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THE HIGH COURT OF SIKKIM : GANGTOK

Criminal Appeal No. 15 of 2003

In the matter of an appeal against conviction and sentence passed by Tashi Wangdi, Sessions Judge, South and West Districts of Sikkim at Namchi vide judgment and order dated 24.08.2001 in Criminal Case No.2 of 2000.

1. Dawa Tshering Tamang,
S/O Bir Bahadur Tamang,
R/O 11th Mile,
Tokal Bermiok, South Sikkim.
2. Arun Kumar Subba,
S/O Ojahang Subba,
R/O Tapreyzong Doko Busty,
Nepal No.5,
At present 11th Mile,
Tokal Bermiok, South Sikkim

..... **Appellants.**

Versus

State of Sikkim **Respondent.**

For the appellants : D. R. Thapa, Advocate.
For the respondent : J. B. Pradhan, Additional
Public Prosecutor

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

**DATE OF HEARING : 19TH MAY, 2004.
DATE OF ORDER : 24TH MAY, 2004.**

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ORDER**R.K.PATRA, CJ.**

This appeal filed on behalf of Dawa Tshering Tamang and Arun Kumar Subba is directed against the judgment and order dated 24.8.2001 passed by the learned Sessions Judge (South & West) Sikkim at Namchi in Criminal Case No.2 of 2000 convicting them under section 302/34 IPC and sentencing each to undergo r.i. for life and to pay a fine of Rs.5000/- with a defaulting clause of imprisonment.

It may be noted that the appellants and Prem Kumar Rai (hereinafter referred to as the accused no.3) were tried together in the aforesaid trial and each of them was convicted under section 302/34 IPC by the impugned judgment dated 24.8.2001. The said accused no.3 filed Criminal Appeal No.17 of 2000 in this Court challenging his conviction and sentence passed in the case. This Court by judgment dated 4.6.2002 set aside his conviction and sentence under section 302/34 IPC and acquitted him of the charges.

2. The case of the prosecution is that, appellant no.1 is a resident of 11th mile Tokal Bermiok in South Sikkim. Appellant no.2 who hails from Nepal had come to Sikkim 5 to 6 years ago of the year of occurrence and he had been going around sawing timber. In the year of occurrence, the appellant no.2 brought accused no.3 from Nepal to assist him in sawing timber. On 15.11.1999, at about 7.30 p.m., the appellants and accused no.3 came to the house of Dhan Bahadur Tamang (PW1) in village

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Bermiok 11th Mile and took tea.. After some time, Bhim Mangar (hereinafter referred to as the deceased) came and had heated discussion with the appellants and accused no.3 over payment of lease amount to the landlord for cultivation of ginger. Thereafter, the appellants as well as accused no.3 left PW1's house. After about 10 to 15 minutes, they all came again and had discussions with the deceased. After some time they all left the place leaving the deceased in the house of PW1. The deceased also left PW1's house later after they departed. In the same evening at 11.00 p.m. Lallmaya Tamang (PW2) (sister of PW1) and Kalpana (PW8) (daughter of the deceased) came and informed PW1 that the deceased had been assaulted by someone and he had been lying in the ginger field of PW2. They requested PW1 to go to the spot and see the injured, but he declined to go on health ground. The police however arrived at the spot and took the deceased to Singtam hospital in the same night. He was later referred to STNM hospital, Gangtok where he succumbed to injuries on 17.11.1999.

3. The prosecution examined as many as 29 witnesses to bring home the charge against the appellants under section 302/34 IPC.

4. The plea of the appellants was one of denial.

5. There is no eye witness to the occurrence. The learned Sessions Judge relying on the evidence of PW1, PW2, PW6 and PW8 held that chain of circumstances has been made out against

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the appellants and accused no.3 and convicted them under section 302/34 IPC.

6. There is no dispute that the deceased had a homicidal death. The doctor (PW 28) who conducted the post mortem examination on the dead body of the deceased had found the following ante mortem injuries :-

1. Surgical Suture (8 stitches) on the forehead.
 2. Lacerated injuries 2 x 1 c.m. left temporal region.
 3. Lacerated injuries 2 x 1 c.m. left ear.
- b. Head and neck :-
1. fracture of left parietal bone.
 2. extradural sub-dural hemorrhages present
 3. laceration of left temporal region of the brain.
- c. Chest (Thorax) All the organs were healthy and intact.
- d. Abdomen : All the organs were healthy and intact.

According to him, the head injury produced by blunt forces was the cause of death.

7. Prosecution tried to establish that appellant no.2 and accused No.3 made extra judicial confession before PW6. The witness however in his cross-examination admitted that the accused persons did not make any confession before him. The conviction of the appellants was solely passed on circumstantial evidence.

In order to find the accused guilty on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be firmly established. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. The circumstances taken cumulatively should form a complete chain and all the

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links in the chain of events must be established beyond reasonable doubt.

8. Let us now examine the evidence to find out if the prosecution has been able to establish the chain of circumstances beyond reasonable doubt. The evidence of PW1 shows that in the evening of the date of occurrence at about 7.30 p.m., the appellants and accused no.3 came to his house and after some time, the deceased came. There was heated discussion over non-payment of dues of the landlord by them and after some time they all left the house leaving the deceased behind. After some time they again came and had discussion with the deceased. Some time thereafter, they left leaving the deceased with PW1. The deceased also left the house of PW1 later. PW1 stated that at about 11.00 p.m. his sister PW2 and Kalpana PW8 (daughter of the deceased) came and informed him that the deceased was lying injured in the ginger field of PW2. The evidence of PW1 thus shows that the accused persons first left his house and thereafter the deceased departed. There is no evidence that all of them together met at any place. The ginger field where the deceased was lying injured was at a distance of 3/4 miles from the house of PW1. PW2, sister of PW1 deposed that the deceased came to his house around 8.00 p.m. of the date of occurrence and asked for a lamp. While preparing the bottle lamp, the deceased asked PW2 if the accused persons were going on the road. PW2 replied that it might be. Thereafter, the bottle lamp was handed over by her nephew PW5 to the deceased who

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took it and went away towards the same direction where those persons were going. After some time, PW5 hearing some groaning sound went out and found the deceased lying injured in the ginger field. After about 1 hour the police came and removed the deceased to the hospital. Sancha Bahadur Tamang is PW6. He stated that at about 11.00 p.m. of the date of occurrence, appellant No.2 and accused No.3 came and knocked at his door and requested him to allow them to spend the night in his house. He accepted their request and allowed them to sleep in his house. In the morning, after taking tea, they left for the jungle for sawing timber. Kalpana, PW8 is the daughter of the deceased. She stated that while she was watching television in the house of one Phur Tshering, PW2 came and informed her that her father was lying injured in the ginger field. On being informed, she went to the spot and found him lying injured. When he was questioned as to what had happened, the deceased could not speak anything. Save and except the evidence of the aforesaid 4 PWs, the evidence of other witnesses is of little assistance to the prosecution.

9. From the aforesaid discussion of the evidence of PWs 1, 2, 6 and 8 it is quite clear that none of them had seen the accused persons and the deceased together. From their evidence it cannot be held that the appellants and the accused no.3 assaulted the deceased. The chain of events is not complete and there has been missing links everywhere. Suspicion, however grave it may be, cannot take the place of proof. In absence of any other evidence on record we have no hesitation to hold that the prosecution has

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not been able to prove its case beyond reasonable doubt. Hence, the appellants are entitled to be acquitted.

9. For the foregoing reasons, the conviction and sentence passed by the learned Sessions Judge against the appellants under section 302/34 IPC are hereby set aside. They are acquitted of the charge. They may be set at liberty forthwith if their detention is not required in any other case.

10. In the result, the appeal is allowed.


(R. K. Patra)
Chief Justice
24.05.2004

I agree.


(N. S. Singh)
Judge
24.05.2004

Dictation taken
&
typed by me
Aunku T. Lepcha