution. In his cross-
examination by the defence, he admitted that A-1 was not
known to him personally. Admittedly, the alleged
confessional statement was oral and it was not recorded
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in writing. An extra judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration. PW- 10 appearing particularly anxious to implicate 'JS' in place of A-3, his testimony loses any credibility.[para 23-27] [54-D-H; 55-A-E]

S. Arul Raja v. State of Tamil Nadu 2010 (9) SCR 356 = (2010) 8 SCC 233 - relied on

3.1. So far as the recovery of the bloodstained jacket of A-1 from under the seat of a rickshaw is concerned, no effort was made to take the blood sample of A-1 and it is not known what is his blood group. Moreover, the jacket was recovered from a rickshaw standing out in the open where it was accessible to anyone. In the circumstances, the recovery of the bloodstained jacket, on its own is a circumstance too fragile to bear the burden of the appellants' conviction for murder. [para 29-30] [56-B-D]

3.2. Likewise, the fact that A-1 had got his money and clothes stolen and he believed that the deceased had committed the theft, normally, cannot be said to make out sufficient motive for him to kill the deceased. In any event, motive alone can hardly be a ground for conviction. [para 31] [56-F-G]

3.3. On the materials on record, there may be some suspicion against the accused but, the suspicion, howsoever strong, cannot take the place of proof. Therefore, the conviction of the appellants is based on completely insufficient evidence and is wholly unsustainable. The quality of the prosecution evidence is too poor to satisfactorily establish any of the first three circumstances for holding the appellants guilty of the offence of murder. As none of the three circumstances

A were sufficiently proved, there is no question of taking them as links forming an unbroken chain that would lead to the only possible inference regarding the appellant's guilt. [para 32-33] [56-G-H; 57-A-C]

B 3.4. So far as A-2 and A-3 are concerned, it is a case of no evidence inasmuch as apart from the first, the remaining three circumstances are not relatable to them at all. The second circumstance in the case was the extra judicial confession made by A-1, which could not be fastened upon A-2 and A-3 for holding them guilty of murder. Recovery of the bloodstained jacket of A-1, the third circumstance obviously does not relate to A-2 and A-3 in any manner. Equally, the theft of the money and clothes of A-1, would be no motive for the other two accused to assault the deceased much less to kill him.
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D [para 33, 37 and 38] [57-C; 59-B-D]

Ammini v. State of Kerala 1997 (5) Suppl. SCR 181 = (1998) 2 SCC 301 and the other in *Prakash Dhawal Khairnar v. State of Maharashtra* 2001 (5) Suppl. SCR 612 = (2002) 2 SCC 35 – relied on.
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F 4. Thus, the conviction of the appellants cannot be sustained. The judgments and orders of the High Court and the trial court are completely unsustainable and, as such, are set aside. The appellants are acquitted of the charges. [para 39] [59-D-E]

Case Law Reference:

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|---|-------------------------|-----------|---------|
| | 2010 (9) SCR 356 | relied on | para 27 |
| G | 1997 (5) Suppl. SCR 181 | relied on | para 34 |
| | 2001 (5) Suppl. SCR 612 | relied on | para 34 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
Nos. 1254-1255 of 2011.

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SUNIL RAI @ PAUA & ORS. v. UNION TERRITORY, 47
CHANDIGARH

From the Judgment & Order dated 5.3.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 523-DB and 580-DB of 2006. A

Shirin Khajuria for the Appellants.

Manpreet Singh Doabia (for Sudarshan Singh Rawat) for the Respondent. B

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted. C

2. The three appellants are serving life sentences for committing murder of one Dile Ram. They were never on bail and have, thus, completed over ten years of incarceration. We, therefore, intended to grant leave in the case and release the appellants on bail. But, the counsel for the respondent stated that once released on bail it will be almost impossible to get hold of the appellants. We, accordingly, proceeded to hear the case on merits at the stage of special leave itself and at the conclusion of hearing we are dismayed to find that the appellants were convicted and sentenced on completely insufficient evidence. D E

3. The appellants are migrant workers who came to Chandigarh from different parts of the country in search of livelihood and were trying to eke out a living by working as rickshaw pullers. Appellant no.1, Sunil Rai alias Puaa (accused no.1) had his money and clothes stolen by someone breaking open the lock of the box under the passenger seat of the rickshaw and the quarrel that took place, as a result of it, is said to be at the root of the alleged offence. F G

4. According to the prosecution case, on March 29, 2001 at about 8:30 p.m. Arun Kumar (PW-14), Shailendra Kumar Pandey (PW-9) and one Jaspreet Singh alias Chikna were present near the GPO, Sector 17, Chandigarh. Appellant no.2, Sher Bahadur alias Sheru (accused no.2) was also present H

A there. At that time Sunil Rai and appellant no.3, Ram Lal
(accused no.3) came there. Sunil Rai was agitated as his
money and clothes were stolen. He accused Sher Bahadur of
committing the theft and an altercation took place between
them. Sher Bahadur told Sunil Rai that he had not stolen his
B money or the other articles and it might have been the work of
Dile Ram. He also told Sunil Rai that he would make Dile Ram
return his money and clothes. It was at this stage that Dile Ram
also arrived at the scene coming from the side of Jagat
Cinema. Sunil Rai caught hold of Dile Ram by his neck and
C asked him to return his money and clothes otherwise he would
kill him. A scuffle took place between Sunil Rai and Dile Ram
but the latter got himself freed and ran away from there. The
three accused went after him yelling and shouting that they would
not spare him. 12 hours later, at about 8:30 in the morning of
D March 30, 2001, an unidentified person was found lying in a
badly injured condition at a spot near the local bus stand on
the rear side of Neelam Cinema, situate at the sector 17 market.
There were injuries on his head and face. At the spot where
he lay there was a pouch of liquor (Ex. P32), a piece of brick
E (Ex. P1), a piece of stone (Ex. P2) and another piece of hard
concrete. The blood flowing from the injuries had stained the
earth at the spot, a sample of which was collected and
produced in court as Ex. P3.

F 5. The injured was sent to hospital where he died. He was
later identified as Dile Ram who, according to the prosecution,
was last seen the previous evening, fleeing away with the
appellants in pursuit yelling and shouting threats at him.

G 6. The three accused were put on trial for the murder of
Dile Ram before the Sessions Judge, Chandigarh, who by
judgment dated June 12, 2006 passed in Sessions Case no.02
of July 30, 2001 convicted all of them under section 302 read
with section 34 of the Penal Code and by orders dated June
13 & 15, 2006, sentenced them to rigorous imprisonment for
life and a fine of Rs.5,000/- each with the direction that in default
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of payment of fine they would undergo rigorous imprisonment for 1 year. The appellants went to the High Court in two separate appeals, one by Sunil Rai (Criminal Appeal no.580-DB of 2006) and the other by the other two appellants (Criminal Appeal no.523-DB of 2006). Both the appeals were heard together and were dismissed by a division bench of the High Court by judgment and order dated March 5, 2008. The matter is now before this Court in appeal by grant of special leave.

7. From the ante mortem injuries on the body of Dile Ram as coming to light from the medical evidence and the objective findings at the spot where the body was found lying, it is quite clear that his death was homicidal. But, the question remains regarding the culpability of the three appellants.

8. It may be stated at the outset that there is no ocular evidence of the commission of the offence and the prosecution case is based entirely on circumstantial evidence. There are four circumstances relied upon by the prosecution and accepted by the trial court and the High Court to hold the appellants guilty of the offence. These are as under:

I. The deceased was last seen being chased by the appellants yelling at him and shouting that they would not spare him (paragraphs 20 and 21 of the High Court judgment).

II. Sunil Rai made an extra judicial confession before PW-10, Chander Shekhar, President of the Rickshaw Pullers' Union telling him that he along with Sher Bahadur and Ram Lal hit Dile Ram with brickbats and stones at about 9:00pm in the night between March 29 and 30, 2001, causing injuries to him that led to his death (paragraphs 22, 23 and 24 of the High Court judgment).

III. The recovery of the blood-stained jacket (Ex. P8) of Sunil Rai, appellant no.1 from under the seat of the rickshaw on the basis of the disclosure statement (Ex. PU)

A made by him and that was seized under seizure memo (Ex. PV) (paragraph 27 of the High Court judgment).

IV. There was motive for the accused to beat and even kill Dile Ram (paragraph 25 of the High Court judgment).

B 9. Let us now examine the evidences in support of each of the four circumstances enumerated above.

C 10. On the issue of last seen, the prosecution examined Shailendra Kumar Pandey as PW-9, Arun Kumar as PW-14 and Harish Kumar Bansal as PW-15. Though Jaspreet Singh had also been cited earlier as one of the witnesses on this point, he was not examined before the Court.

D 11. PW-9, in course of his examination-in-chief stated that as he (Dile Ram) was able to free himself from the hold of Sunil Rai:

“Dile Ram ran towards **Jagat Theatre**. Pauya and Sheru and Ram Lal ran after Dile Ram.”

E In cross examination he stated as follows:

“Dile Ram went towards **Neelam Theatre** whereas Sheru and Pauya went towards **Jagat theatre**.”

In reply to a question by the court, he said:

F “Chikna and Arun ran towards Jagat theatre. Pauya, Sheru and Ram Lal ran after the deceased towards **Neelam theatre**.”

(emphasis added)

G 12. It needs to be recalled here that the spot where Dile Ram was found next morning lying in an injured condition, was near the local bus stand, on the rear side of Neelam Cinema. It has also come on record that the place where the quarrel took place between the accused and the Dile Ram and from where

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Dile Ram ran away, allegedly being chased by them, is at a large square and Neelam theatre and Jagat theatre are at its two opposite ends, at a distance of about 1km from each other. Sub-Inspector, Ramesh Chand Sharma, PW-17 in his deposition said:

“... It is correct that if one comes from Jagat Theatre and goes to Neelam Theatre he has to pass police post of Neelam Chowki. Subway of Neelam is at a distance of 50 yards from the police post. Some one always remains at police post of Neelam. After 8/9p.m. only 1/2 persons remain in the police post. It is wrong to say that 12 persons remain deputed at the police post....”

13. Thus, the first statement of PW-9 suggests that the deceased and the accused had gone in the direction completely opposite to where his body was found 12 hours later. His second statement is that the deceased and the accused had gone in opposite directions. His third statement, in answer to the court question, is of course that the deceased and the accused had gone in the direction of Neelam Cinema. It is also to be noted that in his first two statements he only mentions the names of accused nos.1 and 2, that is, Sunil Rai and Sher Bahadur but does not name Ram Lal whom he mentions only in his third statement in reply to the question by the court.

14. The High Court has tried to explain the vacillating statements of PW-9 by observing as follows:

“It appears that Shailender Kumar Pandey, PW9, inadvertently made a statement that Dile Ram (deceased) ran towards Jagat Cinema, instead of Neelam Cinema and the accused chased him. Such a minor discrepancy, cannot be given any weight, since a period of more than one year, and four months, from the date of altercation, referred to above, had lapsed when Shailender Kumar Pandey PW9 appeared in the court as a witness.”

A 15. To our mind the vacillations in the deposition of PW-9 cannot be brushed aside as “minor discrepancy” especially when it is to form the basis for life sentences to three persons.

B 16. With all the inconsistencies, on the issue of last seen PW-9 happens to be the best prosecution witness and the position becomes far worse when we come to the other two witnesses. PW-14 was first examined on January 14, 2003. In course of his examination-in-chief, he stated as follows:

C “... all of a sudden Diley Ram freed himself from the clutches of Pauya and ran towards **Neelam Cinema** located in sector 17. All the three accused i.e. Pauya alias Sunil Rai, Sheru and Ram Lal also chased Diley Ram and as they were chasing they said they will kill him....”

D 17. His cross examination did not take place on that date but it was done later on April 8, 2003. In cross examination he stated as follows:

E “... The deceased was under the influence of liquor on the day of occurrence and some others had also taken liquor. It is correct that Dilay Ram was insisting for more liquor whereas the others were saying that they will not consume liquor. Dilay Ram was demanding money for buying more liquor. Then they all left that place. *Dilay Ram left towards Neelam theatre and the accused present in the court went towards Jagat theatre....*”

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(emphasis added)

G 18. After his cross examination, the prosecution declared him ‘hostile’ and filed a petition seeking permission to cross examine him. The court allowed the petition by order dated July 11, 2003 and granted permission to the prosecution to cross examine PW-14, whereupon his cross examination by the prosecution took place on September 18, 2003. In this round he again went back to his earlier statement and stated as follows:

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“... Dilay Ram ran towards Neelam Theatre and all the accused present in the court today ran after him...”

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... I say that deceased ran towards Neelam theatre and the accused followed him. It is correct that earlier I had mentioned in my statement regarding Jagat Theatre.”

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19. The only explanation for these contrary statements appears to be that each time during the gap between his depositions in court he came under the influence of the one or the other side and made the statements to please the respective sides. To us, he is not a trustworthy witness and we are unable to place any reliance on his testimony.

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20. PW-15 did not at all support the prosecution case on the point of last seen and he did not even identify the accused present in court. He was declared hostile by the prosecution. There is one thing, however, quite significant about PW-15. In cross examination by the defence, it was suggested that he was a tout and a stock witness for the police. In reply to the suggestion, he stated as under:

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“... It is wrong to say that I am a police tout. It is correct that I have been shown as a witness in case FIR.52 dt.12.8.2K under NDPS Act. It is correct that I also appeared as a prosecution witness registered under NDPS Act under FIR No.228 dt.15.5.2000. It is correct that both these cases were investigated by S.I. Ramesh Chand. It is correct that the spot where the injured was running does not have any light point. I have not seen any person hitting the injured.”

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21. Ramesh Chand Sharma, S.I. was the investigating officer of the case before the investigation was taken over by DSP Arjun Singh Jaggi, PW-20. Ramesh Chand Sharma was examined in the case as PW-17.

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22. On a careful consideration of the evidences of PWs 9, 14 and 15, we are unable to see how the accused can be

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A said to be connected with the commission of the offence on the basis of the quarrel that is said to have taken place in the evening of March 29, 2001 between Sunil Rai and Dile Ram. On the basis of the depositions of PWs 9 and 14 what can be said to have been established is only that while they were all present near the GPO, Sector 17, a quarrel and a scuffle had taken place between Sunil Rai and Dile Ram whom he accused of stealing his money and clothes. But the further story that when Dile Ram freed himself from the grip of Sunil Rai and ran away from there to-wards Neelam Cinema he was pursued by all the accused who were shouting that they would not spare him is completely unacceptable on the basis of their evidences. The failure to establish that part of the story leaves a wide gap in the prosecution case and weakens it considerably.

D 23. Coming now, to the extra judicial confession said to have been made by Sunil Rai before Chander Shekhar, President, Rickshaw Pullers' Union, Sunil Rai, in his statement under section 313 of the Code of Criminal Procedure, of course, denied having made any confessional statement. Chander Shekhar was examined as PW-10. In the examination-
E in-chief he stated that on April 1, Sunil Kumar went to him at about 3 in the afternoon and disclosed that he along with some others had committed a blunder by killing Dile Singh in course of a fight. He added that Sunil disclosed to him that *Jaspreet Singh* and Sher Bahadur had also joined him in assaulting the
F deceased.

G 24. It is, thus, evident that in course of his examination-in-chief, he was trying to implicate Jaspreet Singh (who was not an accused in the case) and was trying to save Ram Lal who, according to the prosecution, was accused no.3.

H 25. At that stage he was declared hostile and on being cross examined by the prosecution, he said that Sunil had told him that he along with Sher Bahadur and Ram Lal had caused injuries to Dile Ram by hitting him with brickbats and stones.

26. In further cross examination by the defence, he admitted that Sunil was not known to him personally but all rickshaw pullers were known to him as he was the President of one of the three Unions of Rickshaw Pullers of Chandigarh. In cross examination by the defence, he once again replaced Ram Lal by Jaspreet Singh and stated that Sunil Rai had disclosed to him that he along with Sher Bahadur and Jaspreet Singh had thrown stones at the deceased causing injuries to him leading to his death. Evidently, PW-10 does not have much regard for truthfulness.

27. Admittedly, the alleged confessional statement was oral and it was not recorded in writing. Admittedly, Sunil Rai had no personal acquaintance, much less any intimacy with PW-10. An extra judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration (See *S. Arul Raja v. State of Tamil Nadu*, (2010) 8 SCC 233 paragraphs 48-56). In this case with PW- 10 appearing particularly anxious to implicate Jaspreet Singh in place of Ram Lal, it further loses any credibility. Further, in the confessional statement allegedly made before PW-10 there is an inherent improbability. The "disclosure" made by Sunil Rai before PW-10 did not indicate the place where the assault on Dile Ram took place but it gave the time of the assault as 9.00pm. In the evidence of PW-17 it has come that Neelam Police Chowki is at a distance of 50 yards from the Neelam sub-way. The police post is naturally manned twenty four hours even though, according to PW-17, after 8-9 pm only one or two persons remain on the post. The occurrence took place on March 29. At the end of March, 9.00pm is not a very late hour when an occurrence of this kind taking place near the local bus stand and the parking place for rickshaws, behind a cinema theatre and at a distance of no more than 50 yards should normally go completely unnoticed by any one, including the policemen at the police post.

A 28. For the aforesaid reasons we find it impossible to rely upon the evidence of PW-10 and, thus, goes the extra judicial oral confession by Sunil Rai.

B 29. This leaves us with the remaining two circumstances, that is to say, the recovery of the bloodstained jacket of Sunil Rai from under the seat of a rickshaw and motive. According to the report of the Central Forensic Science Laboratory (Ext. PA) the pair of pants, shirt, vest, and under-pants taken off from the body of Dile Ram were stained with human blood of 'B' group; the blood group of the sample of blood taken from the deceased was also 'B'. And the stains on the jacket recovered from under the seat of the rickshaw were also of the same group of human blood. The report further indicated that though there were stains of human blood on the piece of brick and the sample of earth collected from the spot where the body of Dile Ram was found it was not possible to ascertain the blood group. The piece of concrete and the stone piece had no blood stains.

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E 30. No effort was made to take the blood sample of Sunil Rai and it is not known what is his blood group. Moreover, the jacket was recovered from a rickshaw standing out in the open where it was accessible to anyone. In the aforesaid circumstances, the recovery of the bloodstained jacket, on its own is a circumstance too fragile to bear the burden of the appellants' conviction for murder.

F 31. Likewise, the fact that Sunil Rai had got his money and clothes stolen and he believed that Dile Ram had committed the theft, normally, cannot be said to make out sufficient motive for him to kill Dile Ram. In any event, motive alone can hardly be a ground for conviction.

G 32. On the materials on record, there may be some suspicion against the accused but as is often said suspicion, howsoever, strong cannot take the place of proof. We, therefore, find and hold that the conviction of the appellants is

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based on completely insufficient evidence and is wholly unsustainable. A

33. It is seen above that the quality of the prosecution evidence is too poor to satisfactorily establish any of the first three circumstances for holding the appellants guilty of the offence of murder. As none of the three circumstances were sufficiently proved, there is no question of taking them as links forming an unbroken chain that would lead to the only possible inference regarding the appellant's guilt. But before parting with the records of the case, we must sadly observe that so far as appellant nos.2 and 3 are concerned, it's a case of no evidence inasmuch as apart from the first the remaining three circumstances are not relatable to them at all. B C

34. The second circumstance in the case as noted above was the extra judicial confession made by Sunil Rai, appellant no.1. It is seen above that PW-10, before whom the confession was allegedly made, tried his best to shield Ram Lal and to implicate in his place Jaspreet Singh. Nonetheless, the High Court deemed fit to use the extra judicial confessional statement made orally by Sunil Rai as substantive evidence not only against him but against appellant nos.2 and 3 as well. In our view, the High Court was completely wrong in using the alleged confessional statement made by Sunil Rai against appellant nos.2 and 3. For taking into consideration the confessional statement of Sunil Rai against the other two appellants the High Court has relied upon two decisions of this Court. One in *Ammini v. State of Kerala* (1998) 2 SCC 301 and the other in *Prakash Dhawal Khairnar v. State of Maharashtra*, (2002) 2 SCC 35. In our view, both the decisions have no application to the facts of this case. In both cases the confessions were neither oral nor extra judicial. In both cases confessional statements were made before a Magistrate and were reduced to writing. In *Prakash Dhawal Khairnar*, the Judicial Magistrate, first class, before whom the maker of the confession was produced not only gave him the due warning D E F G H

A but also allowed him 24 hours time to think over the matter. It was only after he was produced the following day that the Magistrate recorded his statement under section 164 of the Code of Criminal Procedure. In *Prakash Dhawal Khairnar*, the confessional statement was not retracted either.

B 35. In *Ammini*, the facts were entirely different from the present. The accused had entered into a conspiracy in pursuance of which several unsuccessful attempts were earlier made before the victims were eventually killed. In the trial for the crime the accused were charged separately under section C 120-B, apart from section 302 read with section 34 of the Penal Code. One of the charges being under section 120-B, the confessional statement by one accused was used against the others on the basis of section 10 of the Indian Evidence Act. In the present case there was no allegation of any conspiracy and D there was no charge under section 120-B of the Penal Code.

36. In *Prakash Dhawal Khairnar* too, one of the charges against the two accused being father and son was under section 120-B of the Penal Code. But the son, the maker of E the confession was acquitted of the charge under section 120-B of the Penal Code. In that circumstance, the question arose whether the confessional statement of the son could be used against the other co-accused, his father for maintaining his conviction under section 302 of the Penal Code. This Court F pointed out that the conviction of the father under section 302 of the Penal Code was based on a number of circumstantial evidences that were independently established and the confessional statement of the son was not used as a substantive piece of evidence. In paragraph 20 of the judgment, G this Court observed as follows:

H "20. In this case, the High Court has not relied upon the confessional statement as a substantive piece of evidence to convict Accused 1. It has been used for lending assurance to the proved circumstances. The High Court held that the proved circumstances would not involve

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Accused 2 for the offence punishable under Section 302 A
IPC and the circumstantial evidence does not establish that
there was any common intention or conspiracy between
the father and the son to commit the offence....”

37. It is, thus, clear that the extra judicial confession of B
Sunil Rai could not be fastened upon the other two appellants
for holding them guilty of murder and the High Court was quite
wrong in using the confessional statement of Sunil Rai as a
circumstance against the other two appellants.

38. Recovery of the bloodstained jacket of Sunil Rai, the C
third circumstance obviously does not relate to appellant nos.2
and 3 in any manner. Equally, the theft of the money and clothes
of Sunil Rai would be no motive for the other two accused to
assault Dile Ram, much less to kill him.

39. Thus, seen for any angle the conviction of the appellants D
cannot be sustained. The judgments and orders of the High
Court and the trial court are completely unsustainable. The two
judgments are set aside. The appellants are acquitted of the
charges and are directed to be released forthwith unless E
required in connection with any other case.

40. In the result the appeals are allowed.

R.P.

Appeals allowed.