THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 17th AUGUST, 2016

D.B. : HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, ACTING CHIEF JUSTICE
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.02 of 2016
(Jail Appeal)

Appellant : Ram Kumar Basnett,
S/o Prem Lall Basnett,
Aged about 38 years,
R/o Lower Tinzering, Arithang Busty,
West Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance

Mr. Sudesh Joshi, Legal Aid Counsel with Ms. Tengop Subba, Advocate for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State.

J U D G M E N T

The following Judgment of the Court was delivered by

Meenakshi Madan Rai, J.

1. The Judgment and Order on Sentence dated 06-08-2013 convicting the Appellant under Section 302 of the Indian Penal Code

(for short "IPC"), and sentencing him to undergo simple imprisonment for life and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default stipulation, in S.T. Case No.18 of 2011, in the Court of the Learned Sessions Judge, South and West Sikkim at Namchi, has been assailed in the instant Appeal.

2. The Appellant's grievance before this Court is that his conviction is based solely on the uncorroborated statements of the child witnesses, P.W.6 and P.W.7, by placing reliance on their statements under Section 164 Code of Criminal Procedure, 1973, (for short "Cr.P.C.") ignoring the fact that those statements had been demolished in their cross-examination in the Court. That in any event the statement of a witness recorded under Section 164 of the Cr.P.C. cannot be used as substantive evidence and is only for the purpose of contradiction and corroboration. To buttress this argument, reliance was placed on ***George and Others*** vs. ***State of Kerala and Another***[1] and ***R. Shaji*** vs. ***State of Kerala***[2]. Emphasis was also laid on the fact that P.W.6 and P.W.7 were child witnesses, but their evidence was not closely scrutinised to rule out tutoring. Reliance was placed on the decision of ***Alagupandi alias Alagupandian*** vs. ***State of Tamil Nadu***[3]; ***Radhey Shyam*** vs. ***State of Rajasthan***[4] and ***State of Rajasthan*** vs. ***Chandgi Ram and Others***[5]**.**

1. (1998) 4 SCC 605
2. (2013) 14 SCC 266
3. (2012) 10 SCC 451
4. (2014) 5 SCC 389
5. (2014) 14 SCC 596

Referring to the unusual behaviour of P.W.5 inasmuch as he took twenty-five minutes to reach the place of occurrence (for short "P.O.") after learning of the assault, it was put forth that this circumstance has also not been given any consideration by the Learned Trial Court. That, Exhibit 23, the FIR, has been lodged on hearsay. It was further canvassed that chemical analysis of M.O.I, the weapon of offence, could not link the weapon to the murder of the victim as no blood of human origin was detected therein, the question of disintegration of the blood being immaterial as the Analyst has made no such observation. Consequently, the recovery of M.O.I under Exhibit 12 the statement of the Appellant under Section 27 of the Indian Evidence Act, 1872 (for short "the Evidence Act"), has no evidentiary value. On the above counts reference was made to the decision in ***Nirmal Kumar*** vs. ***State of U.P.***[6]; ***Sk. Yusuf*** vs. ***State of West Bengal***[7] and ***State of M.P.*** vs. ***Kriparam***[8]. It is the further case of the Appellant that the evidence of P.W.6 and P.W.7 nowhere reveals that the Appellant was inside the house with the victim at the time of the alleged incident. It was also urged that even assuming that the victim did utter the words "*Baba ley katyo*" does not necessarily mean that "*your Father cut me*" as translated, as P.W.6 and P.W.7 have not stated that the victim had told them that their father had chopped her, besides which the Prosecution failed to lead evidence to establish

6. 1993 Supp (1) SCC 510
7. (2011) 11 SCC 754
8. (2003) 12 SCC 675

that P.W.6 and P.W.7 used to address their father as "*Baba*". As the evidence of the child witnesses P.W.6 and P.W.7 are uncorroborated, mere recovery of M.O.I does not assist the Prosecution case, consequently the Learned Trial Court has erred in convicting the Appellant and the impugned Judgment and Order on Sentence be set aside.

3. Learned Additional Public Prosecutor *per contra* contended that the evidence of P.W.1 has to be read alongside the evidence of P.Ws 5, 6 and 7 which establishes the hand of the Appellant in the crime. Reliance was also placed on the evidence of P.W.8 and P.W.9 witnesses to the disclosure statement of the Appellant, which cogently established recovery of M.O.I. That, merely because blood was not detected on the 'khukuri', does not absolve the Appellant of the heinous offence, since it is not disputed that the CFSL, Kolkata, examined M.O.I after about one month of the incident, on this count, reliance was placed on ***Mritunjoy Biswas*** vs. ***Pranab alias Kuti Biswas and Another***[9]. That obviously with the passage of time the chemical composition of the blood would have disintegrated but non-detection of human blood does not prove the innocence of the Appellant, on this submission, reliance was placed on ***Sunil Clifford Daniel*** vs. ***State of Punjab***[10]. Apart from the evidence of P.W.6 and P.W.7 who were at the spot, the Appellant's

9. (2013) 12 SCC 796
10. (2012) 11 SCC 205

statement in Exhibit 12 disclosing the place where M.O.I was concealed by him is clearly admissible under Section 27 of the Evidence Act. On this point, L earned Additional Public Prosecutor placed reliance on ***Praveen Kumar*** vs. ***State of Karnataka***[11] and ***Nagaraj*** vs. ***State represented by Inspector of Police, Salem Town, Tamil Nadu***[12]. That, P.W.6 and P.W.7 have admitted that the statement of the victim "*Baba ley katyo*" were heard by them and is, therefore, a cogent dying declaration made by the victim when conscious. To buttress his submission, reliance was placed on ***Atbir*** vs. ***Government of NCT of Delhi***[13] and ***Parbin Ali and Another*** vs. ***State of Assam***[14]. At the same time, there was no reason for P.W.6 and P.W.7 to falsely implicate their father, while their evidence of his involvement has remained consistent. Support on this aspect was drawn from the Judgment of the Hon'ble Apex Court in ***Bishan Singh and Others*** vs. ***The State of Punjab***[15]. That the Appellant's involvement in the offence is apparent from his absconsion from the P.O. on 09-06-2011, after the incident and his arrest by the Police only on 13-06-2011, after being traced by them. Vouching for the veracity of Exhibit 23, it was submitted that the evidence of the Investigating Officer reveals that the assault took place on 09-06-2011 and the FIR Exhibit 23 was lodged on 09-06-2011 itself, at around 2130 hours as reflected in Exhibit 24 after Lok Bahadur Basnett (P.W.16)

11. (2003) 12 SCC 199
12. (2015) 4 SCC 739
13. (2010) 9 SCC 1 (Paras 17 and 22)
14. (2013) 2 SCC 81
15. (1974) 3 SCC 288

learnt of the incident. It was also urged that although P.W.6 had been declared hostile it is not necessary that his entire evidence is beyond the scope of consideration, and if it is cogent and corroborated by other evidence the statement of the hostile witness can still be a ground for holding the accused guilty of the crime committed. Hence, considering the grounds enumerated above, it was prayed that the Appeal be dismissed.

4. We have carefully considered the rival contentions raised by Learned Counsel before this Court and have also minutely perused the entire evidence and documents on record, including the impugned Judgment and Order on Sentence. The question that arises for consideration is, whether the Appellant had committed the offence under Section 302 of the IPC or whether he was erroneously convicted by the Learned Trial Court?

5. In order to gauge the above, it is imperative to traverse through the facts of the case. Lok Bahadur Basnett (P.W.16), the younger brother of the Appellant, lodged Exhibit 23, the FIR, before the Gayzing Police Station on 09-06-2011 at around 2130 hours, informing therein that, his elder brother (the Appellant), who had been living at Lower Arithang, Khunduray, West Sikkim, along with his wife and children, had fatally assaulted his wife on her neck with a 'khukuri'. Consequently, Gayzing Police Station Case No.13/2011 dated 09-06-2011 under Section 302 of the IPC was registered against

the Appellant and taken up for investigation, which revealed that, on the evening of 09-06-2011 the Appellant returned home at around 1300 hours with some grocery which later became the cause of a heated altercation between the deceased and the Appellant. The enraged Appellant who was standing behind the victim assaulted her with M.O.I on the back of her neck, on which she fell to the floor, meanwhile the Appellant absconded from the P.O. Saren Basnett (P.W.6) and Sunil Basnett (P.W.7) the sons of the Appellant and the deceased who were playing behind the house heard their mother's cry of pain "*aiya*" and rushed towards the house, and simultaneously they saw, the Appellant running into the jungle. Their mother was lying in the kitchen in a pool of blood oozing from her neck. On enquiry by them, their mother informed them that the Appellant had assaulted her with M.O.I and asked them to call Nar Bahadur Limboo P.W.5 (their immediate neighbour). P.W.6 went to call P.W.5 who at the time was milking his cow, duly informing him of the assault by the Appellant on their mother. P.W.5 reached the P.O. after sometime and informed the other neighbours while also directing P.W.6 and P.W.7 to inform their uncle at Arithang, Tinzering Busty, about the murder. During investigation Section 164 Cr.P.C. statements of P.Ws 5, 6 and 7 were recorded, while M.O.I was later recovered from Borong Busty, South Sikkim, on the disclosure statement (Exhibit 12) of the Appellant made in presence of the witnesses P.W.8 and P.W.9 and seized by the Police. On the basis of the evidence so collected,

Charge-Sheet was submitted against the Appellant under Section 302 IPC and the Learned Trial Court finding *prima facie* materials, framed Charge accordingly. The Prosecution examined twenty-one witnesses in support of their case, on closure of which the Appellant was duly examined under Section 313 of the Cr.P.C. and on 06-08-2013 the impugned Judgment and Order on Sentence was pronounced as aforesaid.

6. While delving into the argument of Learned Counsel for the Appellant that the evidence of P.W.6 and P.W.7 requires close scrutiny being child witnesses and that their evidence in Court failed to support the Prosecution case, in ***Radhey Shyam*** vs. ***State of Rajasthan***[4] (*supra*), the Hon'ble Apex Court while referring to the decision of ***Ratansinh Dalsukhbhai Nayak*** vs. ***State of Gujarat***[16] observed as follows;

> **"11.** In *Ratansinh Dalsukhbhai Nayak*, this Court considered the evidentiary value of the testimony of a child witness and observed as under: (SCC pp.67-68, para 7)
>
> > "*7.* … The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an

16. (2004) 1 SCC 64

> established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.**"**

In the same Judgment, reference was also made to ***Panchhi and Others*** vs. ***State of U.P.***[17] wherein it was also observed that –

> **"12.** In *Panchhi*, after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness' evidence. If found reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinise PW 2 Banwari's evidence in light of the above principles.**"**

7. On the anvil of the observations *supra* it may be remarked that P.W.6 and P.W.7 were found competent to depose by the Learned Trial Court after they gave rational answers to questions put to them in terms of Section 118 of the Evidence Act. In view of this circumstance, we may now carefully examine and analyse the

17. (1998) 7 SCC 177

evidence of P.W.6 a child witness. According to him, "*On 8th July, 2011, at around 5:30 in the evening when I was at home and playing with my younger brother Sunil Basnett in the courtyard of our house, my father (accused) and mother was (sic) inside the house, thereafter I donot know what happened.*" He was declared hostile by the Prosecution having resiled from his Section 161 Cr.P.C. statement. On careful perusal of his cross-examination, he has stated that "*It is true that we were playing outside our house on the relevant day as such I did not see nor do I know if my father was in the* ***kitchen*** *with my mother.*" Thus, although he did not know whether his father was in the kitchen the fact that his father was indeed inside the house was not demolished. It is not the case of the Appellant that any other person had visited his house at the relevant point of time or even thereafter, until P.W.5 was called to the P.O. by P.W.6 and P.W.7 after the traumatic and heinous incident, hence the "last seen theory" which is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty falls into place here. This theory requires the Courts to shift the burden to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased in terms of Section 106 of the Evidence Act. It was held in ***Nizam and Another*** vs. ***State of Rajasthan***[18] that –

> **"15.** Elaborating the principle of "last seen alive" in *State of Rajasthan* v. *Kashi Ram* [(2006) 12 SCC 254], this Court held as under: (SCC p. 265, para 23)

18. (2016) 1 SCC 550

> "*23.* It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. ***Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution.*** It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohamed*, *In re*. [AIR 1960 Mad 218]"
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> The above judgment was relied upon and reiterated in *Kiriti Pal* v. *State of W.B.* [(2015) 11 SCC 178]**"**
>
> **[emphasis supplied]**

In the light of the above observation, it is evident that the Appellant was in the house with the deceased and despite being afforded an opportunity under Section 313 of the Cr.P.C. has not explained where else he was at the time of the incident nor extended any plausible explanation on the death of the victim, thereby failing to discharge the burden cast upon him.

8. That having been said, when P.W.6 was declared hostile and cross-examined by the Public Prosecutor, he was confronted with his statement under Section 164 Cr.P.C., Exhibit 9, which was read over and explained to him in the Nepali vernacular. It was enquired from the child witness as to whether he had made such a statement to the Magistrate, this was affirmed by the child. He has categorically stated that "*I was not tutored by anybody to depose in the manner that I had done and recorded in my statement Exhibit 9.*" According to him, Exhibit 8, i.e., the questions put to him by the Magistrate and Exhibit 9 his statement, were prepared at Gayzing and read over to him and explained by the Magistrate who had recorded the same statement. The witness went on to state in his evidence before the Court that "*On the relevant incident of the evening there were no other persons except* ***my parents and us i.e. myself and my brother Sunil****. I had also gone to inform about the death of my mother to the old man Nar Bdr. Limboo but he was not at home and I came back. Thereafter my brother Sunil went to the house of Nar Bdr. Limboo and informed him about the incident. After about five minutes the said Nar Bdr. Limboo came to our house.*" The above statements of the witness under Section 164 of the Cr.P.C. have not been demolished by the defence cross-examination. That apart, his deposition clearly points to the incident of the evening and how he went to inform P.W.5, but returned as P.W.5 was not at home, following which P.W.7 went to inform P.W.5, resultant the evidence of P.W.6 in the Court with regard to the incident has not been

demolished whatsoever under cross-examination, save to the effect that, though he had given his statement at Gayzing, he did not know what he had stated. This obviously would stem from the fact that the statement was made by him on 20-06-2011 and his evidence was recorded on 25-07-2012. The evidence of P.W.7 read conjointly with the evidence of P.W.6, corroborates the fact that P.W.6 first went to call P.W.5 followed by P.W.7.

9. Now, the question that would arise is why would P.W.6 and P.W.7 have gone to the house of P.W.5. At this point, it would be beneficial to extract the evidence of P.W.7;

> ***"****……..*
>
> *I know the accused present in the dock as he is my father.*
>
> *On 09.07.2011, in the evening I was playing with my elder brother Saren Basnett in our field. My mother was inside the house. Suddenly, we heard my mother crying 'Aiya' (expression of pain) we entered inside the house. We saw our mother bleeding profusely from the neck. My mother told "Baba ley katyo' (your father cut me). She also told us "Bajay lai bolai day'" (call the old man). Bajay lives below our house. First my brother Saren Basnett went to call Bajay but he did not come so I went and told Bajay about the incident and called him to our house. He came after some time. The said bajay got scared to see the condition of my mother and went out to call Falaiza Saila. He came back and sent me and my brother to our paternal uncle Lok Bdr. Basnett where we told the entire thing to our paternal grandfather Prem Lall Basnett and paternal uncle Lok Bdr. Basnett. In connection with this case I made my statement at Gyalshing Thana. Exhibit 10 consisting of three pages is a document prepared at Gyalshing Thana wherein Exhibit 10(a), 10(b) and 10(c) are my signatures. Exhibit 11 consisting of two pages is another document prepared at Gyalshing Thana wherein Exhibit 11(a) and 11(b) are my signatures.****"***

As per P.W.7, the victim told him and P.W.6 that "*Baba ley katyo' (Father cut me).*" She also told them "*Bajay lai bolai day" (call the*

old man)." On carefully walking through the cross-examination of this witness, not a single line of the above statements have been demolished by cross-examination, neither was the witness confronted with Exhibit 10 or Exhibit 11 in Court, to controvert his evidence in chief or for that matter the statements made by him under Section 164 of the Cr.P.C. It is also apparent from the records that Exhibit 9, Section 164 of the Cr.P.C. statement of the P.W.6 was read over to him in the Court room and he admitted to having made the statements. It goes without saying that evidence under Section 164 of the Cr.P.C. is not substantive evidence, but can be relied upon for the purposes of corroborating statements made by the witnesses before the Magistrate or to contradict the same, as the Defence at that time will have had no opportunity to cross-examine the witnesses. The statements of P.W.6 and P.W.7 under Section 164 Cr.P.C. stand duly corroborated.

10. It is no one's case that either P.W.6 or P.W.7 witnessed the incident but P.W.7 has deposed that when he heard his mother crying '*aiya'*, he along with P.W.6 entered the house and found their mother in the condition already described by him hereinabove. One cannot even begin to imagine the trauma the child went through on seeing his mother in that state, nevertheless, despite the condition of the victim, P.W.6 and later P.W.7 after calling P.W.5 also went to inform P.W.1 of the incident. The fact of arrival of P.W.6 and P.W.7 in the house of P.W.5 was not controverted in the cross-examination of

P.W.5 who deposed that "*It is not a fact that neither of the sons had not come to my house. ……. It is not a fact that the son of the accused did not tell me that his father (accused) cut his mother.*" Thus, the evidence of P.W.5 clearly supports the evidence of P.W.6 and P.W.7 firstly with regard to their having gone to his house, and thereafter to the effect that their father had cut the victim. The evidence of P.W.5 that he informed Tek Bahadur Chettri (P.W.19) and Ranbir Limboo (P.W.12) is duly corroborated by the said witnesses. P.W.1 has stated that P.W.6 and P.W.7 had come to his residence and P.W.6 told him "*Aama ta chutti bhayo*". Roughly translated from the Nepali vernacular into English, it would mean that, "*mother has been done away with*". Although in cross-examination, he has denied that his grandson told him that the Appellant had cut and killed their mother, the fact remains that P.Ws. 6 and 7 had indeed gone to P.W.1 to inform him of the incident at the instance of P.W.5.

11. While dealing with the question of hostile witness, we may refer to ***Govindaraju alias Govinda*** vs. ***State by Sriramapuram Police Station and Another***[19], wherein it was held that–

> **"36.** It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eyewitness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence,

19. (2012) 4 SCC 722

> documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.**"**

In light of the above decision, it is clear that the evidence of P.W.6 despite being declared hostile, points to the fact of the offence, as already discussed hereinabove having remained undemolished. It may also be pointed out here that the evidence of the Prosecution Witnesses corroborate each other and there is no lacunae to make the Prosecution story improbable.

12. Coming to the argument that the Prosecution has failed to establish that M.O.I is the weapon of offence, for which reliance was placed by the Appellant on the evidence of P.W.14 Sujit Kr. Mallick, Junior Scientific Officer (Biology) of CFSL, Kolkata, his evidence reveals that he examined M.O.I, the 'khukuri' forwarded to him by the SP, CID, PHQ, Gangtok, in connection with the instant matter but that the blood found therein was not of human origin. The first fact that is established by the evidence of this witness is that, M.O.I contained blood, we cannot help but agree with the submission of the Prosecution that over time there is bound to be disintegration of the chemical composition of the blood as evidently the seizure of M.O.I was made on 14-06-2011, vide Seizure Memo Exhibit 15, while analysis was carried out on 29-09-2011 and the

incident occurred on 09-06-2011. Exhibit 21 has been carefully perused by this Court, in which the Expert has opined that Blood was detected on M.O.I. He has deposed that the blood was not of human origin, although this statement finds no place in Exhibit 21, thus it is nebulous as to on what basis the Expert, has opined that the blood was not of human origin. It would be worthwhile perusing the decision of the Hon'ble Apex Court in ***R. Shaji*** vs. ***State of Kerala***[2] *(supra)* on this count where it held as follows;

> **"30.** It has been argued by the learned counsel for the appellant, that as the blood group of the bloodstains found on the chopper could not be ascertained, the recovery of the said chopper cannot be relied upon.
>
> **31.** A failure by the serologist *to detect the origin of the blood due to disintegration of the serum does not mean that the blood stuck on the axe could not have been human blood at all*. Sometimes it is possible, either because the stain is insufficient in itself, or due to hematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group(s) loses significance. (Vide *Prabhu Babaji Navle* v. *State of Bombay* [AIR 1956 SC 51], *Raghav Prapanna Tripathi* v. *State of U.P.* [AIR 1963 SC 74], *State of Rajasthan* v. *Teja Ram* [(1999) 3 SCC 507], *Gura Singh* v. *State of Rajasthan* [AIR 2001 SC 330], *John Pandian* v. *State* [(2010) 14 SCC 129] and *Sunil Clifford Daniel* v. *State of Punjab* [(2012) 11 SCC 205].
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> **32.** In view of the above, the Court finds that it is not possible to accept the submission that in the absence of a report regarding the origin of the blood, the accused cannot be convicted, for it is only because of the lapse of time that the blood could not be classified successfully. Therefore, no advantage can be

> conferred upon the accused to enable him to claim any benefit, and the report of disintegration of blood, etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken.**"**

In ***Sunil Clifford Daniel*** vs. ***State of Punjab***[10] ***(****supra)* it was observed as hereunder;

> **"42.** A similar issue arose for consideration by this Court in *Gura Singh* v. *State of Rajasthan* [AIR 2001 SC 330], wherein the Court, relying upon earlier judgments of this Court, particularly in *Prabhu Babaji Navle* v. *State of Bombay* [AIR 1956 SC 51], *Raghav Prapanna Tripathi* v. *State of U.P.* [AIR 1963 SC 74] and *Teja Ram* (SCC p. 514, para 25) observed that a failure by the serologist *to detect the origin of the blood due to disintegration of the serum, does not mean that the blood stuck on the axe would not have been human blood at all*. Sometimes it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain, with some objectivity, no benefit can be claimed by the accused, in this regard.**"**
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> **[emphasis supplied]**

13. The above observations holds good for the purposes of the instant case for the reasons already discussed. The question of human blood not being found on M.O.I could also be attributed to the fact that it was concealed by the Appellant on 09-06-2011 whereas recovery was made on 14-06-2011. It is not the Appellant's case that M.O.I was in its scabbard. Concomitant to the above finding is the seizure of M.O.I on the basis of the statement of the Appellant, Exhibit 12, recorded under Section 27 of the Evidence Act, in the presence of witnesses, Bikash Pradhan (P.W.8) and Rudra Bahadur Chettri (P.W.9). The Appellant has clearly stated therein that he had

concealed the 'khukuri' near a Monastery in Borong, South Sikkim, below the road. P.W.8 has admitted that the Appellant made the statement as recorded in Exhibit 12 in his presence as well as that of P.W.9, before the Police and their signatures were duly affixed therein, his evidence withstood the gruelling cross-examination. P.W.9 has corroborated the evidence of P.W.8 and this witness has also not buckled under cross-examination, thereby establishing recovery of M.O.I.

14. The point canvassed by Learned Additional Public Prosecutor is that it cannot be denied that the statement made by the mother "*Baba lay katyo*" was a dying declaration as provided under Section 32 of the Evidence Act and has to be extended due consideration. Resisting this argument Learned Counsel for the Appellant contended that, the Prosecution has led no evidence to establish that "*Baba*" meant the Appellant. Pausing here for a moment, it would be pertinent to point that it is common knowledge that, one parent while referring to their spouse in a conversation with their children would address them as "*Baba*" (father) and "*Ama*" (mother) and not as "my husband" or "my wife". Clearly what the victim meant when she said "*Baba*" was that it was the "*Father"* of P.W.6 and P.W.7. The presence of the father in the house as already discussed has been established the Appellant having failed to prove otherwise under Section 106 of the Evidence Act. In the instant case, although the conviction is not based solely on the dying declaration

of the victim, but despite comprising of only words it is indeed entitled to great weight. In ***Atbir*** vs. ***Government of NCT of Delhi***[13] *(supra)* the parameters of considering a dying declaration was laid down as follows;

> **"21.** The same view has been reiterated by a three-Judge Bench decision of this Court in *Panneerselvam* v. *State of T.N.* [(2008) 17 SCC 190] and also the principles governing the dying declaration as summed up in *Paniben* v. *State of Gujarat* [(1992) 2 SCC 474].
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> **22.** The analysis of the above decisions clearly shows that:
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> .....
>
> (*vii*) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
>
> (*viii*) Even if it is a brief statement, it is not to be discarded.
>
> ....."

15. Based on the said parameters, it is clear that merely because the statement is a brief, it is not to be discarded. Dr. Ong Tshering Lepcha who conducted the post-mortem examination of the victim and was examined as P.W.20 in his cross-examination has nowhere stated that, the victim was not in a condition to utter the three final words before her life was snuffed out. He has stated that post-mortem was conducted on 10-06-2011 and the following injuries were found on examination;

> **"Ante-mortem injuries:-**
>
> 1. .....
> 2. Chop wound (13 x 5 x 3.8 cms.) placed below the occipital protuberance. It extends horizontally across the neck with clean cut margin and beveling

present over the upper border. The left end of the wound is placed 5 cm. and right end of the would (*sic*) is 4 cm. above the hair line. The wound involves the skin, muscle, bone, artery, veins, nerves and the spinal cord.

3. Vertebral artery is incised and the vessel is clean cut.

4. There is fracture of first cervical spine with complete resection of the odontoid process.

.....

The approximate time since death was around 12 to 18 hours and the cause of death to the best of my knowledge and belief was due to incised/chop wound of the neck involving the major vessels and spinal cord as a result of homicidal chop wound. ....."

The injuries were in the back of her neck thereby ruling out the possibility that her vocal chords were damaged. Hence, in the absence of any evidence to the contrary there is no reason to disbelieve the evidence that she had uttered the words.

16. The matter being based entirely on circumstantial evidence, consequently motive assumes an important role in the matter. It is settled Law that in cases of circumstantial evidence, the facts so established should be consistent only with the hypothesis of the guilt of the accused and the chain of evidence must be so complete and unbroken to clinchingly point to his guilt. In this context, we may refer to the evidence of Birendra Chettri (P.W.2), Ram Kumar Chettri (P.W.3), Narendra Basnett (P.W.4), Lok Bahadur Basnett (P.W.16) which reveal that the Appellant and the deceased had acrimonious relations on account of physical assaults by the Appellant on the deceased. They have also identified Exhibit 1 as an

'Akarnama' submitted at the Tashiding O.P. after one such assault and subsequent amicable settlement between them. Dr. Karma Duryth Bhutia (P.W.17) had examined the victim on 08-05-2011 at 1330 hrs., having been forwarded by the Tashiding O.P. with an alleged history of having been assaulted by her husband and found simple injuries on her person. H/C Hangu Tshering Lepcha (P.W.13) vouched for the fact that the victim had lodged a Complaint at the Tashiding O.P. accusing the Appellant of physically assaulting her and threatening her with dire consequences. The tragic fatal assault is evidently on outcome of the simmering differences.

17. The evidence of P.W.6 and P.W.7 indubitably point to the guilt of the Appellant since nothing good would be gained by them by falsely implicating their father, had he not been there at the time of the incident. In ***Bishan Singh and Others*** vs. ***The State of Punjab***[15] *(supra)* relied on by Learned Additional Public Prosecutor, it has been held at Paragraph 16, *inter alia*, as follows;

> "**16.** ..... Normally a close relative of the deceased would be most reluctant to spare the real assailants and falsely mention the names of other persons as those responsible for causing injuries to the deceased. ....."

In the case at hand, records are devoid of any acrimony between the Appellant and his sons.

18. One more circumstance that works against the Appellant is his disappearance from the P.O. after the incident and his arrest

only on 13-06-2011. It is, of course, established Law that merely because a person has absconded from the P.O., it cannot be held that he was guilty, but the surrounding circumstances have also to be carefully considered. In the above backdrop, it may be considered that the Appellant found by the Police on 13-06-2016 after they launched a search for him, followed by disclosure statement, Exhibit 12 pursuant to which M.O.I was recovered.

19. It is also a settled principle of Law that a child witness can be a competent witness provided that the statement of such witnesses is reliable, cogent, truthful and corroborated by other Prosecution evidence. The evidence of P.W.6 and P.W.7 have been unwavering in light of the foregoing discussions.

20. In conclusion, having carefully considered the entire evidence on record and to the fact that the evidence of P.W.6 and P.W.7 was duly corroborated by the evidence of P.W.1 and P.W.5 and by the evidence of P.W.8 and P.W.9 with regard to the recovery of M.O.I, it goes without saying that there is clinching and unbroken chain of evidence against the Appellant which fully supports the Prosecution case.

21. In consideration of the entire facts and circumstances and the discussions hereinabove, the impugned Judgment and Order on Sentence passed by the Learned Sessions Judge warrants no interference by this Court.

22. Lacking in merit, the Appeal stands dismissed.

23. No order as to costs.

24. Copy of this Judgment be sent to the Learned Trial Court.

25. Records of the Court below be remitted forthwith.

(Meenakshi Madan Rai)
Judge
17-08-2016

(Satish Kumar Agnihotri)
Acting Chief Justice
17-08-2016

Approved for reporting : **Yes**

Internet : **Yes**

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