

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 10.04.2019

**DIVISION BENCH : THE HON'BLE MR. JUSTICE VIJAI KUMAR BIST, JUDGE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

Crl. Appeal No.16 of 2018

Appellant : State of Sikkim

versus

Respondent : Kamal Subba,
Philim, Pastar Zilla,
Ward No. 08, Nepal.
Present address:
Lower Samdong,
East Sikkim.

Application under Section 378 of the Code of Criminal Procedure, 1973

Appearance

Mr. J.B. Pradhan, Public Prosecutor, Mr. Karma Thinlay Namgyal with Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors and Mr. S. K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors for the State/Appellant.

Mr. Tashi R. Barfungpa, Advocate (Legal Aid Counsel) with Mr. Ugang Lepcha, Advocate for the Respondent-Accused/Opposite Party.

J U D G M E N T

Meenakshi Madan Rai, J

1. Dissatisfied with the Judgment of acquittal, the State/Appellant (*hereinafter the "Appellant"*) is before this Court praying that the impugned Judgment dated 30.06.2017 of the learned Sessions Judge, East at Gangtok in Sessions

Trial Case No. 28 of 2015 (State vs. Kamal Subba), be set aside. The learned trial Court had acquitted the Respondent/Accused (*hereinafter the "accused"*) of the charge under Section 304 of the Indian Penal Code, 1860 (*hereinafter the "IPC"*).

2. Forwarding his arguments for the State, Learned Additional Public Prosecutor would submit that the evidence of P.W.1 Dhan Kumari Rai, wife of the deceased Bhakta Bahadur Rai, reveals that the accused had in fact two days prior to the date of the incident gone to the house of the deceased and threatened to kill him. It was also in her evidence that the accused used to quarrel and fight with her husband often. That, the investigation of P.W.14, S.I. Tshering D. Bhutia, the Investigating Officer (*for short "I.O."*) clearly indicates that a scuffle had ensued between the accused and the deceased en route to their house on which the accused had pushed the deceased off the road into the culvert below resulting in his death. That, the evidence of P.W.9, Police Inspector, Sonam Wangdi Bhutia, was duly supported by the evidence of P.W.8, Assistant Sub Inspector, C.D. Subba and P.W.14, I.O. concluding that the accused was responsible for the death of the deceased. That, the evidence of P.W.12, Raj Bahadur Subba and P.W.13, Dhan Maya Subba, who are husband and wife, reveals that the accused had helped them plough their field for paddy cultivation on the relevant day. That, in the evening the deceased and accused came to the residence of

P.W.12 where they shared food and some alcohol. Thereafter both the deceased and the accused left his residence together on the relevant night. P.W.13 has supported the evidence of P.W.12. The next morning the body of the deceased was discovered at the "kholcha" (culvert). That, the "last seen theory" comes into play here as P.W.12 and P.W.13 have both deposed that the accused and the deceased left their house together. That, the Statement of the accused under Section 164 of the Code of Criminal Procedure, 1973 (*for short "Cr.P.C."*) reveals that he was responsible for the death of the deceased. Relying on the provisions of Section 106 of the Indian Evidence Act, 1872 (*for short "Evidence Act"*) it was contended that the burden of proving his whereabouts at the relevant time as per this provision lies on the accused which he has failed to discharge, hence the matter ought not to have ended in an acquittal. That, in view of the arguments put forth, the Judgment of acquittal be set aside.

3. Learned Counsel for the accused would submit that the Appellant in the first instance has failed to prove its case beyond a reasonable doubt. No proof whatsoever emanates from the evidence of the Prosecution Witnesses that the accused was responsible for the death of the deceased. That, reliance on the evidence of P.W.8 serves no purpose as it is his conclusion based on investigation done by him after the U.D. Case was endorsed to him but the conclusion has been arrived at without any proof whatsoever.

That, invoking Section 106 of the Evidence Act is of no assistance to the Appellant as in the first instance the Prosecution is required to prove its case beyond a reasonable doubt. That, Statement recorded under Section 164 Cr.P.C. can only be utilized for the purpose of corroboration and the evidence of none of the witnesses throws light on the Prosecution case. It concludes that the Judgment of the learned trial Court warrants no interference as there can be no moral conviction and suspicion cannot take the place of proof, besides which no motive has been imputed on the accused.

4. We have carefully heard the rival contentions placed by Learned Counsel *in extenso* and given it due consideration. We have also carefully perused all documents on record and the impugned Judgment.

5. In order to gauge the correct circumstances it would be essential to briefly advert to the facts of the case.

6. On 14.07.2015, P.W.8 lodged FIR Exhibit 11, to the effect that during the investigation of Singtam P.S. U.D. Case No. 18 of 2015, dated 12.07.2015, under Section 174 of the Cr.P.C. pertaining to the death of one Bhakta Bahadur Rai, it was revealed that the deceased had been ploughing the field of Raj Bahadur Subba (P.W.12) on 11.07.2015 and 12.07.2015. After completing the day's work he went to the house of P.W.12 along with the accused and drank locally

brewed alcohol. Thereafter at around 21:30 Hrs, both the deceased and the accused left together for their respective houses in a drunken state. On the way back a scuffle ensued between the two of them where the accused pushed the deceased from the edge of the road to the culvert below resulting in the death of Bhakta Bahadur Rai. Based on this complaint, Singtam P.S. Case No. 51 of 2015, dated 14.07.2015, under Section 304 of the IPC was registered and endorsed to the I.O. P.W.14 for investigation. The I.O. during investigation reached the same conclusion as P.W.8 upon which Charge-Sheet came to be filed against the accused under Section 304 IPC read with Section 14 of the Foreigner's Act, 1946. The learned trial Court framed charge against the accused under Section 304 IPC to which he entered a plea of "not guilty," consequent upon which fourteen Prosecution Witnesses were examined. The accused was afforded an opportunity to explain the circumstances appearing against him in the evidence as provided by Section 313 Cr.P.C. to which he responded that he was unaware of the incident and that he was innocent. The learned trial Court considered all evidence on record and reached the finding of innocence of the accused and acquitted him of the offence charged with, which is thus being assailed herein.

7. On careful perusal of the evidence of the Prosecution Witnesses it is evident that only P.W.1, the wife of the deceased, has tried to implicate the accused in the

incident. Her statement is to the effect that, *"At that time, I saw the accused proceeding towards the paddy field of his brother carrying a kodali (agricultural equipment) with him. I confronted the accused with the information given to me by Kunti Babu regarding my husband having returned back from his house along with him and enquired from him about the whereabouts of my husband. The accused left the place abruptly and proceeded towards the residence of our landlord Narayan Sardar."* It is the Prosecution case that this witness had specifically stated that *"The accused had come near my house about two days before the incident in a drunken state. He was swearing that he would kill my husband. We had finished planting the paddy on that day. Two days later, the incident occurred. The accused used to quarrel and fight with my husband often."* In the first instance, it would also be relevant to notice that P.W.1 has not stated as to why her husband and the accused had recurrent quarrels and why he would threaten to kill her husband. It is apparent that she has made this allegation only because "Kunti Babu" had told her that her husband had returned on the previous evening from his house along with the accused. Merely because the accused chose not to communicate with her when she approached him with a query does not mean that he was guilty of the offence or that the offence can be foisted on him. That apart, none of the other Prosecution Witnesses have supported the Prosecution case.

8. P.W.2, Passang Lepcha, could shed no light on the incident and he also could not identify who the deceased was. P.W.3, Mitrawati Bhattarai, the wife of P.W.4, Narayan Prasad Bhattarai, has stated that she and P.W.4 came to know about the death of the deceased from P.W.12, the elder brother of the accused, on the day following the evening that the deceased had gone missing from his residence. This witness was also unable to shed light on which date exactly the deceased was missing from his house. That, the accused also had in fact come to their house i.e. of P.W.3 and P.W.4 and told them that the deceased was found lying in the "*kholcha*" (culvert) below the road at Samdong. That, upon such information, P.W.4 went to the place of occurrence to verify the matter. P.W.4 also stated that on 14.07.2015 the accused came to his residence at around 8.30 a.m. to 9 a.m. and informed him that the deceased had been missing since the previous evening. At the same time the elder brother of the accused arrived at the house of P.W.4 and reported that the dead body of the deceased was found at "*Guay Kholcha*" not far from the house of P.W.4. Thereafter he informed P.W.5, Dheraj Bhattarai, member of the Panchayat of Samdung-Kambal GPU. This evidence was duly substantiated by P.W.5 who, for his part informed the Makha Out Post about the sighting of the body at "*Guay Kholcha*" and then he went to the place of occurrence. P.W.6, Dr. Sandhya Rai, who

conducted the post mortem examination of the deceased found the following injuries;

"Post mortem examination of the deceased revealed the following:

1. There was cut injury on the scalp-Occipitoparietal region of the skull. The underlying skull was fractured. Length and depth of the cut was 2x1 inches.

2. Fracture of right humerus-upper 1/3 with displacement.

3. Fracture of left lower 1/3 femur.

4. Cut injury over right forehead measuring around 1x2 inches just above right eyebrow.

5. Cut injury 1 inch long along the line of left eyebrow."

In her opinion, the cause of death was *due to head injury (massive intra cranial haemorrhage) with multiple long bone fractures. That, such injuries could occur when a person is assaulted by a group of men, by a fall from a height and in a motor accident.* The accused was also examined by P.W.6 whereupon she found no recent or fresh injury visible externally on the person of the accused, thereby in our considered opinion this rules out a scuffle between the accused and the deceased. As is well established, the evidence of a Doctor is an opinion and from what P.W.6 has stated nothing emerges to establish that the death of the deceased was the result of a scuffle.

9. Although the Prosecution sought to rely on Section 164 Cr.P.C. Statement of the accused, it may be reiterated that while explaining the object of recording Statements under Section 164 of the Cr.P.C., the Hon'ble

Supreme Court in *R. Shaji vs. State of Kerala*¹ observed as follows;

"27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide *Jogendra Nahak v. State of Orissa [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565]* and *CCE v. Duncan Agro Industries Ltd. [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275]*)

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence."

Evidence under Section 164 Cr.P.C. is not substantial evidence, it can only be used for the purposes of corroboration.

10. P.W.8 the In-Charge, Makha Out Post sought to insert a new twist in the Prosecution case by stating under cross-examination that the accused and the deceased had entered into a scuffle over an argument of the accused having extra marital relations with the wife of the deceased. This is indeed a bolt from the blue as the I.O., P.W.14 has nowhere in her investigation corroborated the statement or indicated

¹(2013) 14 SCC 266

that her investigation also revealed such a fact. The evidence of the other Prosecution Witnesses are of no assistance for the Prosecution case.

11. So far as Section 106 of the Evidence Act is concerned, this provision is not intended to relieve any person of the duty or burden cast on them under Section 101 of the Evidence Act. Section 106 of the Evidence Act cannot be used to shift the onus. This Section applies only when the defence of the accused depends on his proving the fact established within his knowledge and of nobody else. The Prosecution has to prove its case beyond a reasonable doubt before they can take shelter under the provisions of Section 106 of the Evidence Act. In this regard, if we are to revert to the evidence of P.W.12 and P.W.13 all that they have stated is both the deceased and the accused left their residence together on the relevant evening. In the absence of investigation to prove that the deceased and accused were headed for a particular place together and this was in the knowledge of P.W.12 and P.W.13, the only possible interpretation is that they stepped out of the house together. It was stated by P.W.1, the wife of the deceased, that the accused was residing with the landlord who is referred to as "Narayan Sardar" in the village. P.W.4 is the said "Narayan Sardar," he resides in Lower Samdong and has stated that the accused used to reside with his brother in the adjoining village at Kambal, while the deceased used to reside in the

land of the witness along with his family. P.W.3 has specifically stated that the deceased who was cultivating their field was residing at Lower Samdong, while the accused was residing with his brother at Kambal. P.W.10, Yesh Raj Bhattarai, has stated that the deceased was his neighbor in the village i.e. Samdong, and the accused was also a resident of their village, under cross-examination however this evidence stood demolished as the witness has clarified that the accused was not a permanent resident of their village and he had seen him occasionally in the house of his neighbours. Although the evidence of P.W.1. that the accused was residing with "Narayan Sardar" was supported by the evidence of P.W.12, Raj Bahadur Subba and P.W.13, Dhan Maya Subba, who have stated that during the period relating to the incident the accused was residing in the house of P.W.4, P.W.4 for his part has stated otherwise as discussed *supra*. According to the I.O., P.W.14, the accused was residing at Lower Samdong one month prior to the incident. She has not clarified as to whether he was living at the same place during the time of the incident. There is thus contradictory evidence with regard to the lodgings of the accused. The investigation has not thrown any light on the distance between village Kambal and Lower Samdong or whether the two villages fall in the same route which would prompt the accused and the deceased to return home together from the house of P.W.12.

12. It is not the Prosecution case that P.W.12 and P.W.13 were aware that they continued their journey together to their respective houses together. This was for the Prosecution to have established. The "last seen theory" cannot be invoked to establish that the offence was committed by the accused since no one has witnessed them continuing their walk together. It is not denied that both were inebriated when they left the house of P.W.12 and P.W.13. In consideration of the evidence on record and the fact that the Prosecution has failed to discharge the burden cast on it, we find that the Judgment of the learned trial Court brooks no interference.

13. Appeal fails and is accordingly dismissed.

14. Accused be released from custody forthwith and discharged from his bail bonds.

15. Copy of this Judgment be sent to the learned trial Court, for information.

16. Lower Court records be remitted forthwith.

(Meenakshi Madan Rai)
Judge
 10.04.2019

(Vijai Kumar Bist)
Judge
 10.04.2019

Approved for reporting : **Yes**
 Internet : **Yes**

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