THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 14 OF 2003

In the matter of an appeal under section 374 of the Code of Criminal Procedure.

Arjun Rai,
S/o Shri Kharga Bdr. Rai,
R/o 10th Mile, Bhusuk,
P.O. & P.S. Ranipool,
East Sikkim .... **Appellant**

VERSUS

State of Sikkim .... **Respondent**

For the appellant : Shri B. Sharma with N. Lepcha, Advocates.

For the respondent: Shri J. B. Pradhan, Additional Public Prosecutor.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 1st April, 2004.

J U D G M E N T

R. K. PATRA, C.J.

This appeal is directed against the judgment dated 8.7.2003 and order dated 16.7.2003 passed by the learned Sessions Judge (Special Division-II) Sikkim in Criminal Case no. 3 of 2002 convicting the appellant under section 302 IPC and sentencing him to undergo imprisonment for life and to pay a fine of Rs.500/- with a default clause of sentence.

2. The prosecution story emerging from the FIR and the evidence on record runs as follows:-

At the material time, the appellant was working as driver at Dikchu under National Hydel Project Corporation. Yaon Subba (hereinafter referred to as the deceased) was a writer constable and was posted as in-charge of Bhusuk out-post. The deceased was living in the same house where the out-post was being housed. The father of the appellant was the owner of the said house. On 2.7.2001 at about 5.30 p.m. the appellant came to the out-post and had some heated discussion with the deceased. PW1, a constable who was on duty in the said out-post apprehended that the discussions might result in a fight and he was trying to pacify them. At that moment PW1 was informed that there was a telephone call to him from Ranipool Police Station in the house of the Vice-President of East District Panchayat. He accordingly rushed to attend the telephone call. When he returned to the out-post after attending the telephone, he saw the appellant standing on the door-step of the room with a bamphok in his hand and the deceased was lying dead on the floor of the room in a pool of blood. On receipt of information from PW1 about the incident the officer-in-charge of Ranipool police station arrived at the spot. PW1 thereafter filed the FIR before him.

3. In order to bring home the charge against the appellant the prosecution examined 19 witnesses. Besides the oral evidence, prosecution also pressed into service the judicial confession (exhibit 7) made by the appellant before the Judicial Magistrate PW18. The appellant examined his brother as DW1 to prove that at the relevant time he was at Dikchu.

4. The plea of the appellant was one of denial. With regard to the confessional statement his plea was that as he was tortured by the investigating officer he had to make it.

5. There is no eye-witness to the occurrence. The learned Sessions Judge relying mainly on PW1 coupled with the evidence of PWs 4, 5, 7, 10, 11, 13 and 16 held the appellant guilty of the charge. He however did not take into account the confessional statement but no reason has been ascribed by him in the judgment for its exclusion .

6. At this stage, we may have a resume of the entire evidence led by the prosecution. PW1 was a constable and at the time of occurrence he was at the out-post. He deposed that at about 5.30 p.m. the appellant came to the out-post and had some heated discussion with the deceased. Apprehending that the discussion might result in a fight he tried to calm them down. At that time, he got message that there was a telephone call to him from Ranipool police station in the house of the Vice-President of East District

Panchayat. He accordingly went to attend the telephone call. On return to the out-post after attending the telephone call, he saw the appellant standing at the door-step of the room holding a bamphok and the deceased was lying dead on the floor of the room in a pool of blood. He further deposed that the appellant confessed before him to have killed the deceased. We are not inclined to accept this part of his evidence because it is hit by section 25 of the Evidence Act. In his cross-examination, he admitted that he did not see as to who actually assaulted the deceased to death. It was brought out in his evidence that the wife of the appellant was also residing in the ground floor of the same house where the out-post was functioning. He also stated that the subject-matter of quarrel centred around the wife of the appellant. He further stated that the place where he attended the telephone call was at a distance of 10 minutes walk from the out-post. PWs 2, 3 and 6 were merely tendered by the prosecution. PW4 did not speak anything about the incident. PW5 is the brother-in-law of the appellant. His evidence is to the effect that on the date of the incident he received a telephone call from the appellant who wanted to know from his wife PW6 as to whether he could visit her. He accordingly went to her and conveyed the message. She in turn requested him to convey to the appellant that he need not visit her. PW7 is a blacksmith

who stated that he knew the father of the appellant being a co-villager. PW8 is the mother of the appellant. She stated that since 6 months prior to the incident the appellant was working as a driver at Dikchu whereas his wife PW6 was staying alone in their own house at Bhusuk. PW9 is a witness to the inquest of the dead body of the deceased and seizure of alleged weapon of offence, bamphok exhibit P1. PWs 10 and 11 are the seizure witnesses to the wearing clothes (one pant and one vest) of the appellant. PWs 12 and 17 were the seizure witnesses to one scabbard of bamphok. PW13 is the doctor who conducted the post-mortem examination of the deceased. PW14 was declared hostile by the prosecution. PWs 15 and 16 were examined to say that they had to stay at out-post to help PW1 after the incident. PW18 is the Judicial Magistrate who recorded the confessional statement made by the appellant. PW19 is the investigating officer.

7. It is not disputed at the bar that the deceased had homicidal death. PW13, the doctor who conducted autopsy on the dead body of the deceased found the following ante-mortem injuries:-

1. Multiple incised injuries left ear portion upto the left cheek.
2. Multiple incised injuries on the back portion of the neck.
3. Incised wound 3 x 2 cms. on the left elbow.
4. Incised wound 7 x 5 cms. on the left arm pit.

5. Incised wound (gaping) 5 x $1^1/_2$ cms. on left scapular region.
6. Incised wound middle of the right hand.
7. Lacerated injury on the back portion of the neck.

According to him, the cause of death was shock as a result of haemorrhage due to ante-mortem multiple injuries caused by sharp cutting weapon.

8. Shri Sharma, learned counsel for the appellant firstly contended that the detention of the appellant was illegal *inasmuch* as although he was arrested on 2.7.2001 and was produced before the learned Magistrate on 7.7.2001. On perusal of the lower court records, we find that the above submission made by the learned counsel is based on error of record. As a matter of fact, the appellant was produced before the Magistrate within 24 hours of his arrest i.e. on 3.7.2001.

9. Shri Sharma, learned counsel appearing for the appellant realising that this court might consider the confessional statement, made a two-pronged attack against its admission into evidence. (i) The learned Magistrate did not observe the preliminaries as required under sub-section 2 of section 164 Cr.P.C. before recording the confession and because of such non-compliance, the confession is not admissible (ii) On account of administration of oath to the appellant the confessional statement is inadmissible.

So far as the first ground of attack is concerned, on perusal of the records it is found that the appellant was produced before the learned Magistrate on 12.7.2001 at about 11.30 a.m. for recording his confession. The learned Magistrate placed him under the custody of her peon and thereafter put certain questions to ascertain as to whether he was subjected to any sort of threat or compulsion. Thereafter she gave him 5 days' time for reflection and remanded him to judicial custody with a direction that he should be produced on 17.7.2001. Pursuant to the above direction the appellant was produced again before her on 17.7.2001 who without putting any further questions administered oath to him and recorded his statement. We need not examine the validity of this ground because there is substance in the second ground of objection taken by the learned counsel.

It is evident from the confessional statement (exhibit P8) that the learned Magistrate administered oath to the appellant before his statement was recorded. The question as to what is the effect of administering oath to an accused before his confessional statement is recorded came up for consideration before a Division Bench of the Lahore High Court in Karam Ilahi vs. Emperor (AIR 1947 Lahore 92). Considering section 164 of the old code and section 5 of the Indian Oaths Act, 1873 the Bench held that a person

becomes an accused soon after his arrest by the police for an offence which forms the subject-matter of investigation and a confession made by him in the course of an investigation comes within the ambit of section 5 of the Indian Oaths Act, 1873 and the Magistrate acted illegally in recording such a confession on solemn affirmation. The Bench however held such confession is admissible in evidence in absence of any proof of occasioning mis-courage of justice.

The same question came up for consideration before the Division Bench of the Karnataka High Court in Philips vs. State of Karnataka 1980 Criminal Law Journal 171. In that case the Magistrate administered oath on the accused while recording the confessional statement. On reading of section 164(4) and section 281 Cr.P.C. the Bench observed as follows :

> "It is clear from the above that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate. When this specific provision is made, the other provisions of the Indian Evidence Act etc., regarding recording of statements will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of Section 281, Cr.P.C. ..... Therefore, recording of Ex. P.4 by P.W.1 confessional statement by the Magistrate after administering oath to the accused, in not as provided by Section 281 Cr.P.C. and as such Ex.P.4 loses its evidentiary value. Moreover, the object behind this provision viz. S.164 (4) Cr.P.C. is clear on the face of it. The concerned accused should not

> be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that he would be incurring the wrath of law."

The very question came up for consideration before a Division Bench of the Gauhati High Court in Akanman Bora vs. State of Assam, 1988 Criminal Law Journal 573. After referring to sub-section 5 of section 164 Cr.P.C. in paragraph 6 of the judgment, the Bench observed as follows:-

> "Confession should be recorded in the manner provided for statement of an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character in so far the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Art. 20(3) of the Constitution of India read with sub-sec.(5) of S.164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence."

10. May it be stated that sub-section 1 of section 164 Cr.P.C. empowers a Metropolitan Magistrate or a Judicial Magistrate, whether or not he has jurisdiction in the case, to record any confession or statement made to him in the course of an investigation or at any time afterwards before the commencement of any inquiry or trial. Sub-section 2

requires that before recording any confessional statement the Magistrate to explain to the person making confession that he is not bound to make any confession and that, if he does so, it may be used against him. The said provision further mandates the Magistrate not to record any such confession unless, he is satisfied that it is being made voluntarily. Sub-section 4 states that such confession shall be recorded in the manner provided in section 281 Cr.P.C. and the Magistrate has to append a note of memorandum at the foot of the confession. Sub-section 5 has direct bearing on the point at issue. A close reading of it would indicate that any statement <u>other than a confession</u> made under sub-section 1 shall be recorded in the manner prescribed for recording of evidence and the Magistrate shall have the power to administer oath to such person. Therefore the expression "statement recorded other than a confession" provides key to the question. It means that if he records the statement of a person other than the accused he shall have the power to administer oath to him but if it is a case of recording a confession, he shall not administer oath to such person (accused). At this stage, we may have a look at sub-section 2 of section 4 of the Oaths Act, 1969 which states *inter alia* that nothing in the said section shall render it lawful to administer, in a criminal proceeding oath or affirmation to the accused person unless he is examined as

a witness for the defence. Therefore recording of confession of the accused by administering oath or affirmation to him is illegal and therefore is inadmissible.

In the case at hand, the learned Magistrate did administer oath to the appellant before she recorded his confessional statement. For the reasons foregoing, we have no hesitation to hold that the confessional statement (exhibit P8) is inadmissible and the same is not available to be considered.

11. From the analysis of evidence made in the preceding paragraph no.6, it may be seen that there is no eye-witness to the occurrence and the entire case rests on circumstances. PW1 is the star witness in this regard. He was the constable at Bhusuk out-post. His evidence is to the effect that on the day of the incident at about 5.30 p.m. the appellant came and had discussion with the deceased. The subject-matter of discussion centred around the wife of the appellant. The discussion between them appeared to be intense and PW1 apprehended that it might result in fight and he tried to cool them down. At that moment, he got a message that there was a telephone call for him from Ranipool police station. He accordingly went to attend the telephone call. On return he found the deceased was lying dead in a pool of blood and the appellant was standing at the door-step of the room holding a bamphok. In his cross-

examination, it was brought out that the place where he had to attend the telephone call was located at a distance which took 10 minutes' time on walk. From the above, it follows that within 10 minutes of departure of PW1 from the out-post the deceased was assaulted to death. Who could be the assailant? The answer is obvious: it was the appellant and appellant alone. There is no iota of evidence or any suggestion to PW1 that there was any other person present before he left the out-post to attend the telephone call. Before he left the out-post, he had seen the appellant and the deceased engaged in discussion and on return he found the appellant standing at the door-step of the room by holding the bamphok and the deceased lying dead in a pool of blood. There is no reason as to why PW1 would falsely implicate the appellant. The investigation officer PW19 arrived at the spot soon after receipt of the information from PW1 and took the appellant to the police station where his wearing apparels (grey pant exhibit II and coffee colour vest exhibit III) were seized in the presence of PWs 10 and 11 (vide seizure list exhibit P4). The serologist's report (exhibit P12) indicates that the 'cuttings' of the pant and the vest contained human blood. Taking into consideration the totality of the above circumstances, we have no hesitation to hold that it was the appellant who assaulted the deceased to death.

12. In the result, we do not find any merit in this appeal which is accordingly dismissed.

(R. K. Patra)
Chief Justice
01.04.2004

I agree.

(N. Surjamani Singh)
Judge
01.04.2004

Dictation taken
&
typed by me

Dipak Saha