THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 14th December, 2021

DIVISION BENCH : THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.04 of 2018

Appellant : Subash Thapa

versus

Respondent : State of Sikkim

Appeal under Section 374(2) of the
Code of Criminal Procedure, 1973

Appearance

Mr. Tashi Rapten Barfungpa, Advocate (Legal Aid Counsel) for the appellant.

Dr. Doma T. Bhutia, Public Prosecutor with Mr. S. K. Chettri, Additional Public Prosecutor for the respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The instant matter pivots around the death of the victim, one Purna Kumar Gurung, aged about 34 years, working as a Lab Attendant under the Human Resource Development Department, in a school at Khecheopalri, West Sikkim. He is alleged to have been murdered by the appellant on the intervening night of 16-04-2016 and 17-04-2016 on a road half a kilometer away from his residence situated at 13th Mile, Thingling, West Sikkim. The appellant was charged under Sections 302, 392 and 427 of the Indian Penal Code, 1860 (for short "IPC"). To each count of charge the appellant pleaded "not guilty". The learned trial Court on consideration of the entire Prosecution evidence furnished before it, convicted the appellant as charged vide the impugned Judgment dated 29-11-2017, in Sessions Trial Case

No.03 of 2016 and vide assailed Order dated 30-11-2017 sentenced him to undergo imprisonment for life under Section 302 of the IPC, rigorous imprisonment of 10 years under Section 392 of the IPC and rigorous imprisonment of 2 years under Section 427 of the IPC. The sentences of imprisonment were ordered to run concurrently. Sentences of fine were also imposed with default sentence of imprisonment. Assailing the Judgment and the Order on Sentence, the appellant is before this Court.

2(i). Learned counsel for the appellant while meticulously walking this Court through the evidence of the Prosecution Witnesses put forth the arguments that the Prosecution case is *inter alia* based on the "last seen together theory", built around the evidence of P.W.2, a Police personnel, whose evidence by itself is debatable as P.W.2 was himself travelling in the direction opposite to that allegedly taken by the victim and the appellant. That, the Prosecution effort was to convince the Court that the appellant was motivated by greed on seeing the victim in possession of a substantial amount of money, and the alleged recovery of a sum of Rs.71,000/- (Rupees seventy one thousand) only, from the appellant's residence was said to be adequate ground not only to prove robbery but also murder. However, only P.W.2 deposed that the deceased was in possession of a bundle of currency notes, uncorroborated by other witnesses who were assembled at the Hotel where they were playing cards. P.W.2 however was not made a witness to the recovery of the money or for identification of the currency notes. The ownership of the currency notes is not proved as no forensic tests were conducted to verify this aspect. The money recovered was in the denomination of Rs.1,000/-

(Rupees one thousand) only, whereas P.W.3 the victim's mother deposed that she had handed over currency notes to the victim in the denomination of Rs.500/- (Rupees five hundred) only and Rs.1,000/- (Rupees one thousand) only. None of the currency notes alleged to have been seized from the appellant had blood stains. That, the evidence of P.W.14 and P.W.19 reveals that the Police seized M.O.V, wallet of the deceased, from the accident site, containing Rs.11,000/- (Rupees eleven thousand) only, and a gold ring. If robbery was the motive it is unfathomable as to why the appellant would not have taken the money in the victim's wallet and his jewellery. Motive is unproved as the appellant was financially stable as established by the evidence of P.W.19 who deposed that the appellant, a Contractor, had encashed two bills amounting to Rs.5,00,000/- (Rupees five lakhs) only, and Rs.4,42,000/- (Rupees four lakhs and forty-two thousand) only, some time before his arrest, negating any requirement for commission of robbery. Hence, this stance of the Prosecution cannot be countenanced. That, in ***Tarseem Kumar*** vs. ***The Delhi Administration***[1] the Hon'ble Supreme Court has held that in a case of circumstantial evidence, motive for committing crime assumes importance which has not been established in the instant case. Strength was also drawn on this aspect from the ratio of ***State of Rajasthan*** vs. ***Hakam Singh***[2].

(ii) That, the Disclosure Statement of the appellant, Exhibit 5 reflects that the statement was recorded on 18-04-2016, whereas recovery of incriminating articles, viz., M.O.VII (Rs.71,000/- in Rs.1,000/- denomination), M.O.VIII blood stained

[1] AIR 1994 SC 2585
[2] (2011) 15 SCC 171

shoes, M.O.IX Jeans of the appellant and M.O.X gray coloured jumper, were made in the presence of P.W.15 and P.W.16 on 17-04-2016, prior in time to the recording of Exhibit 5, thereby demolishing the Prosecution case of recovery of these articles on disclosure. P.W.14 has corroborated the evidence of P.Ws 15 and 16 with regard to the date of seizure of the articles being 17-04-2016 and not 18-04-2016 as asserted by the Prosecution. That, P.W.15 and P.W.16 are also stock witnesses for the Investigating Officer (for short, the "I.O."), P.W.43, both having been witnesses in S.T. Case No.10/2015 and J.J. Case No.01/2016 in which P.W.43 was the I.O. Even if the Prosecution case with regard to the Disclosures in Exhibit 5, is to be believed, the appellant allegedly stated therein that he had washed the insoles of the shoes worn by him at the time of the offence. Contrarily, P.W.15 has deposed that a pair of blood stained shoes with insoles were seized by the Police fortifying the allegation that P.W.15 is a stock witness and thereby unreliable. That, the Court should be wary while considering the evidence of such interested witness as held in ***State of U.P.*** vs. ***Arun Kumar Gupta***[3], thus Exhibit 5 deserves to be discarded in view of the anomalies. The evidence of P.W.5 a Police personnel subordinate to the I.O. reveals that on 17-04-2016 after forwarding the dead body to Gangtok for post-mortem, he along with P.W.43, the I.O. went to the house of the appellant, obtained the keys from the appellant's father and brought a few clothes belonging to the appellant to the Police Station. His statement thus further buttresses the evidence of P.W.14 and the fact that the clothes of the appellant were seized in his absence, prior in

[3] (2003) 2 SCC 202

time to the Disclosure Statement. P.W.27, a witness declared hostile by the Prosecution did not see the appellant and the victim going together on the motorcycle after their game of cards. Another witness, P.W.38 stated that he had not even seen the appellant at the game of cards, according to him, P.W.2, P.W.27 and P.W.28 left the game together, neither had he seen any motorcycle parked outside the Hotel where they had all gathered to play cards. The evidence of these witnesses are contrary to the evidence of P.W.2 with regard to the departure of the victim and the appellant.

(iii) That, the evidence of P.W.36 and P.W.37 alleged to have heard the extra-judicial confession of the appellant are unreliable, as P.W.37 made a concerted bid to improve his statements during the trial, leading to inconsistencies in the Prosecution case besides which he had political rivalry with the appellant during the Panchayat elections. That, the delay in forwarding the blood sample of the deceased for forensic testing sans reasons raises doubts about the Prosecution case as the incident took place on the intervening night of 16-04-2016 and 17-04-2016, while the sample was forwarded on 08-05-2016. Succour was drawn on this count from the observation in ***Arun Kumar Gupta*** (*supra*). That, as no finger prints were lifted from the place of occurrence or from any of the material objects seized by the Police the complicity of the appellant has not been proved. Although attempts were made to tarnish the character of the appellant by the I.O. P.W.43, by alleging he had been terminated from service due to unruly behavior this is not substantiated by proof. The evidence of P.W.42 categorically indicates that the appellant was at

another location at 10-10.30 pm. of 16-04-2016 and not with the victim and that the victim and the appellant did not bear animosity towards each other. The '*Shungdi'* (a religious thread worn around the neck) with which the appellant is alleged to have dragged the dead body, although allegedly seized was not exhibited by the Prosecution.

(iv) It was next urged that during post-mortem P.W.39 Dr. O.T. Lepcha, the Medico-Legal Consultant found that the abdomen of the victim smelled of fermented alcohol, hence intoxication being the cause of the accident cannot be ruled out. The alleged weapon of offence M.O.I, a stone, was not shown to P.W.39 to determine the cause of injuries found on the victim. On this aspect, reliance was placed on ***Ishwar Singh*** vs. ***State of U.P.***[4]. That, the Prosecution had attempted to establish that the appellant also rode pillion with the victim on the bike to a further distance instead of alighting on reaching his home and then committed the offence, devoid of evidence. The blood group of both the victim and the appellant was admittedly 'AB', but no effort was made during investigation to conduct further scientific tests to establish beyond doubt that the blood stains on M.O.I was that of the deceased. That, suspicion however grave cannot take the place of proof as held by the Hon'ble Supreme Court in ***Rajiv Singh*** vs. ***State of Bihar and Another***[5]. That, it is established law that if two views are possible on the evidence adduced in the case, one pointing to the guilt and the other to the innocence of the accused, the view favourable to the accused should be accepted. On this count, reliance was placed on

[4] (1976) 4 SCC 355
[5] (2015) 16 SCC 369

Suchand Pal vs. ***Phani Pal and Another***[6] and ***State of Rajasthan*** vs. ***Naresh alias Ram Naresh***[7]. That, the learned trial Court has rejected the evidence of the Defence Witnesses while failing to appreciate that it is the bounden duty of the Prosecution to prove its case beyond all reasonable doubt and not for the defence to establish innocence. Reliance was placed on ***State of Haryana*** vs. ***Ram Singh***[8]. That, in view of all arguments put forth and the mandate of law *supra*, the Judgment of the learned trial Court be set aside and the appellant acquitted of the offences charged with.

3(i). Countering the arguments of learned counsel for the appellant, learned Public Prosecutor contended that the four circumstances relied on by the Prosecution to prove its case was the Last Seen Theory, Motive, recovery of money and non-explanation by the appellant of how he came to be in possession of Rs.71,000/- (Rupees seventy one thousand) only.

(ii) That, the last seen together theory has been established by P.W.2 duly corroborated by P.W.37 and P.W.1. P.W.1 saw the deceased and the appellant entering the Hotel. P.W.2 and P.W.37 saw them going out together. That, the evidence of P.W.2, a Police personnel should not be discounted merely on account of his profession. On this count, reliance was placed on ***Kashmiri Lal*** vs. ***State of Haryana***[9]. P.W.33 had also seen the appellant and the deceased in a vehicle returning from the wedding at 14th Mile.

(iii) That, the death being the result of an accident is ruled out by the injuries apparent on the back of the head of the

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[6] (2003) 11 SCC 527
[7] (2009) 9 SCC 368
[8] (2002) 2 SCC 426
[9] (2013) 6 SCC 595

deceased as an accident would have caused only frontal injuries, added to which P.W.26, the Motor Vehicle Inspector (Technical) deposed that there was no mechanical defect in the motorcycle. The dead body was found 49 feet below the road, thus if the death was due to accident there was no reason either for blood to be found on the road or on the stone M.O.I, the weapon of offence.

(iv) The recovery of cash from the deceased has been established by the evidence of P.W.15, P.W.16 and P.W.43 and P.W.3 has proved that she had handed over money to her son, the victim, on the relevant day. The money was for paying P.W.4 who in turn had deposed that the deceased had told him that he would pay Rs.80,000/- (Rupees eighty thousand) only, as an advance for the landed property purchased from him, but he failed to turn up at his house. That, the appellant made a Disclosure Statement, Exhibit 5, without coercion as proved by P.W.15 and P.W.16 and P.W.43, the I.O. Motive has been established by the fact that the deceased had refused to give the appellant a sum of Rs.5,000/- (Rupees five thousand) only, on his request when gambling and the humiliation of the refusal and awareness of the victim's possession of a large sum of money led to the offence. Drawing the attention of this Court to the decision in ***Paramjeet Singh alias Pamma*** vs. ***State of Uttarakhand***[10], it was next urged that motive is for the purpose of supplying a link in the chain of circumstantial evidence, but its absence cannot be a ground to reject the Prosecution case.

(v) That, PWs 15 and 16 cannot be referred to as stock witnesses merely because they are witnesses in two other matters where P.W.43 was the I.O. This is a result of people not wanting to

[10] (2010) 10 SCC 439

be embroiled in any criminal disputes but in no way renders their evidence weak, reliance was placed on ***Sri Bhagwan*** vs. ***State of Uttar Pradesh***[11]. It was contended that minor discrepancies and infirmities in the Prosecution evidence is not a ground to reject the Prosecution case in its entirety as the evidence has to be considered as a whole in order to assess the truth. Reliance was placed on the ratio of ***State of Uttar Pradesh*** vs. ***Krishna Master and Others***[12]. Inviting the attention of this Court to the decision in ***State of M.P. through CBI and Others*** vs. ***Paltan Mallah and Others***[13] it was canvassed that evidence obtained under illegal search is not completely excluded unless it has caused serious prejudice to the accused and the discretion lies with the Court to accept or reject such evidence. That, since the doctrine of last seen together has been proved the burden of proof shifts to the accused, however, the appellant has failed to shed light on his role or his possession of Rs.71,000/- (Rupees seventy one thousand) only, reliance was placed on ***Pattu Rajan*** vs. ***State of Tamil Nadu***[14] to drive home this point. That, merely because P.W.27 and P.W.28 turned hostile their evidence cannot be rejected in totality, evidence which is otherwise acceptable can be relied upon. Strength was drawn from the ratio in ***Khujji @ Surendra Tiwari*** vs. ***State of Madhya Pradesh***[15].

4. Having heard the rival submissions of learned counsel for the parties *in extenso*, perused the entire records of the learned trial Court including the impugned Judgment and Order on Sentence and the citations made at the Bar, this Court is to determine whether the Prosecution on the edifice of circumstantial

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[11] (2013) 12 SCC 137
[12] (2010) 12 SCC 324
[13] (2005) 3 SCC 169
[14] (2019) 4 SCC 771
[15] (1991) 3 SCC 627

evidence has proved its case beyond a reasonable doubt, thereby rendering the impugned Judgment of the learned trial Court unassailable.

5. In order to gauge this circumstance, it is necessary to briefly delve into the facts of the case. The Prosecution case is that on 17-04-2016 at 0830 hours, Exhibit 13 an FIR was lodged by P.W.36 at the Gyalshing Police Station at 7 a.m., informing that in the morning he received a call from P.W.7 stating that the deceased had met with an accident and his motorcycle was lying below the road, but the victim was not seen there. The Complainant reached the spot and found the victim lying face downwards. On close inspection of the victim he suspected that he had been murdered and hence lodged the FIR seeking necessary action. On the basis of the Exhibit 13, Gyalshing P.S. Case No.22/ 2016, dated 17-04-2016, under Section 302 of the IPC was registered against unknown persons and taken up for investigation by the I.O. P.W.43, the Station House Officer (SHO) of the Gyalshing P.S. On completion of the investigation, *prima facie* case under Sections 341/302/392/427 of the IPC was made out against the appellant and charge-sheet submitted accordingly.

6. On the appellant's plea of "not guilty" to the charges framed against him by the learned trial Court under Sections 302, 392 and 427 of the IPC the Prosecution embarked on examining 43 witnesses including the I.O. of the case. On closure of Prosecution evidence, the appellant was examined under Section 313 Criminal Procedure Code, 1973 (for short, "Cr.P.C.") and his responses recorded. He sought to and was permitted to examine 6 (six) persons as his witnesses being D.W.1 to D.W.6. The learned trial

Court on consideration of oral, documentary and material evidence pronounced the impugned Judgment of conviction and Order on Sentence.

7(i). While reaching its conclusion of guilt of the appellant under the various offences he was charged with the learned trial Court observed that proof of possession of cash with the victim was given by P.W.3 and chose to disbelieve that the victim had adequate means of income. That, the appellant made no effort to explain his possession of the recovered cash, although he had the opportunity to do so when examined under Section 313 Cr.P.C. While discussing the forensic evidence put forth by the Prosecution and the evidence of P.W.25, the learned trial Court concluded that the appellant did not explain how his shoes/insoles came to have blood stains. He had taken the plea that the Police had rubbed "his blood on his shoes" and clothes but never explained how or when the Police obtained his blood.

(ii) While discussing the last seen theory, the learned trial Court found the evidence of P.W.2 credible and trustworthy. The Court was loathe to accept the statement of P.W.27 that he along with P.W.28 and P.W.2 left the Hotel together and reasoned that it was not corroborated by P.W.28, P.W.38 or P.W.2. That, P.W.2 had also clearly testified that the appellant had lost while gambling and requested the deceased for a loan which the deceased refused lending motive to the crime.

(iii) The evidence of the Motor Vehicle Inspector, P.W.26, was considered and the learned trial Court concluded that it was highly improbable that the victim would have died as a result of an accident and nothing in the evidence of P.W.2, P.W.27, P.W.28 and

P.W.38 suggested remotely that the appellant was so intoxicated to have lost control of his motorbike.

(iv) The medical evidence of P.W.39 who opined that the cause of death was *intracranial haemorrhage with fracture of skull as a result of blunt force* was believed to have been a result of the assault by the appellant.

(v) The evidence of P.W.5 to the extent that the appellant tried to escape from the Police vehicle was found to be another incriminating circumstance against the appellant. The extra-judicial confession of the appellant as deposed by P.W.36 and P.W.37 was found plausible, while the Disclosure Statement, Exhibit 5 was believed to have been made by the appellant before P.W.15 and P.W.16 at the Gyalshing P.S. of his own freewill. The seizures made pursuant to Exhibit 5 were given due consideration and accepted as the truth. The evidence of the Defence Witness were disregarded in totality and after recording its observations the assailed Judgment was pronounced.

8. Circumstantial evidence is legal evidence, but when the Prosecution relies upon circumstantial evidence as is the case here, the circumstances must be so convincing that no other conclusion can be arrived at than the guilt of the accused which must adequate to convict the accused. In ***Hanumant Govind Nargundkar and Another*** vs. ***State of Madhya Pradesh***[16] while considering a case based on circumstantial evidence, the Hon'ble Supreme Court held as follows;

> **"**[10] ……..……..
>
> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to

[16] AIR 1952 SC 343

> be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and pendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. ……..**"**

9. The Supreme Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[17] expounded that the five golden principles which constitute the panchsheel of the proof of a case based on circumstantial evidence as (i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established; (ii) The facts so established should be consistent with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) The circumstances should be of a conclusive nature and tendency; (iv) They should exclude every possible hypothesis except the one to be proved; and (v) There should be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. On the anvil of these well-settled parameters the evidence in the instant matter is to be examined to assess whether they fulfil the above principles.

10(i). The first link in the chain of circumstantial evidence would undoubtedly have to be the last seen together theory. In ***Bodhraj alias Bodha and Others*** vs. ***State of Jammu and Kashmir***[18] the Supreme Court held that the last seen theory comes into play

[17] (1984) 4 SCC 116
[18] (2002) 8 SCC 45

where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead, is so small, that possibility of any person other than the accused being the author of crime becomes impossible. Only on this circumstance being proved can the Prosecution link the other circumstances to it and thereby the offence to the appellant. On this aspect the evidence of P.W.2 a Police personnel posted at the Yuksom Police Out Post at the relevant time is to be examined. As per P.W.2 the deceased had called him to the Hotel after his duty hours. He along with the deceased, P.W.28, P.W.27 and P.W.38 and the appellant played cards and he noticed that the deceased was in possession of some amount of money in the denomination of Rs.1,000/- (Rupees one thousand). When they dispersed after the game he saw the deceased and the appellant going towards Gyalshing on the motorcycle of the deceased. P.W.27 and P.W.28 who were also at the same Hotel and playing cards, were declared hostile by the Prosecution. Another witness present at the place was P.W.38.

(ii) On careful consideration of the evidence of the Prosecution Witnesses present at the Hotel, it is evident that P.W.27, P.W.28 and P.W.38 have not supported the evidence of P.W.2 with regard to the time of the card playing session at the Hotel and their dispersal from the place. According to P.W.27, after the game of cards the group had dispersed and he left with P.W.2 and P.W.28 at 6.30 p.m., he did not see the motorbike of the deceased. P.W.28 too denied seeing the appellant and the deceased on the bike of the deceased. According to him, he along with P.W.27 went to the place where the appellant, the deceased

and others were gambling. Thereafter, he left with P.W.27 went shopping and returned home. That, he did not state to the Police that he had seen the appellant and the deceased leave together on a motorbike and such a statement was falsely attributed to him in his Section 161 Cr.P.C. statement. P.W.38 deposed that he left the Hotel around 6.30 to 7.00 p.m., that P.W.2, P.W.27 and P.W.28 had also left the store room where the gambling took place. He had not seen any bike parked outside the Hotel where the game of cards was played. Contrarily P.W.2 stated that he went to the Hotel at around 7.30 to 8 p.m., P.W.2 failed to give details of the time when the group broke up after the game of cards. This evidence is to be considered in tandem with that of P.W.32 who stated that he had attended the wedding at 49th Mile, Thingling, on reaching home he found that he had lost one of his two mobiles and he told the appellant telephonically about the loss. P.W.42 supported the evidence of P.W.32 and under cross-examination deposed that at 10-10.30 p.m. of 16-04-2016 the appellant had come to their house in his Maruti 800 car looking for the lost mobile.

(iii) In light of the above, evidence of the witnesses, furnished by the Prosecution, it is questionable as to why more weight was attached to the evidence of P.W.2 by the learned trial Court when other witnesses have not corroborated his evidence and when specific timings of the event are missing from his evidence as against the evidence of P.W.27 and P.W.38 who vouch for the fact that they all dispersed from the Hotel at 6.30 p.m. The I.O. in his evidence has stated that the game of cards gave over at 2200 hours which is contrary to the evidence of P.W.27, P.W.28,

P.W.38 and P.W.6 one of the Hotel owners, according to whom, her Hotel closed down at 7 p.m. The evidence of P.W.2 that he reached the Hotel at 7.30 p.m. to 8 p.m., therefore, falls flat considering that the Hotel owner claimed that her Hotel closed down at 7 p.m. Although Learned Public Prosecutor had contended that P.W.1 had seen the appellant and the deceased at her Hotel thereby buttressing the last seen theory, under cross-examination P.W.1 stated that she did not see the appellant on the relevant day at her Hotel. She also stated that the deceased had 'allegedly' come to her Hotel at around 4.30 p.m. To compound the confusion P.W.5 added that **"***…….. during the investigation it was found that* ***during the day*** *the deceased had last been seen with the accused on the motorbike***"**. In light of the anomalies with regard to the time of closure of the Hotel, the time when P.W.2 reached there and the consistent contradictory evidence of the time of dispersal of the gathering, added to the contradictory evidence of P.W.2 with that of P.W.27, 28 and 38, the evidence of P.W.2 having last seen the deceased and the appellant together on the motorbike cannot be countenanced. Hence, the cogent and consistent evidence essential to establish the last seen theory in the Prosecution case is glaringly lacking. Besides P.W.2, no other person assembled at the Hotel and gambling, there had seen the victim in possession of a large sum of money. It is these anomalies and conflicting evidence that make the testimony of P.W.2 untenable and unworthy of reliance and not the fact that he is a Police personnel. Beneficially it may also be stated that it is no more *res integra* that it is not prudent for the Court to base its conviction solely on the basis of the last seen theory.

11(i). Next, on the basis of Exhibit 5 the Disclosure Statement of the appellant under Section 27 of Indian Evidence Act, 1872 (for short, "Evidence Act") allegedly made in the presence of PWs 15 and 16, M.O.VII cash amounting to Rs.71,000/- (Rupees seventy one thousand) only was recovered vide Exhibit 6, dated 18-04-2016, from the place allegedly shown by the appellant. Vide Exhibit 7, dated 17-04-2016, signed by PWs 15 and 16 on 18-04-2016, M.O.VIII (pair of white blood stained shoes with insoles), M.O.XXVI (one white coloured blood stained Jumper), M.O.IX (one blood stained blue Jeans trousers of the appellant) and M.O.X (one blood stained V-shaped vest with blood stains), were seized allegedly. But can these recoveries link the crime to the appellant? In our considered opinion, it would not be so in view of the contradictions that emerges in the Prosecution evidence with regard to Exhibit 5.

(ii) Before discussing this aspect of the Prosecution case, we may briefly examine what Section 27 of the Evidence Act entails. The provision of Section 27 of the Evidence Act is extracted below for easy reference;

> **"27. How much of information received from accused may be proved**.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

Section 27 is by way of a proviso to Sections 25 and 26 of the Evidence Act, by which a statement made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. The conditions prescribed in Section 27 enabling admissibility of the statement of the accused made to

the police are enumerated in ***Pulukuri Kottaya and Others*** vs. ***Emperor***[19] which still rules the roost with regard to the interpretation of Section 27 of the Evident Act as follows;

> **"**[10]. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. ……..**"**

The phrase **"**distinctly relates to the fact discovered**"** in Section 27 of the Evidence Act is the foundational aspect of this provision. This phrase refers to that part of the information supplied by the accused which is the driver and immediate cause of the discovery. If a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of the truth of that part of the information which was the clear, immediate and proximate cause of the discovery.

(iii) Bearing in mind the principles so enunciated, we now examine Exhibit 5 recorded by the I.O. in the presence of two witnesses, P.W.15 and P.W.16. In his Disclosure, the appellant claims to have washed the insoles of the shoes, M.O.VIII and washed the white jumper worn by him on the night of the incident

[19] AIR 1947 PC 67

which he could show the witness. P.W.43 has strangely however recovered a blood stained white Jumper and blood stained insoles allegedly in pursuance to the appellant's disclosure vide Exhibit 7. M.O.X a gray Jumper was not even one of the articles seized on the basis of Exhibit 5 as deposed by P.W.15. The appellant is alleged to have revealed in Exhibit 5 that the shoes, M.O.VIII were kept separately and the washed insoles kept elsewhere but the Prosecution evidence indicates that the shoes were seized with the insoles, in contradiction to the Disclosure Statement thereby making the recovery suspect.

(iv) P.W.15 and P.W.16 under cross-examination admitted that articles under Exhibit 7, dated 17-04-2016, were seized on the same date, i.e., 17-04-2016 at 1515 hours and recovery of the money was also made on the same date vide Exhibit 6. The Disclosure Statement Exhibit 5, was recorded on 18-04-2016, hence it emerges that recovery of articles reflected in Exhibit 7 were made prior to the disclosure, which is an incongruous proposition and razes the Prosecution case to the ground. The learned Public Prosecutor sought to brush aside these anomalies as minor discrepancies, however, these discrepancies strike at the root of the Prosecution case since their attempt is to link the crime to the appellant on the anvil of Exhibit 5. In such a circumstance, the investigation is required to be faultless. Apart from violation of the legal provision the seizures being inconsistent with the statement in Exhibit 5 are, therefore, prone to be viewed with suspicion. The evidence of P.W.5 fortifies the statement of P.W.15 and P.W.16 and lends further doubt to the seizures of even having been made in the presence of P.W.15 and P.W.16. According to

P.W.5, the victim's body was forwarded to Gangtok for post-mortem while he was at the place of occurrence. This statement obtains credence from Exhibit 3 the Medico-Legal Autopsy Report of the victim which records that the body was received by the STNM Hospital, Gangtok, on 17-04-2016 at 6.45 p.m. After forwarding the body, he along with P.W.43 went to the house of the appellant for investigation after getting the keys from the father of the appellant, which were returned only on the next day. They brought a few clothes of the appellant from his house and came to the Police Station. His evidence thus leads to the conclusion that he accompanied P.W.43 to the house of the appellant on 17-04-2016 itself. P.W.5 surprisingly is not even a witness to the articles seized vide Exhibit 7 and the I.O. has not explained this circumstance in his testimony nor has he disclosed as to what became of the clothes taken by him when P.W.5 had accompanied him to the appellant's house. It would be profitable to notice at this point that in Question No.9 put to the appellant in his Section 313 Cr.P.C. statement he has shed light on how the blood stains came on his washed clothes. The Question and Answers are extracted hereinbelow for convenience;

> **"**Q. No.9 PW-15 has further stated that on the same day the police also seized a pair of blood stained shoes (MO-VIII), a jeans pant (MO-IX) and a gray coloured jumper (MO-X) from your room in his presence vide Exhibit-7.
>
> What have you to say?
>
> Ans:- These clothes and the money was taken by the Police on 17.4.2016 from my house and brought to the Police Station. Thereafter, they again rubbed blood on my clean clothes and later went and placed the clothes and money in my house in various places. On 18.4.2016 the Police then took me to my house and the money was taken out by the Police and my

clothes were also taken out by the Police from Tikjuk P.S.**"**

(v) Learned Public Prosecutor while relying on ***Paltan Mallah*** *(supra)* had contended that evidence obtained under illegal search is not completely excluded unless it has caused serious prejudice to the accused. The facts and circumstances in the said case are distinguishable from the one at hand. In ***Paltan Mallah*** *(supra)* the Prosecution had conducted search of the residence of A1 and recovered certain articles, however, the recovery was not based on Section 27 of the Evidence Act. Once the Prosecution bases its case on Section 27 of the Evidence Act then necessarily the procedure laid down therein must be followed to the hilt, as the liberty of an individual is at stake.

(vi) P.W.25 the Junior Scientific Officer examined the Material Objects, i.e., one white coloured Jumper, M.O.XXVI; one blue coloured Jeans pant, M.O.IX; one brown coloured V-shaped, M.O.X (in the impugned Judgment M.O.X is indicated as gray coloured Jumper); blood sample of victim, M.O.XXVII and blood sample of the accused, M.O.XXX. As providence would have, the blood sample of both the appellant and the deceased belonged to the blood group 'AB'. Despite the similarity in the blood group of the victim and the deceased, no effort was made during investigation to establish by further scientific evidence as to whose blood was found on the clothes and shoes of the appellant. Blood was not detected on the brown V-shaped vest, white Jumper and Jeans. Pausing here it requires to be reiterated that even forensic tests did not detect blood on these articles, but the I.O. contrarily has recorded in Exhibit 7 that the articles were blood stained. It is relevant to recapitulate that the appellant in Exhibit 5 had stated

that the insoles of his shoes were washed but strangely appears to have contained blood stains when forwarded for forensic test. It is not the Prosecution case that there were blood stained foot prints at the site of the crime or on the road where the alleged incident took place. Thus, even the forensic evidence is of no assistance to the Prosecution case.

(vii) P.W.3 has stated that on the date of the accident she handed over Rs.1,00,000/- (Rupees one lakh) only, to the victim. Recovery of cash amounting to Rs.71,000/- (Rupees seventy one thousand) only, was made by the Police from the place of concealment as disclosed by the appellant, but no finger prints were lifted from the currency notes to establish ownership of the currency notes, followed by robbery and thereby change in ownership. No investigation ensued to prove the fate of the remaining Rs.29,000/- (Rupees twenty nine thousand) only, out of the said Rs.1,00,000/- (Rupees one lakh) only. The added anomaly is that P.W.3 had evidently handed over Rs.1,00,000/- (Rupees one lakh) only, in denominations of Rs.500/- (Rupees five hundred) only, but recovery was of denominations in Rs.1,000/- (Rupees one thousand) only. The vehement argument of the learned Public Prosecutor that the burden was cast on the appellant to establish how he came to be in possession of Rs.71,000/- (Rupees seventy one thousand) only, in our considered opinion, is against all established legal tenets as the reverse burden under Section 106 of the Evidence Act would fall into place only once the Prosecution succeeds in establishing by plausible evidence its allegations against the appellant. The Prosecution, as can be seen from the discussions above, has failed to discharge its obligation.

The motive of the appellant to do away with the victim has not been established nor was it established that they had inimical relations. As pointed out by learned counsel for the appellant if greed was the factor that motivated him, then it needs to be mulled over as to why a sum of Rs.11,000/- (Rupees eleven thousand) only, said to be found in the victim's possession at the place of occurrence as also his gold ring were not taken by the appellant.

(viii) P.W.39 the Doctor who examined the victim has merely opined that the approximate time since death was 12 to 24 hours and the cause of death, to the best of his knowledge and belief, was due to *intracranial haemorrhage with profuse loss of blood, with fracture of skull as a result of blunt force trauma*. No opinion was expressed on how the blunt force trauma was inflicted on the victim. An expert deposing before the Court plays a crucial role as the entire purpose of opinion evidence is to aid the Court in forming its opinion on questions concerning science, medical aspects, etc. Here, P.W.39 was not able to opine as to whether the death was homicidal or accidental and he was disadvantaged by not having been shown M.O.I the alleged weapon of offence. The wounds on the person of the victim and the fracture of his skull could well have been the consequence of having been struck by a stone (M.O.I) or due to a fall from the height of the road, but the Prosecution case cannot be based on conjectures.

(ix) Investigation has failed to explain as to how the ligature mark (5 cm width) appeared over the neck of the deceased detected by P.W.39 was inflicted. P.W.39 has opined as follows;

> "11. Ligature mark (5 cm width) placed over the neck and running backwards situated just over

> and above the thyroid. The left ligature is placed 3.9 cm below left ear and right ligature is placed 3.8 cm below right ear. The ligature encircles the neck and does not extend upwards. Multiple small ligature marks (2 in numbers) each measuring 0.5 cm and is placed within the broad ligature mark of 5 cm. The ligature mark excludes possibility of hanging."

He, however, was not shown any article which could have caused the ligature mark neither has any such object been exhibited by the Prosecution before the learned trial Court to explain the mark.

12(i). So far as extra-judicial confession of the appellant to P.W.37 is concerned, in his evidence-in-chief, P.W.37 stated that the appellant narrated to him in the Nepali language, which roughly translated into English, reads as follows;

> *I pushed the bike from behind and it toppled over. After that I took a stone and hit him and killed him. To make it appear like an accident I made it look like the bike had fallen down, took the money and came home.*

(ii) Under cross-examination, it was elicited from him that this statement *supra* finds no place in his Section 161 Cr.P.C. statement recorded by the I.O. during the course of investigation. P.W.37 also sought to clarify that although the 'wife' of the appellant was not present when his statement was being recorded her presence had been wrongly mentioned, when in fact it was the 'uncle' of the appellant who was present. The witness sought to rectify this error. In light of the above contradictions, it would be a risky proposition to rely on the deposition of this witness as his evidence before the Court appears to be an effort to improve the Prosecution case by insertion of concocted statements which had earlier not been made by him. According to P.W.36, the appellant had told him that he had returned home with the victim and that now he would be dragged into the matter, but he had also added

that after they returned together he had gone home while the victim had proceeded ahead towards 13th Mile. If that be the case, then the statement of the appellant made to the witness must be appreciated in its entirety and the Prosecution cannot pick and choose sentences which suit them and discard the portions unsavoury to the Prosecution.

(iii) Although the learned trial Court observed that the accident could not have occurred in view of the absence of mechanical failure of the bike, however, the fact that the appellant was speeding and went off the road also cannot be discounted these are therefore only conjectures and surmises not evidence. The Motor Vehicle Inspector (Technical), P.W.26 was not in a position to state whether the victim was speeding or not. Moreover, finger prints were not lifted by the I.O. from the motorbike to substantiate the Prosecution version that the appellant was riding pillion when the victim was driving at the time of the incident. The statements of P.W.5 and P.W.43 that the appellant attempted to escape from the custody of the Police have to be taken with a pinch of salt as records reveal that no such effort was made by him during the entire intervening night after the alleged incident, although he was allegedly in possession of the stolen amount of Rs.71,000/- (Rupees seventy one thousand) only, and could well have made good his escape.

(iv) That, having been said the delay in forwarding the blood sample of the victim to P.W.25, the Junior Scientific Officer, stationed at Ranipool, East District of Sikkim, on 08-05-2016, when the incident had occurred on the intervening night of 16-04-2016

and 17-04-2016, has not been explained by the Prosecution and adds to the doubts about the authenticity of the Prosecution case.

(v) Despite there being strong suspicion against the appellant with regard to him having a hand in the death of the appellant, suspicion however strong cannot replace certainty. Moral conviction cannot be resorted to in a criminal case as the golden rule is proof of case beyond a reasonable doubt.

13. In the end result, we find that the Prosecution has not only failed to establish the last seen together theory, but also the motive of the appellant for committing the crime. On pain of repetition, it is reiterated that the seizure of the articles allegedly based on Exhibit 5 is fraught with inconsistencies. In the absence of cogent, consistent and plausible evidence furnished by the Prosecution, there is every possibility of a false implication of the appellant.

14. Consequently, the conviction and sentence imposed on the appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

15. The appellant is acquitted of the charge under Sections 302, 392 and 427 of the IPC.

16. Appeal allowed.

17. Appellant be released from custody forthwith unless required to be detained in connection with any other case.

18. Fine, if any, deposited by the appellant in terms of the impugned Order on Sentence, be reimbursed to him.

19. No order as to costs.

20. Copy of this Judgment be transmitted to the learned trial Court, for information, along with its records and a copy be sent forthwith to the Jail Authorities as also e-mailed.

(Meenakshi Madan Rai)
Judge
14-12-2021

(Biswanath Somadder)
Chief Justice
14-12-2021

Approved for reporting : **Yes**

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