



THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

D.B. : HON'BLE MR. JUSTICE S. K. SINHA, CHIEF JUSTICE
HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Crl.A. No.13 of 2014

Convict-Appellant : Shri Chabi Kharka
aged about 31 years,
S/o Late Man Bahadur Kharka,
R/o Ghumaunay,
Samchi,
Bhutan
(At present - Rongyek Jail, East Sikkim).

versus

Respondent : State of Sikkim

Appeal under the provisions of Chapter XXIX
of Sub-Section (2) of Section 374 of the
Code of Criminal Procedure, 1973

Appearance

Mr. Sudesh Joshi, Advocate as Legal Aid Counsel
with Mr. Deepen Pradhan, Advocate for the Convict-
Appellant.

Mr. Karma Thinlay Namgyal, Senior Government
Advocate and Additional Public Prosecutor with Mrs.
Pollin Rai, Assistant Public Prosecutor for the State-
Respondent.

J U D G M E N T(21st April, 2015)

Following judgment of the Court was delivered by

Wangdi, J.


1. In this Appeal, the Appellant challenges the judgment of the Learned Sessions Judge, Special Division – I, Sikkim at Gangtok, dated 26-12-2013 in S. T. Case No.04 of 2011, by which he was convicted and sentenced for the offence under Section 302 of the Indian Penal Code, 1860 (for short “IPC”).

2(i). The prosecution case as would be material for the purpose of disposal of this Appeal, is that on 04-06-2011 at about 1205 hours, a written First Information Report (for short an “FIR”), Exhibit 1, was received by the Officer-in-Charge, Rangpo Police Station, East Sikkim, from one Ram Bahadur Basnet, P.W.1, of Duga, Rangpo, East Sikkim, stating that at around 1130 hours of the same day, he heard a scrambling noise on the terrace of his building under construction at IBM, Rangpo, Mazuwa, East Sikkim, and then one of his masons, Deepak Sarki,

P.W.2, jumped on to the ground floor from the terrace shouting "*manchey mareyo*" (a man has been killed) and when he rushed to the terrace he found the deceased, Phuchung Sarki alias Bhakta Bahadur Sarki, lying on the floor in a pool of blood and that, on enquiry, Deepak Sarki, P.W.2, told him that it was Chabi Kharka, the Appellant, who had killed the deceased.

(ii) Based on this, Rangpo Police Station Case No.17(6)2011 dated 04-06-2011 under Section 302 IPC was registered against the Appellant and taken up for investigation.

3(i). Investigation revealed that the deceased, Phuchung Sarki alias Bhakta Bahadur Sarki, and Deepak Sarki, P.W.2, were engaged as petty contractors by Ram Bahadur Basnet, P.W.1, for construction of his RCC building at IBM, Rangpo, Mazuwa, East Sikkim. They had in turn engaged the Appellant, Chabi Kharka, a Bhutanese refugee, and Shrilall Cintury, P.W.6, as their helpers for the work. On 04-06-2011, when the deceased and P.W.2 along with the Appellant were working on the first floor slab, all of a sudden the Appellant picked up a 'khukuri' (a



sharp edged weapon), M.O.I, of the deceased lying on the floor and struck the deceased on his neck. On seeing this, P.W.2 fled from the place and informed the owner of the house, P.W.1, who was at the ground floor of the building at that time. The Appellant also jumped from the first floor and fled away from the scene of crime carrying the weapon of offence in his hand.

(ii) Gopal Baraily, P.W.3, the Head Master of the Government Primary School at Jitlang, Rangpo, while returning from his duty, saw the Appellant with his body and face smeared with blood carrying a blood stained 'khukuri' in his hand going towards Mandi Bazaar, Rangpo. This was reported by him to one police constable, Khem Raj Lamichaney, P.W.5, of Rangpo Police Station whom he met just as he crossed the Appellant and both of them then rushed to the Rangpo Check Post where they found him already in custody.

(iii) The Appellant was then brought to the Rangpo Police Station with the weapon of offence, M.O.I, carried by P.W.5, which was formally seized there vide Seizure Memo Exhibit 5 in his presence.

4. On completion of the investigation, charge-sheet under Section 302 IPC was filed against the Appellant for having committed the murder of the deceased, Phuchung Sarki alias Bhakta Bahadur Sarki.

5. The Learned Sessions Judge upon conclusion of the trial, found the Appellant guilty of the charge and accordingly, convicted and sentenced him to undergo imprisonment for life and to pay a fine of ₹ 1,000/- (Rupees one thousand) only and, in default of payment of fine, to undergo further imprisonment of 2 (two) months.

6. Before proceeding to deal with the case, it is relevant to note that during the trial, on 22-02-2013, the Trial Court on noticing the Appellant behaving abnormally directed the prosecution to send him for psychiatric evaluation and to submit report. Dr. Chandra Shekhar Sharma, the Psychiatrist at the STNM Hospital, submitted his report dated 12-03-2013, Exhibit C1, as per which the Appellant was stated to be capable of making his defence by instructing his Counsel but was difficult to ascertain as to whether he was of sound mind or otherwise when the offence was committed. The Psychiatrist when examined



in Court as C.W.1 reiterated the contents of his report, Exhibit C1. The case then proceeded against the Appellant which eventually culminated in the impugned judgment.

7. During the proceedings of this Appeal, an application being CrI.M.Appl No. 64 of 2014 under Section 391 read with Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), was filed on behalf of the Appellant seeking for an order allowing him to further cross-examine Dr. Chandra Shekhar Sharma, C.W.1, the Psychiatrist, on the ground that vital questions regarding the mental illness of the Petitioner at the time of the commission of the alleged offence were not put to him. This Court by order dated 05-03-2015 rejected the application having found that examination of the Psychiatrist would serve no useful purpose in view of the categorical findings in his report, Exhibit C1 and his evidence recorded by the Trial Court. In the backdrop of the above, we may now proceed to examine the various contentions raised by the Learned Counsel for the parties.

8(i). Mr. Sudesh Joshi, Learned Legal Aid Counsel, appearing on behalf of the Appellant, at the very outset,

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seriously assailed the trial as being vitiated for non-compliance of Section 329 Cr.P.C. as the principal ground in support of the Appeal. He would submit that the Trial Court ought to have halted the trial until such time the mental condition of the Appellant had become normal. It was asserted that the report of the Psychiatrist would reveal that the Appellant was admitted at the STNM Hospital on 06-03-2013 for detailed observation and evaluation of psychopathology and the report was prepared 5 (five) days thereafter on 12-03-2013 which, as per him, was too short a period to arrive at any conclusive opinion. It was also submitted here that the Psychiatrist, C.W.1, was examined on his report, Exhibit C1 dated 12-03-2013, only on 05-08-2013. As per him, considering the evidence of the Psychiatrist and his report, the possibility of the Appellant being mentally ill earlier could not have been ruled out. Resting on *Vivian Rodrick* vs. *The State of West Bengal : (1969) 3 SCC 176*, it was contended that the Trial Court ought to have halted the proceedings on that very ground.

(ii) Next, it is contended, rather feebly, that the prosecution even otherwise had failed to establish the case

beyond reasonable doubt on account of serious discrepancies in the prosecution evidence which the Trial Court had overlooked. It was contended that at the time of the incident, only P.W.2, the Appellant and the deceased were present. The investigation of the case was launched on the basis of an FIR lodged by P.W.1 on the information received by him from P.W.2. P.W.2, as per the Learned Legal Aid Counsel, is the relative of the deceased and, therefore, clearly an interested witness. Thus, as per the Learned Legal Aid Counsel, the possibility of the deceased having been killed by someone else or the P.W.2 himself could not be ruled out. This, as per him, gets further reinforced by the fact that none of the people whom the P.W.2 had seen when he had jumped from the terrace to the ground floor, had been cited as a witness.

(iii) The fact that no Test Identification Parade (for short "T. I. Parade") was conducted to confirm the identity of the Appellant rendered the case against the Appellant doubtful.

(iv) Finally, relying upon *Sree Vijayakumar and Another* vs. *State, by Inspector of Police, Kanyakumari* :

(2005) 10 SCC 737, it was contended that even the CFSL reports, Exhibits 14 and 15, on the weapon of offence and the wearing apparels of the Appellant, were unreliable as the letter forwarding those reports was not produced.

9(i). Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, on the other hand, supporting the impugned judgment, submitted that the finding against the Appellant is based upon eye-witness account of P.W.2 which stands fully corroborated by P.Ws 3, 4, and 5 considered along with that of the Medicolegal Consultant of the STNM Hospital, P.W.12, the Junior Scientific Officer (Biology), CFSL, Kolkata, P.W.13 and the Senior Scientific Officer, CFSL, Kolkata, P.W.14.

(ii) The Learned Additional Public Prosecutor contends that the fact that P.W.2 had seen the Appellant picking up the weapon of offence, M.O.I and striking the deceased on his neck, could not be demolished. Further, the evidence of P.W.3 that he had seen the Appellant carrying a blood stained 'khukuri' with his clothes and face smeared with blood is corroborated by P.W.4 when it has come in evidence that the Appellant was seen standing on

the road in front of the check post carrying a 'khukuri' saying "*mailey manchey katey ra aako*" (I have cut a person and come here) with his shirt and 'khukuri' smeared with blood. That the evidence of P.Ws 3 and 4, as per him, stands further corroborated by P.W.5, when it has come in his evidence that he saw the Appellant detained in the check post and he and one other police man had taken the Appellant to the police station carrying the weapon of offence, M.O.I, which was smeared with blood. These, as per the Learned Additional Public Prosecutor, are clinching evidence to establish the charge against the Appellant.

(iii) On the plea of mental illness of the Appellant, he would refer to medical report, Exhibit 23, which was initially obtained by the Investigating Officer, P.W.15, after the arrest of the Appellant on the basis of a requisition made vide Exhibit 22 on 04-06-2011. Referring to the report, Exhibit 23, it was submitted that he was found fit and had not observed anything abnormal in his behaviour. It is then contended even from the report, Exhibit C1 of the Psychiatrist, C.W.1, it was clear that the Appellant was capable of making his defence by instructing his Counsel

and that it was difficult to ascertain if he was of a unsound mind or otherwise when the offence was committed.

(iv) The Additional Public Prosecutor would then submit that when an accused seeks protection under Section 84 IPC burden lies entirely upon him to prove that he was insane at the time of the offence and that the offence was committed due to that reason.

10. We have carefully considered the submissions of the Learned Counsel for the parties, the evidence and the records.

11(i). The thrust of the argument placed by Mr. Sudesh Joshi, Learned Legal Aid Counsel, appearing for the Appellant, was that the Trial Court having noticed the abnormal mental condition of the Appellant and after having referred him for evaluation of his mental condition, ought to have adjourned the trial until such time he was found fit to defend himself. Since this was not done, the entire trial stands vitiated for non-compliance of Section 329 Cr.P.C.

(ii) As already observed earlier, it was his submission that the report of the Psychiatrist, Exhibit C1

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and his evidence would indicate the possibility of the Appellant being stricken by mental illness even before. We are, however, unable to accept this contention in view of the events writ large on the face of the records.

(iii) Order dated 22-02-2013 passed by the Trial Court during the proceedings of the trial, clearly indicates that it had taken due note of the abnormal behaviour of the Appellant and accordingly directed him to be sent for psychiatric evaluation and to submit report by the next date of remand. On the next date, i.e., 08-03-2013, certificate issued by Dr. Chandra Shekhar Sharma of the STNM Hospital, certifying that the Appellant was undergoing treatment and observation in Psychiatry Unit of the Hospital was noted. Thereafter, on each date fixed by the Trial Court, the Appellant was produced from judicial custody until 09-04-2013 when the report of the Psychiatrist dated 12-03-2013 was taken note of where it had, *inter alia*, been advised that the patient's treatment should be regular, evaluation of his suicidal ideas had been conducted regularly and that he was required to be brought monthly for detailed mental status examination. It was thus directed in the said order that the Appellant be

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sent for his mental status examination as required by the Psychiatrist on a monthly basis without fail and to inform the Court on the steps taken.

(iv) Thereafter, several dates were fixed during which no effective trial was conducted. Ultimately, on 05-08-2013, Dr. Chandra Shekhar Sharma, the Psychiatrist, was examined as a Court witness. The Court, after examination of the statement of the doctor recorded on oath, his report Exhibit C1 and on general examination of the Appellant, found him capable of making his defence by instructing his Counsel. At the same time, it was noted that it was difficult to ascertain if he was of sound mind or otherwise when the alleged offence was committed granting liberty to the parties to adduce evidence on that aspect. During the proceedings of the trial which then recommenced, no efforts whatsoever was made on behalf of the Appellant to adduce any evidence to prove that he was mentally unsound any time prior to the date of his examination by the Psychiatrist, C.W.1 and that the offence was committed when he was in the throes of his mental illness.

(v) Thus, from the facts alluded to above, undeniably, the Trial Court had taken the requisite steps as envisaged under Section 329 Cr.P.C. and, therefore, in sync with the decision in *Vivian Rodrick (supra)*. Contrary to what was submitted by Mr. Joshi, in the present case, as in the facts obtaining in *Vivian Rodrick (supra)*, the Trial Court upon noticing the abnormality in the behaviour of the Appellant and had directed for evaluation of his mental condition.

(vi) There is no dispute on the law that burden is upon the accused to prove that the offence was done or committed by him when at the time of commission of the offence he was incapable of knowing the nature of the act, or that he was doing what is either wrong or contrary to law at the time of doing it. Amongst the catena of decisions on this, we may refer to *Sudhakaran* vs. *State of Kerala* : (2010) 10 SCC 582. For these reasons, we are of the view that the Appellant has failed to discharge the burden cast upon him.

(vii) As noted earlier also, during the pendency of this Appeal, the Appellant had sought to get the case

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remanded to the Trial Court by filing before us an application under Section 391 read with Section 482 Cr.P.C. seeking to further cross-examine Dr. Chandra Shekhar Sharma, C.W.1. Upon consideration of his categorical finding in the report, Exhibit C1, this Court by order dated 05-03-2015 had rejected the application. Moreover, we find that there is no tangible basis for the contention being based purely on assumptions and speculations. We, therefore, have no hesitation in rejecting this plea.

12. Having held so, we may now proceed to consider the next contention on the merits of the findings in the impugned judgment on several grounds but, for the reasons that shall follow, we need not delay ourselves on those in entirety.

13(i). We find that this is a case where there is direct evidence of an eye-witness to the commission of the offence.

(ii) Deepak Sarki, P.W.2, in his evidence has in most unambiguous terms stated that as he turned to pick up some nails, he saw the Appellant striking the deceased



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on his neck with a 'khukuri', M.O.I, and then chased him also brandishing the 'khukuri' forcing him to flee down the stairs screaming "*manchey mareyo, manchey mareyo*". As he was fleeing he met P.W.1 at the floor below and informed him of the incident. When the Appellant who was chasing him saw people gathered downstairs, he jumped off the building and ran away. That thereafter he accompanied by P.W.1 and other persons who had gathered there, went upstairs to remove the victim to the hospital but, by the time they had arrived he was already dead. P.W.2 could not at all be contradicted on this crucial evidence in his cross-examination but, was rather found to have remained firm and unshaken.

(iii) It is a settled position of law that conviction can be based upon the testimony of sole eye-witness if it is found wholly reliable. In ***State of Madhya Pradesh vs. Laakhan alias Lakhan : (2009) 14 SC 433***, it has been held as under: -

"10. Even the evidence of a solitary witness can be sufficient to record conviction if the same is wholly reliable. No particular number of witnesses is necessary to prove any fact, as statutorily provided in Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). It is the quality and not the quantity of the evidence that

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matters. The court cannot take a closed view in such matters.”

(iv) In the present case, apart from finding the testimony of the eye-witness, P.W.2 reliable, he is found to have been satisfactorily corroborated by the evidence of other prosecution witnesses as shall be revealed hereafter.

(v) P.W.1, who lodged the written FIR in the Rangpo Police Station, confirmed the evidence of P.W.2 in his evidence that he had jumped down from the top floor screaming the words “*manchey mareyo, manchey mareyo*” and, as they were rushing upstairs, P.W.2 exclaimed “*bhagyo, bhagyo*” (has run away). When asked as to who had run away, he answered that it was the Appellant, Chabi Kharka. He then lodged the FIR, Exhibit 1, at the Rangpo Police Station. On a perusal of the FIR, we find no inconsistency or contradiction in the facts said to have been narrated by P.W.2 to P.W.1.

(vi) Gopal Baraily, P.W.3, while returning home from school in his vehicle, saw the Appellant with his face and body smeared with blood holding a blood stained ‘khukuri’ walking towards the Mandi Bazaar, Rangpo, which got him

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scared and quickly rolled up the windows of the car and then called the Police. Just as he had crossed the Appellant, he met Khem Raj Lamichaney, P.W.5, a police personnel from the Rangpo Police Station to whom he informed of his encounter with the Appellant. P.W.4 then got into the vehicle and then both headed for the Thana where they found the Appellant already in custody.

(vii) Khem Raj Lamichaney, P.W.5, has corroborated P.W.3 in full measure when it has come in his evidence that he had met P.W.3 on the way to his duty and informed him of his encounter with the Appellant carrying a blood stained 'khukuri' and that he then got into the vehicle of P.W.3 and drove to the check post, where they found the Appellant detained already and further that the Appellant was then taken to the Police Station and had carried the weapon of offence, M.O.I, to the Rangpo Police Station.

(viii) Brihaspati Adhikari, P.W.4, a constable on duty at the Rangpo Check Post at the relevant time, saw the Appellant standing on the road outside the check post carrying a 'khukuri' saying "*mailey manchey katey ra*

aako" and that both his shirt and 'khukuri' were smeared with blood and as asked the Appellant placed the weapon on the doormat at the entry of the check post. Later, after being informed, Senior Officers from the Rangpo Police Station arrived there and took the Appellant and the weapon of offence to the Police Station.

(ix) The evidence of the above three witnesses could not be demolished at all in their cross-examination. They are found to be consistent and corroborative of each other. Their evidence also lend credence to the evidence of P.W.2 that the Appellant had fled away from the place of occurrence after the commission of the offence which apparently is how P.Ws 3 and 5 had seen him on the road.

(x) Such being the unimpeachable evidence of the eye-witness and the other witnesses as discussed above, nothing further would be necessary to convince us that the offence was indeed committed by the Appellant.

14(i). In the Medicolegal Autopsy Report, Exhibit 12, the following ante-mortem injuries were detected: -

1. Incised wound 12 cms x 3 cms x 4 cms on the front and left side of the neck.

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2. Incised wound 10 x 3 x 3 cms, 1 cm below the wound No.1 on the front and left side at the neck.
3. Incised wound 9 x 3 x 3 cms, 2 cms below the wound No.2 on the front and left side of the neck.

(ii) As per the opinion of the Medicoloegal Consultant, Dr. K. B. Gurung, P.W.12, the death had occurred 12 to 14 hours prior to the autopsy. The main cause of death were the ante-mortem injuries caused by heavy sharp cutting weapon. All the injuries were fresh injuries (12 to 14 hours old). It has come in the evidence of P.W.12 that the injuries can be inflicted by the weapon of offence, M.O.I and that all the injuries were fatal. The fact that the injuries were on the front and left side of the neck confirms the evidence of the eye-witness, P.W.2, that he had seen the Appellant striking the deceased on his nape and also that of P.W.1, who saw the deceased bleeding from the nape.

(iii) Apart from the above, there is the evidence of the Junior Scientific Officer, P.W.13 and the CFSL report, Exhibit 14, prepared by him upon examination of the material objects sent to him for his opinion. As per the

CFSL report, Exhibit 14, blood was detected on all material objects, namely, 'khukuri', half pant, check shirt and T-shirt of the Appellant and categorical finding has been recorded of having detected human blood on the half pant, check shirt and T-Shirt of the Appellant.

(iv) The case of *Sree Vijayakumar (supra)* cited by Mr. Sudesh Joshi is clearly distinguishable on facts of the present case as it was one which pertain to a case involving circumstantial evidence quite unlike the present one where it is based upon eye-witness account duly corroborated by other reliable evidence.

(v) There is then, of course, the contention on behalf of the Appellant that P.W.2 being a relative of the deceased was an interested witness. We are unable to accept this contention as we find the evidence of P.W.2 reliable and acceptable. Even otherwise, merely because a witness is a relative or a member of the family of the deceased would not necessarily call for discarding his evidence. It is well-settled that in the first instance the allegation of interestedness requires to be established and secondly, all that would be required while dealing with the

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evidence of an interested witness is to look for corroboration by way of abundant caution. On this, we may refer to ***Bur Singh and Another* vs. *State of Punjab* : (2008) 16 SCC 65** and ***Main Pal and Another* vs. *State of Haryana and Others* : (2004) 10 SCC 692.**

(vi) The other argument that the prosecution having failed to conduct the T. I. Parade of the Appellant rendered the prosecution case against him doubtful also do not appear to hold water as we find all the prosecution witnesses have identified the Appellant which could not be shaken in their cross-examinations. P.W.2 who is the eye-witness has firmly identified him as the person who struck the deceased causing his death. The indisputable fact that the Appellant had been working with the deceased and P.W.2 for a considerable length of time in the construction site of P.W.1., lends absolute credence to the identification of the Appellant by P.W.2. This would hold true also in respect of the other witnesses who were involved in the events that followed the commission of the offence. That apart, we find that the name of the Appellant has been specifically mentioned in the FIR. In ***Yuvaraj Ambar Mohite* vs. *State of Maharashtra* : (2006) 12 SCC 512**, it has been

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held that where sufficient description of the accused is given in the FIR and is arrested soon thereafter, no test identification of the accused would be necessary.

15. Under these circumstances, it would not be essential to deal with the other evidence available on the records as those are ancillary and supportive of the prosecution case.

16. Considering facts and the evidence discussed above, we find that the prosecution has been able to establish the charge against the Appellant beyond any reasonable doubt and, therefore, find no reason to interfere with the impugned judgment.

17. For all these reasons, we find no merit in the Appeal.

18. In the result, the Appeal is dismissed.

19. No order as to costs.

20. A copy of this judgment and the original case records be transmitted to the Court of the Learned



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Sessions Judge, Special Division – I, Sikkim at Gangtok,
for its record.

Sd/-
(S. P. Wangdi)
Judge
21-04-2015

Sd/-
(S. K. Sinha)
Chief Justice
21-04-2015

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