IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Heard on : 15.06.2017
& 24.07.2017
Pronounced on : 26.07.2017

Single Bench.: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE.

Crl. A. No. 14 of 2015

Kaziman Gurung,
S/o Late Lall Bahadur Gurung,
R/o Dodak Busty, Soreng,
P.O & P.S. Soreng,
West District of Sikkim

.... Appellant.

Versus

State of Sikkim

... Respondent.

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

Appearance:

Mr. Ajay Rathi, Mr. Rahul Rathi, Mr. Aditya Makkim, Ms. Pema Wongmu Bhutia, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri Legal Aid Counsels for the Appellant.

Ms. Pollin Rai, Asstt. Public Prosecutor, for the Respondent.

J U D G M E N T
(26.07.2017)

Bhaskar Raj Pradhan, J

1. A Trial of the offences under Section 307 and Section 392 IPC conducted by the Learned Session Judge, East Sikkim at Gangtok (hereinafter the learned Session Judge) resulted in the conviction of the Appellant on both the charges after examining 17 witnesses. The Appellant is aggrieved by the

Judgment of the Learned Session Judge dated 24.07.2015 (hereinafter the impugned Judgment) and the order on sentence dated 27.07.2015 (hereinafter the impugned sentence). The present Criminal Appeal No. 14 of 2015 (hereinafter the present Appeal) seeks to assail both the impugned Judgment and impugned sentence.

2. On 23.07.2013, Dr. Sangeeta Pradhan, Medical Officer in Sir Thutob Namgyal Memorial Hospital (hereinafter the STNM Hospital), Gangtok, examined a patient, one Suresh Agarwal, found a deep cut injury in front portion of his neck and lodged an FIR with the Sadar Police Station.

3. Around the same time Sub Inspector (S.I.), Rinku Wangmu Bhutia of Sadar Police Station, Gangtok received a telephonic information from Bhim Bahadur Basnett, former Superintendent of Police about the incident, on the basis of which FIR number 182/2013 dated 23.07.2013 under Section 307, Indian Penal Code, 1860 (hereinafter the IPC) was registered at 2010 hrs against unknown person(s) and investigation taken up.

4. On completion of investigation, the Prosecution filed a charge-sheet No. 199 dated 01.10.2013 (hereinafter the charge-sheet) u/s 307 and 392 of the IPC.

5. A supplementary charge-sheet was also filed on 17.10.2013 on receipt of forensic report from the Regional Forensic Science Laboratory (hereinafter RFSL), Saramsa, Ranipool.

6. On 30.05.2014 the Court of the Principal Session Judge, East Sikkim, Gangtok, framed two charges as under:-

> *"**Firstly** – That you on 23.07.2013 at around 8 p.m at Diesel Power House Road, Gangtok, East Sikkim under the jurisdiction of Sadar P.S., East Sikkim, did an act, to wit, you used a knife to cut the throat of the victim Suresh Agarwal with such knowledge that under such circumstances that if by that act you had caused the death of the said Suresh Agarwal, you would have been guilty of murder and by the said Act you caused hurt to Suresh Agarwal and thereby committed an offence punishable under Section 307 of the IPC, 1860, and within my cognizance.*
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> ***Secondly**- that you on the same date, day , time and place as above committed robbery by taking a bag belonging to the victim Suresh Agarwal, containing a sum of Rs. 4,840/- (Rupees four thousand, eight hundred and forty) only, which was the property of the said Suresh Agarwal and in his possession and which you robbed him of in the Diesel Power House Road, Gangtok, East Sikkim at about 8 p.m. and thereby committed an offence under Section 392 of the IPC, 1860, and within my cognizance."*

7. The Appellant having pleaded not guilty the case was put to trial.

8. The Prosecution examined 17 witnesses.

9. After the Prosecution closed its evidence, examination of the Appellant u/s 313 of the Code of Criminal Procedure, 1973 (hereinafter the Cr.P.C) was recorded on 10.06.2015 by the learned Session's Judge.

10. Although an opportunity to enter his defence was granted to the Appellant, the Appellant declined.

11. On 24.07.2015 the learned Session Judge rendered the impugned Judgement holding, inter-alia, that the Prosecution

had proved its case against the Appellant u/s 307 and 392 of the IPC, beyond all reasonable doubt and thus, the Appellant stands convicted and liable to be sentenced in accordance with law.

12. On 27.07.2015, the Learned Session Judge sentenced the Appellant to undergo (i) simple imprisonment for one year and six months and a fine of ₹ 10,000/- under Section 307 IPC and in default of fine to undergo further imprisonment for six months; (ii) imprisonment for one year and six months along with fine of *₹ 10,000/-* under Section 392 IPC and in default of fine to undergo further imprisonment for six months. The sentences were to run consecutively. The period of imprisonment already undergone by the Appellant during investigation and trial would be set off against this sentence. The amounts of fines if recovered were to be made over to the victim as compensation under Section 357 Cr.P.C..

13. This Court has heard Mr. Ajay Rathi, Learned Counsel for the Appellant (hereinafter the learned Counsel for the Appellant) as well as Ms. Pollin Rai, learned Assistant Public Prosecutor (hereinafter the learned APP) for the Respondent-State.

The Appellant's case.

14. The learned Counsel for the Appellant would argue that the Prosecution case suffers from material discrepancies which have rendered the case of the Prosecution improbable. The learned Counsel for the Appellant for the aforesaid purpose would draw the attention of the Court to the cross-examination of the various Prosecution witnesses and highlight, what according to him, were the material discrepancies. It was also argued that Seema Singhal (PW 6), the wife of Suresh Kumar Singhal, (PW 16) (hereinafter the

victim (PW 16) who is said to have gone down to the 'jhora' and taken the bag from the assailant could not also identify the Appellant. The learned Counsel for the Appellant would argue that there is no eye witness in the present case. He would further argue that the victim (PW 16) had in cross-examination deposed that:- "*it is true that I had not seen the accused injured after he jumped from the "jhora". I heard from others that the accused had been injured*". The learned Counsel for the Appellant would point out that Deven Bajaj (PW 2), Sharavan Kumar Sharma (PW 3) and Pradeep Singhal (PW 4) also could not identify the accused. Infact, it was argued, that Shravan Kumar Sharma (PW 3) who had stated that he had seen the assailant running could not identify the Appellant. Besides, the learned Counsel for the Appellant would also draw the attention of this Court to the discrepancy in the statement of Tashi Wangchuk Rana (PW9), Jigme Bhutia (PW 10), Dadiram Chettri (PW 13). The learned Counsel for the Appellant would emphasise on the fact that the victim (PW 16) had not named the Appellant to the Doctor at both the STNM hospital as well as the Central Referral Hospital, Tadong and would thus argue that the identification of the Appellant in Court could not be considered. The learned Counsel for the Appellant would draw the attention of the Court to the statement recorded under Section 313 Cr.P.C to question no. 82 wherein the Appellant had stated that on the relevant night he was going to his Aunt's house for dinner on her invitation when he heard people shouting 'chor chor' and saw a man running away and thus he too started chasing the said man because of which he had fallen down into the 'jhora' and that the actual assailant had jumped across the 'jhora' and run away and argue that, therefore, it was a case of mistaken identity and that the Appellant had provided

adequate explanation. The learned Counsel for the Appellant would also question the alleged recovery and seizure of material objects. It was also argued that the prosecution could not stand in the leg of the defence and it would have to prove its case beyond reasonable doubt and that the chain of circumstances has not been established to sustain a conviction. The learned Counsel for the Appellant would also argue that human blood could not be detected in the 'rambo knife' (MO II) and thus it could not be connected to the crime. The learned Counsel for the Appellant would also argue that Test Identification Parade having not been conducted the identification of the Appellant in Court would have no value. He would also argue that there was personal enmity between the Appellant and the victim (PW 16) as the Appellant owed Rs. 70,000/- to the victim (PW 16) which fact was available in the statement recorded of the Appellant to question no. 75 and 81 of the Section 313 of the Cr.P.C statement.

15. *In contra,* the learned APP would contend that the present case is a case of direct evidence of the victim (PW 16) and not circumstantial evidence as argued by the learned Counsel for the Appellant. The learned APP would also argue that to justify the conviction under Section 307, IPC it is not essential that bodily injury capable of causing death should have been inflicted and although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deducted from other circumstance, and may even, in some cases, be ascertained without any reference at all to actual wounds. She would rely upon the

Judgment of the Apex Court in ***Girija Shankar Vs. State of U.P***[1] for the said purpose. The learned APP would also argue that it is sufficient to justify a conviction under Section 307, IPC if there is present an intent coupled with some overt act in execution thereof. The learned APP would argue that the presence of the accused in the place of occurrence has been adequately proved by Seema Singhal (PW 6), Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10). Learned APP would also argue that Test Identification Parade was not required as the victim (PW 16) himself was a witness and that the plea of alibi taken by the Appellant is proved to be false. Learned APP would rely upon the ***Dudh Nath Pandey v. State of Uttar Pradesh***[2]***, Binay Kumar Singh v. State of Bihar***[3] **and** ***Jumni and Others v. State of Haryana***[4]. The learned APP should also argue that the ingredient of Section 392 IPC i.e. robbery had been fully satisfied. Learned APP would thus argue that the impugned Judgment and sentence needs no interference.

Consideration:-

16. Raju Ghosh (PW 5) who works in an online lottery shop situated near hotel Hungry Jack, National Highway, Gangtok, East Sikkim as a money collector does not remember the date but sometime in the month of July 2013 he remembered that their customer, the victim (PW 16) who is a lottery agent had come to their shop at around 07.00 to 07.15 pm and deposited some amount and thereafter left the shop. In cross-examination, he stated that:- *"it is true that I was not in office on the relevant day."*

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[1] **(2004) 3 SCC 793**
[2] **(1981) 2 SCC 166**
[3] **(1997) 1 SCC 283**
[4] **(2014) 11 SCC 355**

The learned Counsel for the Appellant would submit that therefore the evidence of Raju Ghosh (PW 5) is unreliable. This Court would not consider the evidence of Raju Ghosh (PW 5).

The evidence of the injured victim (PW 16).

17. The victim (PW 16), a resident of Diesel Power House Road (hereinafter the DPH Road), Gangtok, East Sikkim owned an online lottery shop near Denzong Cinema Hall, opposite Super Market, Gangtok. On 23.07.2013 at around 07.00 pm he closed his shop and started returning to his residence carrying Rs. 70,000/- in a bag. *En route*, he made payment to the lottery manager for purchasing the lottery tickets from him. When he reached DPH road, at around 07.30 pm he was called from the back by a person who put his hand over his shoulder. When he turned the said person assaulted him with a sharp weapon over his neck and started snatching his bag which had around Rs. 4,000/- in it. The victim (PW 16) protested but the said person cut the handle of his carry bag with the said weapon and snatched his bag containing money and a water bottle. In the process, the victim (PW 16) also kicked the said person. On his kick the weapon fell down. He ran after the said person shouting *'thief thief'* and saw him jumping over the '*jhora*' (the word 'jhora' is in nepali. Translated it means deep drain). Since he was injured and blood was oozing out from his neck he proceeded to STNM hospital. On reaching the Emergency ward of the STNM hospital, the hospital personnel informed the police. Police came to the STNM hospital and enquired about the matter. Thereafter, the Doctor of STNM hospital sutured his wounds and on the same day he was referred to Central Referral Hospital, Tadong and discharged after three days of the incident.

18. The victim (PW 16) also identified and exhibited the following material objects :-

1. MO I – the bag the Appellant had snatched from him on the relevant night.
2. MO VII- the water bottle that he was carrying in the bag MO I.
3. MO VIII – money amounting to Rs. 4840/- the Appellant had stolen from him on the relevant night.
4. MO VI- the blood stained T-shirt that he was wearing during the relevant time which was seized by the police.
5. MO IX- the pant he was wearing at the relevant time which was also seized by the police.

19. The victim (PW 16), could not identify (MO II)-the knife, as it was dark when he was assaulted by the Appellant.

20. The victim (PW 16), however, categorically identified the Appellant, as the assailant. In his examination-in-chief, the victim (PW 16) stated :-

> *"I know the accused person (identified) as he is the person who had assaulted me on that day."*

21. In his cross-examination, the victim (PW 16) on being led stated:-

> *"it is true that I was able to speak when I reached Emergency Ward at STNM hospital after the alleged incident. It is true that the Doctors did not record my statement at Emergency Ward. (Volunteers to say that the Doctors advised me not to talk since there was injury on my neck and my condition would deteriorate) ..... It is true that I did not mention the name of the accused to the Doctors at STNM hospital or at Central Referral Hospital, Tadong."*

22. The victim (PW 16) also admitted in his cross-examination that, he cannot correctly identify the currency note

marked (MO VIII) as the same currency note which was carried by him because he had not affixed any identification marks on it.

23. Perhaps, it may be almost impossible to identify currency notes unless one records the numbers thereon seals the sense and leaves identification marks to identify the currency notes. The Investigating Officer (PW 17) ought to have done so. The failure of the victim (PW 16) to identify the unmarked currency notes however, also, reassures this Court of his truthfulness to the identification of the Appellant in Court.

24. Although there was no identification mark on the bag (MO I) and the water bottle (MO VII), the victim (PW 16) reiterated that he could still identify the said articles as the said articles belonged to him. (MO VII) was his water bottle, (MO I) was his bag which was snatched by the Appellant. Of course, the victim (PW 16) would be able to identify the material objects even without the identification mark. As correctly held by the learned Session Judge, the victim (PW 16), in fact, was a truthful witness.

25. The learned Counsel for the Appellant would contend that inspite of the fact that the victim (PW 16) knew the Appellant he did not name the Appellant to the Doctor at the STNM hospital, Dr. Sangeeta Pradhan (PW 1) and identified the Appellant only in Court. The learned Defence Counsel, however, has not put a single question to the victim (PW 16) to demolish the identification of the Appellant in Court. In fact, there is not even a denial of the identification of the Appellant in Court by the victim (PW 16).

26. The learned Counsel for the Appellant would argue, based on certain answers to the questions put to the Appellant under Section 313, Cr.P.C, that the victim (PW 16) had falsely

identified the Appellant in Court as the said Appellant owed the victim (PW 16) certain sums of money. The learned Counsel for the Appellant would also argue, again based on, certain answers to the questions put to the Appellant under Section 313 Cr.P.C, that in fact the Appellant was going to his aunt's house for dinner as she had invited the Appellant and while on his way near DPH road he heard people shouting *'chor chor'* and saw a man running away after which he also started chasing the said person but slipped and fell down in the *'jhora'.*

27. It was not the case of the Prosecution that the Appellant owed money to the victim (PW 16). It was also not the case of Prosecution that the Appellant was going to his aunt's house for dinner on invitation when the incident happened. Both the aforesaid facts were the defence of the Appellant. Although the Learned Session Judge, having given the opportunity to lead defence evidence, the Appellant did not. It is difficult to accept the said defence.

28. An injured person in the natural course of events would not implicate an innocent person and let go the real culprit. The identification of the Appellant by the victim in Court, although after one year and 11 months is without any hesitation and unblemished. In the present case, the victim (PW 16), although in the night, had seen the Appellant, from close proximity. The FIR having been lodged by Dr. Sangeeta Pradhan (PW 1) and not by the victim (PW 16), the non mention of the name of the Appellant in the FIR (Exhibit 1) is not of much significance.

29. The Apex Court in re: ***Jodhan v. State of Madhya Pradesh***[5] has held as under :-

> ***"28.*** *..... Additionally, we may note with profit that these witnesses had sustained injuries and their evidence as we find is cogent and reliable. A testimony of an injured witness stands on a higher pedestal than other witnesses. In Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] , it has been observed that: (SCC p. 271, para 28)*
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> *"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."*
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> *It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion was expressed by placing reliance upon Ramlagan Singh v. State of Bihar [Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881 : 1973 SCC (Cri) 563] , Malkhan Singh v. State of U.P. [Malkhan Singh v. State of U.P., (1975) 3 SCC 311 : 1974 SCC (Cri) 919] , Vishnu v. State of Rajasthan [Vishnu v. State of Rajasthan, (2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Balraje v. State of Maharashtra [Balraje v. State of Maharashtra, (2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] and Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] .*
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> ***29.*** *From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do*

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[5] **(2015) 11 SCC 52**

not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge."

30. Deven Bajaj (PW 2), a resident of Paljor Stadium road, Gangtok, East Sikkim and who runs a business of electrical goods there, at around 07.00 to 07.30 pm of 23.07.2013, while watching a program on television in his house, situated on the third floor of a building, suddenly heard people shouting *"chor chor"* below his house on the road side. He came out of his house to find out what was the commotion about and he saw people gathered at the said place of occurrence.

31. Deven Bajaj (PW 2) in his deposition also stated that :- *"I learn that the victim Suresh Kumar Agarwal has been looted and assaulted by a person on the same roadside".* The fact that Deven Bajaj (PW 2) heard that the victim (PW 16) has been looted and assaulted by a person on the same roadside is admissible under Section 60 of the Indian Evidence Act, 1872 (hereinafter the Evidence Act) but the truth of what Deven Bajaj (PW 2) heard is not admissible unless the person who told him so is brought to the witness box since the 'best evidence' has not been put up.

32. Similarly, Sharavan Kumar Sharma (PW 3), a resident of DPH road, Gangtok, East Sikkim, in the ground floor of a building owned by T. T. Tamang, at exactly the same time (07.00 pm to 7.30 pm) on 23.07.2013 also heard some people shouting *"chor chor"* from the road side. When he went out to find out what happened he saw a person running towards Norkhil Hotel and a few persons chasing him. In cross-examination, the said witness,

Sharavan Kumar Sharma (PW 3) admitted that the victim (PW 16) used to reside in the upper floor of the same building where he resided.

33. Both Deven Bajaj (PW 2) and Shravan Kumar Sharma (PW 3) corroborates the testimony of the victim (PW 16) to the extent that both heard someone shouting 'chor chor' at the same time the victim (PW 16) shouted the said words, after the incident and started chasing the Appellant.

34. Bhim Bahadur Basnett (PW 12), a retired Senior Superintendent of Police, who was residing at DPH complex at the relevant time, also heard noises below his house and some persons shouting that a thief had fallen into a '*jhora*' while escaping on 23.07.2013 at around 07.00 pm to 07.30 pm. He came out of his house and went to check. He saw a group of people near the house of Additional DGP, T.T Tamang in the same colony. On enquiry he was told that one 'marwari' had been assaulted by a knife by a person after which the said 'marwari' had been evacuated to STNM hospital and the assailant had fallen into a 'jhora'. He looked into the '*jhora*' and saw a man lying therein. He could not see the face of the assailant as it was dark. He telephoned and informed the duty officer and directed him to depute police personnel to the spot. After about 10-15 minutes, 2-3 police personnel arrived at the spot and went into the '*jhora*' after he told them to check if the man had broken bones and whether he was still alive. He was informed by the police personnel inside the '*jhora*' that the assailant was still breathing. Thereafter, he returned home.

35. The fact that Bhim Bahadur Basnett (PW 12) made an enquiry and he was told that one 'marwari' had been assaulted by a

knife by a person after which the said 'marwari' had been evacuated to STNM hospital and the assailant had fallen into a '*jhora*', is admissible. The truth about what Bhim Bahadur Basnett (PW 12) heard is not, unless, the person who told him so was brought to the witness box. The rest of his evidence is clear and acceptable.

36. Dadiram Chettri (PW 13), a resident of DPH complex, Gangtok, East Sikkim was also watching television at around 07.30 to 08.00 pm in the year 2013 (he does not remember the date or month when he deposes on 26.03.2015 after nearly a year and seven months after the incident) when he heard some noise below his house. He went out and saw a group of person gathered there. Amongst the people gathered, he saw the retired Senior Superintendent of Police, Bhim Bahadur Basnett (PW 12) there. He went to where the crowd was. There he learnt that one Suresh Kumar Singhal (PW 16) had been assaulted with a knife by an unknown person who while escaping after the assault, fell into the 'jhora' behind Norkhil hotel, Gangtok. After sometime 3-4 police personnel came there and evacuated the assailant to the hospital in a police vehicle. As he was quite far from the '*jhora*' he could not see the face of the assailant.

37. The fact that Dadiram Chettri (PW 13) learnt that one Suresh Kumar Singhal (PW 16) has been assaulted with a knife by an unknown person who while escaping after the assault fell into the '*jhora*' behind Norkhil Hotel, Gangtok, is admissible. However, the truth about what he learnt is not, unless, the person from whom he learnt was brought to the witness box.

38. Dadiram Chettri's (PW 13) evidence corroborates the testimony of Bhim Bahadur Basnett (PW 12) both on the factum of

his presence at the place of occurrence and police personnel reaching there and evacuating the assailant from the 'jhora' to the hospital.

39. Rinku Wangmu Bhutia (PW 11) was the police personnel who received the telephonic information from Bhim Bahadur Basnett (PW 12). On receipt of the information he directed Constable Tashi Wangchuk Rana (PW 9), who was on beat duty, to go to the place of occurrence and verify the facts. On verification, Tashi Wangchuk Rana (PW 9), informed him that the Appellant was inside the '*jhora*' having fallen after he had made a bid to escape and that the Appellant may have broken his back. Thereafter, he directed Tashi Wangchuk Rana (PW 9), to take the Appellant to the STNM hospital.

40. Rinku Wangmu Bhutia (PW 11) corroborates the testimony of Bhim Bahadur Basnett (PW 12) about the call made by him and giving information to the police station about the incident. Rinku Wangmu Bhutia (PW 11) also corroborates the testimony of both Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) about finding the Appellant inside the 'jhora' immediately after the occurrence with a suspected broken back.

41. Tashi Wangchuk Rana (PW 9), a police personnel on patrolling duty, on 23.07.2013, received information from Sadar Police Station on his walkie-talkie that one person after assaulting a man and while running away had fallen into a '*jhora*' near Norkhil hotel and that they should bring the person who had fallen to the Sadar Police Station. As directed they had gone to the place and found the Appellant inside the '*jhora*' in an unconscious state. Thereafter, he reported the matter to Sadar Police Station and took

the Appellant to the STNM hospital. The said witness also identified the Appellant in Court on 18.03.2015.

42. The said witness, Tashi Wangchuk Rana (PW 9), in his examination-in-chief stated that he received the information about the assault on 23.07.2013 at around 05.30 pm to 6.30 pm. The learned Counsel for the Appellant would contend that it is a serious discrepancy. The learned APP would contend that it is but a minor inconsistency. This Court does not consider this as such a discrepancy that would render the evidence inadmissible. Considering human conditioning, it is difficult to expect witnesses to remember every little detail with mathematical precision, especially of events which have transpired much earlier. There is a need for completion of effective investigation and filing of charge sheet before good evidence is lost due to lapse of time and faded memory.

43. Jigme Bhutia (PW 10), a home guard, was also on patrolling duty along with Tashi Wangchuk Rana (PW 9) when Tashi Wangchuk Rana (PW 6) received a call on the wireless set from Sadar Police Station while on patrolling duty to the effect that one person was assaulted by a thief with a knife and the assailant had run away after snatching a bag from the victim (PW 16) and while running away the assailant fell into a drain near the Norkhil Hotel. They were directed over the wireless set to bring the assailant to the Police station. Jigme Bhutia (PW 10) correctly states the time of receipt of the information as 07.15 pm on 23.07.2013. He, after Tashi Wangchuk Rana (PW 9) received the information on his wireless set about the assault, accompanied Tashi Wangchuk Rana (PW 9) also to the drain (in nepali "*jhora*") and saw the

Appellant person lying in semi conscious state and moaning in pain. The Appellant was not in a position to talk and stand by himself. They informed the Sadar Police Station of the situation over the wireless set. A vehicle was sent from the Sadar Police Station in which the Appellant was put and taken to the STNM hospital with a driver. Tashi Wangchuk Rana, (PW 9) accompanied the Appellant. Jigme Bhutia (PW 10) could not, as the Appellant had to be kept in lying position.

44. The testimony of Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10), both police personnel, reassures this Court and corroborates the identification of the Appellant in Court by the victim (PW 16). Their depositions also makes it evident that it was the Appellant and Appellant alone who was lying fallen into the same 'jhora' where the victim (PW 16) testified the Appellant had fallen after he tried to escape. Their depositions also corroborate the evidence of Bhim Bahadur Basnet (PW 12).

45. On 23.07.2013, Dr. Sangeeta Pradhan (PW 1), Medical Officer, STNM hospital, Gangtok, East Sikkim received a patient, the victim (PW 16), a 55 year old male, with a history of having been assaulted by an unknown person. On examination she found a deep cut injury in front of his neck. Thereafter, she sent an information to the Sadar Police Station vide a Exhibit 1. Dr. Sangeeta Pradhan (PW 1) was the Doctor who examined the victim (PW 16) at the STNM Hospital and found a deep cut injury in front of his neck. She wrote the fact about the victim (PW 16), being found with a deep cut injury is front of his neck in the FIR (Exhibit 1) too, immediately on examining the victim (PW 16). She deposed

about the said fact once again in Court. The deep cut injury in the front portion of the neck of the victim (PW 16) stands proved.

46. The said F.I.R (Exhibit 1) although not a substantive piece of evidence, however, reassures the Court and corroborates the oral testimony of Dr. Sangeeta Pradhan (PW 1).

47. In cross-examination, Dr. Sangeeta Pradhan (PW 1) admitted that she had not mentioned that the injury was sufficient to cause death in the F.I.R (Exhibit 1). There was no requirement for her to do so. F.I.R (Exhibit 1) was only the first written information to the Sadar Police Station given by the said Dr. Sangeeta Pradhan (PW 1). The medical report of the victim (PW 16) strangely, has not been produced by the Investigating Officer (PW 17). He ought to have done so.

48. The learned Counsel for the Appellant would argue that the failure to name the Appellant to the Doctor was fatal and would rely upon the Judgment of the Apex Court in re: ***Rehmat v. State of Haryana***[6]***.*** The Apex Court had held that "*ordinarily, in a medico-legal case, the doctor is supposed to write down the history of the injured but admittedly in this case medical papers of Padam Singh (PW.4) do not indicate the name of the assailant*." In the present case the medical papers of STNM hospital is not on the record. What is on record is the First Information Report (Exhibit 1) filed by the Doctor, who examined the victim (PW 16), at the STNM hospital.

49. Sonam Rinzing Shenga (PW 14), who was the Station House Officer, Sadar Police Station, Gangtok received an information on 23.07.2013 at around 08.10 pm from the Medical

[6] **1996 (3) Crimes 238**

Officer, Emergency Ward, STNM hospital, Gangtok to the effect that they had received the patient who had been assaulted by an unknown person and a patient had a deep cut injury in his neck. He was also informed that the name of the patient is Suresh Agarwal, (PW 16) aged about 55 years and a resident of Diesel Power House, Gangtok. On receipt of the said information he registered Sadar P.S Case No. 182/2013 dated 23.07.2013 under Section 307 IPC and endorsed the case to the Investigating Officer (PW 17) for further investigation.

50. Sonam Rinzing Shenga (PW 14) identified the FIR (Exhibit 1), by Dr. S. Pradhan, (PW 1), Medical Officer, STNM hospital, Gangtok. He also identified and exhibited the formal FIR, (Exhibit 4) and his signature thereon at (Exhibit 4 (a)).

51. Sonam Rinzing Shenga (PW 14) corroborates the testimony of Dr. Sangeeta Pradhan **(PW 1)** that she lodged the FIR (Exhibit 1).

52. Pradeep Singhal (PW 4), brother of the victim (PW 16), on 23.07.2013 at around 07.00 pm to 07.30 pm, received a telephonic call from one Birju, a friend of his brother, who had in turn received a call from his friend, Imtiaz of Diesel Power house (DPH) informing him that his brother had been assaulted by someone and had been evacuated to the STNM Hospital and that he should reach the hospital immediately.

53. The fact that Pradeep Singhal (PW 4) received a call from Birju and he heard what Birju told him is admissible. The truth of what Birju told him is not admissible as both Birju and Imtiaz were not brought to the witness box.

54. On reaching the hospital Pradeep Singhal (PW 4) met his brother, the victim (PW 16) in the emergency ward of the STNM Hospital. Thereafter, he went to Sadar Police Station and verbally lodged a complaint to the effect that his brother had been assaulted with a knife by an unknown person. Pradeep Singhal (PW 4) also deposed that his brother was operated upon at the STNM Hospital after which they shifted him to the Central Referral Hospital, Manipal, Tadong.

55. In cross-examination, the said witness, Pradeep Singhal (PW 4), on being led, admitted that his verbal complaint was reduced to writing by police personnel at Sadar Police Station. The verbal complaint reduced to writing is not on record. The learned Counsel for the Appellant would contend that this fact is a serious discrepancy. The factum of Pradeep Singhal (PW 4) having gone to the Sadar Police Station and lodging a verbal complaint which was reduced to writing has not been proved. This, however, does not affect the fundamental and foundational facts of the present prosecution.

56. Pradeep Singhal (PW 4) also stated in cross-examination, that at the relevant time he was not aware as to who had assaulted his brother and that he still does not know the Appellant. The identification of the Appellant by the victim (PW 16) and by Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) being clear and without any hesitation, Pradeep Singhal (PW 4) stating in cross-examination that he did not know and still does not know the assailant does not demolish the identification of the Appellant by the victim (PW 16), Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10).

57. Seema Singhal (PW 6), wife of the victim (PW 16), at around 07.30 to 08.00 pm on 23.07.2013, also heard people shouting below her house and went to the road. On reaching the road she was informed that her husband had been assaulted with a knife by someone and evacuated to the hospital. On the way to the hospital she met her mother-in-law, Radha Devi Singhal, who informed her that one thief had taken the cash bag that her husband was carrying at the relevant time and while doing so the thief had fallen. She went to see the thief and found her husband's bag with him. The assailant had fallen into the '*jhora*' next to her house. She took the bag from the possession of the said thief by going to the place where he had fallen from the path along and inside the '*jhora'*. Thereafter, she went to the STNM hospital where her house had been hospitalised. The following day the police came to her house and seized the bag from her brother-in-law, Pradeep Singhal (PW 4). She identified the bag (MO I) and as the one her husband was carrying at the time of the incident. She could not identify the person who assaulted her husband and took away the money bag. In cross-examination she admitted that she had come to the Court along with her husband and he was present in Court.

58. This Court may presume that the Appellant who was found in possession of the Bag (Mo I) belonging to the victim (PW 16) with Rs. 4840/- (MO VIII) in it along with a water bottle (MO VII) by Seema Singhal (PW 6) soon after the incident is the person who is the thief u/s 114 illustration (a) of the Evidence Act.

59. It was but natural for the wife, Seema Singhal (PW 6) to be accompanied by her husband to the Court. The learned Defence Counsel, although got recorded the fact that the husband

of Seema Singhal (PW 6) was present in Court on 05.03.2014 when her deposition was recorded, did not put any question regarding the same to the victim (PW 16) when he was subjected to intense cross-examination by the learned Counsel for the Appellant on 04.06.2015. The learned Defence Counsel cannot, therefore, take advantage of an unknowing error committed by a witness unfamiliar to Trial Court procedure. The learned Defence Counsel was well within his right to desire that the victim (PW 16) be not present in Court while recording the deposition of his wife Seema Singhal (PW 6). The learned Counsel for the Appellant, however, did not do so. Justice may not be served if the Defence were to be allowed to steal a march of an innocuous act of the victim (PW 16) to accompany his wife, Seema Singhal (PW 6) to Court.

60. Seema Singhal's (PW 6) mother-in-law, Radha Devi Singhal was not produced as a witness. The truth of what Radha Devi Singhal told Seema Singhal (PW 6) when she met her on her way to the hospital is not admissible.

Identification in Court and Test Identification Parade

61. The learned Counsel for the Appellant would contend that it was strange that inspite of Seema Singhal (PW 6) having gone to the 'jhora' and taken the bag from the possession of the thief, she could not identify the Appellant. The learned Counsel for the Appellant would also contend that the identification of the Appellant, in Court by the victim (PW 16) would therefore be doubtful since the Prosecution had failed to conduct a Test Identification Parade and the victim (PW 16) had already seen the

Appellant when he had accompanied his wife, Seema Singal (PW 6) to Court.

62. The learned Counsel for the Appellant submits that since it is the Prosecution's case that the Appellant and the victim (PW 16) were known to each other he ought to have named the accused to the Doctor at the STNM Hospital and failure to do so makes the identification of the Appellant in Court doubtful. More so, when admittedly no Test Identification Parade was conducted in the present case. A thorough examination of the materials on record makes it evident that Prosecution case was only to the extent that the Appellant would visit the victim's (PW 16) lottery shop, time to time for playing lottery. It was not the Prosecution's case that they were known to each other or that the victim (PW 16) knew the name of the Appellant. The reasoning that the victim (PW 16) gave that the Doctors advised him not to talk since there was injury on the neck and his condition would deteriorate on being cross-examined regarding his ability to speak at the STNM Hospital is plausible and thus acceptable.

63. The learned Counsel for the Appellant would rely upon the Judgment of the Hon'ble Supreme Court in re: ***Noorahmmad and Ors. v. State of Karnataka***[7] to submit that since the Test Identification Parade was not held in the present case, the Appellant was entitled to an acquittal.

64. In re: ***Noorahmmad (supra)*** the facts were different. In the said case, the evidence on record clearly highlighted material contradictions and discrepancies in the Prosecution evidence. In the F.I.R which was registered, allegations were made against four unknown persons and not against the Appellants therein despite the

[7] **(2016) 1 R.C.R. (Criminal) 961**

fact that the complainant knew the name of the accused, Noorahmmad, which fact became clear when the complainant therein deposed before the Trial Court.

65. The Apex Court in ***Mukesh & Another v. State for NCT of Delhi & Ors.***[8] *decided by a three Judges Bench* held that Test Identification Proceedings corroborate and lend assurance to the dock Identification of accused and that TIP does not constitute substantive evidence. The Apex Court referred to its previous Judgments which held, inter-alia, that an identification test is primarily meant for the purpose of helping the investigation agency with an assurance that the progress with the investigation of an offence is proceeding on the right line; Identification can only be used as corroborative of the statement in Court; Identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating Agencies to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be for the Courts of fact; substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of witness in Court, if required; identification of accused either in test identification parade or in Court is not a sine quo non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under the cover of darkness when

[8] **(2017) 6 SCC 1**

none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence; and the proposition of law is quite clear that even if there is no previous TIP, the Court may appreciate the dock identification as being above board and more than conclusive.

66. The law with regard to the importance of Test Identification Parade and identification in Court is well settled. Failure to hold Test Identification Parade does not make the evidence of identification in Court inadmissible. Identification in Court is a substantive piece of evidence. Test Identification Parade, if conducted, would corroborate the same. Failure to do so does not make the evidence of identification in Court inadmissible.

67. In the present case it was the victim who identified the Appellant in Court. The Appellant who had been seen by the victim (PW 16) from close quarters categorically identified the Appellant as the assailant. His evidence is truthful and clear and needs no corroboration. The eye witness account of the victim (PW 16) who was injured with a deep cut injury on the neck could have easily seen the face of the Appellant assaulting him and his appearance and identity would well remain imprinted in his mind. As a result of the Appellant trying to escape after the assault he fell into a nearby *'jhora'* from where he was picked up by the Police, Tashi Wangchuk Rana (PW 9), a police personnel on patrolling duty and Jigme Bhutia (PW 10), a home guard also on patrolling duty and taken to the hospital. The evidence of Tashi Wangchuk Rana (PW 9) and Jigme Bhutia (PW 10) who also categorically identified the Appellant in Court further corroborates the evidence of the victim (PW 16).

68. This Court is of the view that the Investigating Officer (PW 17) not conducting Test Identification Parade, in the facts and circumstances of the case, is not fatal.

MO II - 'rambo knife' and MO III – its sheath.

69. The Investigating Officer (PW 17) has proved the recovery and seizure of the 'rambo knife' (MO II) and its sheath (MO III) from the said '*jhora*'.

70. The Defence has not been able to demolish the Investigating Officer (PW 17) on the said seizure. The seizure of the 'rambo knife' (MO II) and its sheath (MO III) from the 'jhora' as deposed to by the Investigating Officer (PW 17) has not even been denied in cross-examination by the Defence.

71. The seizure of the 'rambo knife' (MO II) and the sheath (MO III) was effected by the Investigating Officer (PW 17) vide a property seizure memo (Exhibit 2) under the provisions of Section 102 Cr.P.C. This Section confers powers upon the police officer to seize property suspected to be stolen, or found under circumstances which creates suspicion of the commission of any offence. The Investigating Officer (PW 17) is a police officer and as such, authorised to exercise the power under Section 102 Cr.P.C.

72. There is no such inflexible proposition of law that there ought to be independent witnesses associated with the seizure. Section 102 Cr.P.C does not require it. When the police is not going in for the purpose of search for any specified object but for investigation emergently into a case of alleged attempt to murder and robbery there is no requirement of searching for respectable

citizens to be witnesses. The police officer in the course of investigation can seize any property if such property alleged to be stolen or is suspected to be stolen or is the object of the crime under investigation or has a direct link with the commission of offence. However, the Investigating Officer (PW 17), has examined two witnesses to prove the seizure. In such circumstances, it has become imperative to examine the evidence of the search witnesses also.

73. Kunj Bihari Agarwal (PW 7), a resident of Tadong, East Sikkim and who runs an electrical hardware shop, opposite police headquarter, Gangtok is a witness to the seizure and corroborated that the said knife and sheath were seized from the '*jhora'* in his presence vide a seizure memo (Exhibit 2). Kunj Bihari Agarwal (PW 7) exhibited the seizure memo (Exhibit 2) and identified his signature thereon as (Exhibit 2a). The said witness also identified (MO II) as the 'rambo knife' and (MO III) as the cover of the said knife recovered and seized by the police under property seizure memo (Exhibit 2).

74. During cross-examination, Kunj Bihari Agarwal (PW 7), on being led, admitted "*it is true that since no identification mark was affixed on MO II, the knife shown in the Court room may not be the seized knife also*." The learned Counsel for the Appellant therefore, contends that the Prosecution has failed to prove and connect the 'rambo knife' to the crime. The learned Session Judge found it unsafe to hold that the 'rambo knife' (MO II) was the weapon of offence. Rightly so, because even the second witness to the seizure, Abhijit Saha Sardar (PW 8) could not state definitely as to whether the 'rambo knife' (MO II) and its sheath (MO III) shown

to him in the Court room on 12.03.2015 were the same articles which was seized by the police under seizure memo (Exhibit 2) due to lapse of time. Further there being no certainty as to where the said 'rambo knife' (MO II) was seized from.

75. The learned Session Judge was, however, of the view that this would not absolve the Appellant since non recovery of weapon of offence by itself cannot be a reason to reject the testimony of the witnesses which are reliable. The fact that the Appellant had inflicted a deep cut injury in the front of the neck of the victim (PW 16) by a sharp edged weapon having been proved, the failure to clinchingly identify the weapon of offence by the seizure witnesses, although categorically identified by the Investigation Officer (PW 17), is irrelevant. The failure of the Investigating Officer (PW 17) to put identification mark on material objects for proper identification is improper. The Investigating Officer (PW 17) ought to have done so. In the present case, however, the failure of the Investigating Officer (PW 17) to do so thereby allowing confusion to the mind of the seizure witnesses does not detract the case of the Prosecution which has otherwise been proved by cogent evidence.

Material objects- MO I – the bag, MO VII- the water bottle, MO VIII – money amounting to Rs. 4840/-, O VI- the blood stained T-shirt, MO IX- the pants.

76. Item No. 1, 2 and 3 in the list of properties of seizure memo (Exhibit 3) proved by the Investigating Officer (PW 17) were the wearing apparels of the victim (PW 16) containing blood stains. Item no. 8 was cash amount totalling to Rs. 4840/- belonging to the

victim (PW 16). As per the seizure memo (Exhibit 3) item no. 4, 5, 6 and 7 are suspected to belong to the Appellant.

77. As stated earlier, the victim (PW 16) also identified and exhibited, Exhibit (MO I) – the bag, the Appellant had snatched from him on the relevant night; Exhibit (MO VII)- the water bottle that he was carrying in the bag Exhibit (MO I); Exhibit (MO VIII) – money amounting to Rs. 4840/- the Appellant had stolen from him on the relevant night; Exhibit (MO VI)- the blood stained T-shirt that he was wearing during the relevant time which was seized by the police and Exhibit (MO IX)- the pants which he was wearing at the relevant time which was also seized by the police. Pooja Lohar (PW 15), a forensic expert from RFSL, Saramsa clearly stated both in the Forensic Report (Exhibit 5) as well as in her deposition that human blood of group AB was detected in the dried blood sample (MO IV), vest (MO V) and T-shirt (MO VI) belonging to the victim further corroborating the fact that in fact the victim (PW 16) was injured due to the assault on the relevant day.

78. The learned Counsel for the Appellant would submit that the failure of the prosecution to explain how the said items no. 4, 5, 6 and 7 of the seizure memo (Exhibit 3) suspected to belong to the Appellant, were seized vide seizure memo (Exhibit 3) and found in the bag of the victim (PW 16) would create adequate doubt about the Appellant being falsely prosecuted.

79. A perusal of the seizure memo (Exhibit 3) would show ten items were seized. Item 1, 2 and 3 were wearing apparels said to belong to the victim (PW 16) containing blood stains. Item No. 4, 5, 6 and 7 of the said seizure memo (Exhibit 3) were found in a

cream colour bag which were said to belong to the Appellant. Item no. 8, 9 and 10 of the seizure memo were cash amount of Rs. 4,840/-, one dark blue colour bag and one water bottle said to belong to the victim (PW 16). The dark blue colour bag seized vide a seizure memo (Exhibit 3) was infact the bag (MO I) of the victim (PW 16). The Investigating Officer (PW 17) states that (MO I) is the blue coloured bag. The said (MO I) has been identified by the victim (PW 16) and his wife Seema Singhal (PW 6). The said items nos. 4- Grey colour shirt, 5- Brown colour wallet with Rs. 200/- in it, 6- ATM Card of State Bank, 7- two numbers of passport photo were infact found in another cream colour bag which was stated to belong to the Appellant as would be clear from the seizure memo (Exhibit 3). The Defence has not given a suggestion to the Investigating Officer (PW 17) that said articles 4,5, 6 and 7 of the seizure memo (Exhibit 3) were planted. The items 4, 5, 6 and 7 of the seizure memo (Exhibit 3) were all personal items of the Appellant. The Investigating Officer (PW 17) ought to have explained why those items were seized from the house of the victim (PW 16). Whether the said items were picked up by Seema Singhal (PW 6) from the place of occurrence or it was collected by the Police officers immediately after the incident remains unanswered.

80. The failure of the Prosecution to explain how items no. 4, 5, 6 and 7 of the seizure memo (Exhibit 3) were seized from the house of the victim (PW 16) does not in any way, however, create any doubt of the seizure of the bag (MO I) of the victim (PW 16) along with the seizure of the money (MO VIII) amounting to Rs. 4840/- and the water bottle (MO VI).

81. The Court has a duty to ensure that truth prevails. In material particulars the fact being well established, this Court is of the view that the said discrepancy does not shake the foundational facts of the present case.

Exhibit 9-Wound Certificate of the Victim (PW 16).

82. The Investigating Officer (PW 17) also collected the medical report of the victim (PW 16) from the Central Referral Hospital and exhibited the Wound Certificate issued by the Central Referral Hospital under the signature of Dr. Tarpan Limboo. The Investigating Officer (PW 17) identified and exhibited the said Wound Certificate as (Exhibit 9) and Dr. Tarpan Limboo's signature as (Exhibit 9 (a)), identifying the signature as he prepared the Wound Certificate in his presence and signed it. The said wound Certificate records the following injuries on the victim (PW 16) :-

> *"(1). Sutured cut injury at the level of upper border of thyroid cartilage extending from (R) anterior border of SCM to left posterior border of SCM."*

83. The learned Counsel for the Appellant would submit that the Wound Certificate (Exhibit 9) is not admissible in evidence. The fact that the Investigating Officer (PW 17) obtained the said Wound Certificate (Exhibit 9) under the signature of Dr. Tarpan Limboo from the Central Referral Hospital is admissible. However, as Dr. Tarpan Limboo was not brought to the witness box, the contents of the wound certificate (Exhibit 9) are inadmissible as the 'best evidence' of Dr. Tarpan Limboo has not been brought on record.

Exhibit 10 – certificate of Injury of the Appellant.

84. The Investigation Officer (PW 17) also collected the Certificate of Injury sustained by the Appellant from Central Referral Hospital as he was shifted to Central Referral hospital from STNM Hospital. He exhibited the said Certificate of Injury as (Exhibit 10). He collected the certificate from the counter of Central Referral hospital, Tadong, Gangtok. The said Certificate of injury reflected that the Appellant was admitted to Central Referral Hospital, Tadong, on 26.07.2013 for spinal injury and paraplegia and he was operated on 01.08.2013. A perusal of Certificate of Injury (Exhibit 10) reflects that it is signed by one Dr. P.R.K Prasad. The said Doctor was not examined. The contents of the said Certificate of Injury (Exhibit 10) also stands not proved.

Exhibit 11- the Arrest Memo.

85. The Investigating Officer (PW 17) proved the arrest memo dated 25.07.2013 of the Appellant and identified his signature at Exhibit 11 (a), 11 (b) and 11 (c) as the signature of the relative of the Appellant. The said arrest memo (Exhibit 11) would show the Appellant was arrested on 25.07.2013 at 14.00 hrs at STNM hospital where he was under treatment.

Exhibit 12- the rough sketch map.

86. The Investigating Officer (PW 17) also exhibited a rough sketch map (Exhibit 12) prepared by him. The contents of the rough sketch map prepared by the Investigating Officer (PW 17) 24.07.2013 is admissible except the identification of the place of occurrence marked "P.O" as the same is hit by the provisions of section 162 Cr.P.C. No witness has come forward and deposed that

the place of occurrence was shown to the Investigating Officer (PW 17) by him / her. The rough sketch map (Exhibit 12) would however and importantly show that *'jhora'* was 24'x24' 6" (dimension). This fact totally improbablises the defence of the Appellant given in answer to question no. 82 of the Section 313 Cr.P.C statement of the Appellant that the actual assailant who the Appellant also chased, jumped across the *'jhora'* and ran away. An act, perhaps humanly impossible.

Section 307 IPC- Attempt to murder.

87. The Appellant has been charged under the provision of Section 307 I.P.C. Section 307 reads as under:-

> **" *Attempt to murder.-*** *whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment to life, or to such punishment as is herein before mentioned."*

88. The Apex Court in re: ***State of Madhya Pradesh v. Mohan and Ors***[9]. : has held that :-

> *"14. ..... In order to attract Section 307, the injury need not be on the vital parts of the body. In order to attract Section 307, causing of hurt is sufficient. If anybody does any act with intention or knowledge that by his act he might cause death and hurt is caused, that is sufficient to attract life imprisonment. Section 307 uses the word "hurt" which has been explained in Section 319 IPC and not "grievous hurt" within the meaning of Section 320 IPC. Therefore, in order to attract Section 307, the injury need not be on the vital part of the body." (**emphasis supplied**)*

[9] **(2013) 14 SCC 116**

89. *A similar view has been reiterated by the Apex Court in re:* ***Anjani Kumar Chaudhary v. State of Bihar & Ano.***[10]*.*

90. The Appellant called the victim (PW 16) from the back, put his hand on his shoulder and when the victim (PW 16) turned around assaulted him on his neck, a vital part of his body, with a sharp edged weapon an inflicted a deep cut injury. A deep cut injury in front of the neck caused by a sharp edged weapon inflicted by the Appellant on the victim (PW 16) is more than a 'hurt'. The intention and knowledge is clear. The Appellant, obviously, would have known that a deep cut injury in front of the neck by a sharp edged weapon would definitely cause death and he would be guilty of murder. There is premeditation which is discernible in the act of the Appellant. The Appellant knew what he was doing. The Appellant committed the heinous act, unprovoked. The time, place and manner of the commission of the crime are indicative of the motive of the Appellant.

91. The learned Session Judge has held thus:-

> *"43. The nature of injuries sustained by the victim was "deep cut injury" on the front portion of neck which PW-1 (Dr. Sangeeta Pradhan) has clearly testified and about which the victim has elaborated. It is therefore, manifest that the victim had been assaulted by the accused with a sharp edged weapon on a vital part of the body (neck). Though it is uncertain whether the knife (marked M.O –II) was the same weapon of offence. It is however, unmistakable that the accused had used a sharp edged weapon to inflict the injury on the victim."*

92. This Court is of the view that the learned Session Judge has correctly come to the finding as quoted above. The learned Session

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[10] **(2014) 12 SCC 286**

Judge has correctly relied upon the Judgment of the Apex Court in re: ***Girija Shankar v. State of U.P***[11] which held that to justify a conviction under Section 307, IPC the Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section.

93. In view of the aforesaid the impugned Judgment convicting the Appellant under Section 307, IPC is upheld.

Section 392 IPC-robbery

94. The Appellant has also been charged under Section 392 IPC and convicted by the learned Session Judge. Section 392 IPC reads as under: -

> *"**392. Punishment for robbery.** – Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."*

95. Robbery has been defined in Section 390 IPC which reads as under: -

> *"**390. Robbery.-** in all robbery there is either theft or extortion.*
>
> ***When theft is robbery.-** Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carrying away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful strained, or fear of instant death or of instant hurt or of instant wrongful restraint…….*
>
> *……..*
>
> ***Explanation.**- the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."*

[11] **(2004) 3 SCC 793**

96. The second clause of Section 390, IPC, relating to "when extortion is robbery" is not attracted in the present case. Therefore, it is important to examine what is 'theft'.

97. "Theft" has been defined in Section 378, IPC which reads as under:-

> "**378. Theft.-** *whoever, intending to take dishonestly any movable property of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."*

98. The basis of the offence of robbery under Section 390, IPC is either theft or extortion committed under the circumstances specified therein. In the present case, extortion is not an issue. Theft is an ingredient of robbery. The felonious taking from the person of another or in his presence against the persons will, by violence or putting him in the form of injury elevates theft to robbery. For the Section to apply it is necessary that the accused should have from the very start, the intention to deprive complainant of the property and should for that purpose either hurt him. As distinguished from theft, robbery consists in the causing or attempting to cause death, hurt, or wrongful restraint, or fear of instant death, hurt or wrongful restraint.

99. In re: ***Venu alias Venugopal and others v. State of Karnataka***[12] , the Apex Court held:

> *"8. Section 392, IPC provides for punishment for robbery. The essential ingredients are as follows:*
>
> 1. *Accused committed theft.*
> 2. *Accused voluntarily caused or attempted to cause.*
>
> *(i) death , hurt or wrongful restraint;*

[12] **(2008) 3 SCC 94**

(ii) fear of instant death, hurt or wrongful restraint.

3. He did either act for the end

(i) to commit theft;

(ii) while committing theft;

(iii) in carrying away or in the attempt to carrying away property obtained by theft."

100. The victim (PW 16) has categorically deposed :-

> *"On 23.07.2013 at around 7 p.m. I closed my shop and started returning back to my residence carrying ₹ 70,000/- in a bag. En route I made payment to Lottery Manager for purchasing the lottery tickets from him .When I reached DPH road, it was around 7.30 p.m where I was called from the back by a person and he put his hand over my shoulder. When I turned back, he assaulted me with a sharp weapon over my neck and started snatching my bag where around ₹ 4,000/- was there. I protested but the accused cut the handle of my carry bag with the said weapon and snatched my bag containing my money and a water bottle. In the process I kicked him. I know the accused person (identified) as he is the person who had assaulted me on that day. On my kick, the weapon carried by the accused fell down. I ran after him shouting "thief thief" and saw him jumping over the "jhora". Since I was injured and blood was oozing out from my neck, I proceeded to STNM hospital. On my reaching the Emergency Ward of the hospital, the hospital personnel informed the police. Police came to STNM hospital and enquired about the matter. Thereafter the Doctor of STNM hospital sutured my wounds and on the same day I was referred to Central Referral Hospital, Tadong."*

101. Seema Singhal (PW 6), the wife of the victim (PW 16) has deposed that on hearing the thief had taken away the cash bag (MO I), the victim (PW 16), her husband, was carrying she went into the 'jhora' and took the said bag (MO I) from the possession of the said thief and the following day the said bag (MO I) was seized from her house from her brother, Pradeep Singhal (PW 4). The fact that the bag (MO I) had been seized from the house of Seema

Singhal (PW 6) has been proved. The seizure memo (Exhibit 3) also record so. It is not the Appellant's case that the money Rs. 4840/- (MO VIII) found in the bag (MO I) which was taken from the possession of the Appellant from the 'jhora' by Seema Singhal (PW 6) was not found inside the bag (MO I) which was identified by the victim (PW 16). Seema Singhal (PW 6) also identified the bag (MO I) as the bag, her husband, the victim (PW 16), was carrying at the time of incident. The presence of the Appellant has been continuously established by the evidence of the prosecution witnesses as held above.

102. The evidence of the victim (PW 16) and Seema Singhal (PW 6) read with other evidence on record clearly brings the act of the Appellant within the parameters of the Section 392, IPC and amounts to 'robbery' as defined therein.

103. This Court is of the view that the Prosecution has been able to discharge the burden of proof which lay on it to prove the charge under Section 307 and 392 IPC, proving all the ingredients of the offence, beyond all reasonable doubt leaving no uncertainty that it is the Appellant and the Appellant alone who committed the said offences and no other.

Sentence

104. The learned Counsel for the Appellant would finally argue that if this Court was to uphold the conviction then the sentences may be directed to run concurrently and not consecutively as has been done by the learned Session Judge.

105. The object and purpose of imposing adequate sentence as held by the Apex Court time and again is to protect the society

and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. The sentence imposed ought to reflect the conscience of the society. Sentence without considering its effect on the social order may not serve the avowed object.

106. This Court has perused the impugned sentence passed by the learned Session Judge. A person found guilty of offence under Section 307, IPC is liable for punishment with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment, as provided in the first part of the said Section.

107. In the present case, it has been found that the victim (PW 16) was inflicted a deep cut injury in the front of his neck, a vital part of his body, which injury is more grievous than a hurt.

108. Similarly a person found guilty of offence under Section 392, IPC is liable for rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. In the present case, the Appellant has also been found guilty of the offence of robbery.

109. For the purpose of examining whether the learned Session Judge was right in directing the sentences to run consecutively, it is important to examine Section 31 of Cr.P.C.

110. Section 31 of Cr.P.C provides :-

> ***"31. Sentence in cases of conviction of several offences at one trial.*** - ***(1)*** *When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him*

for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) *In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-*

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) *For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."*

111. The Apex Court in re: ***O.M. Cherian v. State of Kerala***[13], held as under:-

"10. *Section 31 CrPC relates to the quantum of punishment which may be legally passed when there is (a) one trial, and (b) the accused is convicted of "two or more offences". Section 31 CrPC says that subject to the provisions of Section 71 IPC, the court may pass separate sentences for two or more offences of which the accused is found guilty, but the aggregate punishment must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC. In Section 31(1) CrPC, since the word "may" is used, in our considered view, when a person is convicted for two or more offences at one trial, the court may exercise its discretion in directing that the sentence for each offence may either run consecutively or concurrently subject to the provisions of Section 71 IPC. But the aggregate must not exceed the limit fixed in provisos (a) and (b) of sub-section (2) of Section 31 CrPC, that is; (i) it should not exceed 14 years;*

[13] **(2015) 2 SCC 501**

and (ii) it cannot exceed twice the maximum imprisonment awardable by the sentencing court for a single offence.

11. *The words "unless the court directs that such punishments shall run concurrently" occurring in sub-section (1) of Section 31, make it clear that Section 31 CrPC vests a discretion in the court to direct that the punishment shall run concurrently when the accused is convicted at one trial for two or more offences. It is manifest from Section 31 CrPC that the court has the power and discretion to issue a direction for concurrent running of the sentences when the accused is convicted at one trial for two or more offences. Section 31 CrPC authorises the passing of concurrent sentences in cases of substantive sentences of imprisonment. Any sentence of imprisonment in default of fine has to be in excess of, and not concurrent with, any other sentence of imprisonment to which the convict may have been sentenced.*

12. *The words in Section 31 CrPC*

> *"… sentence him for such offences, to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct"*

indicate that in case the court directs sentences to run one after the other, the court has to specify the order in which the sentences are to run. If the court directs running of sentences concurrently, order of running of sentences is not required to be mentioned. Discretion to order running of sentences concurrently or consecutively is judicial discretion of the court which is to be exercised as per the established law of sentencing. The court before exercising its discretion under Section 31 CrPC is required to consider the totality of the facts and circumstances of those offences against the accused while deciding whether sentences are to run consecutively or concurrently."

Then further at Page 510:

"***16.*** *When the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. So far as the benefit available to the accused to have the sentences to run concurrently of several offences based*

on single transaction, in V.K. Bansal v. State of Haryana [(2013) 7 SCC 211 : (2013) 3 SCC (Civ) 498 : (2013) 3 SCC (Cri) 282] , in which one of us (T.S. Thakur, J.) was a member, this Court held as under: (SCC p. 217, para 16)

"16. … we may say that the legal position favours exercise of discretion to the benefit of the prisoner in cases where the prosecution is based on a single transaction no matter different complaints in relation thereto may have been filed as is the position in cases involving dishonour of cheques issued by the borrower towards repayment of a loan to the creditor.""

Then further at Page 511:

*"**19.** As pointed out earlier, Section 31 CrPC deals with quantum of punishment which may be legally passed when there is (a) one trial; and (b) the accused is convicted of two or more offences. The ambit of Section 31 is wide, covering not only a single transaction constituting two or more offences but also offences arising out of two or more transactions. In the two judgments in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and Manoj [(2014) 2 SCC 153 : (2014) 1 SCC (Cri) 763] , the issue that fell for consideration was the imposition of sentence for two or more offences arising out of the single transaction. It is in that context, in those cases, this Court held that the sentences shall run concurrently.*

***20.** Under Section 31 CrPC it is left to the full discretion of the court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically.*

***21.** Accordingly, we answer the reference by holding that Section 31 CrPC leaves full discretion with the court to order sentences for two or more offences at one trial to run concurrently, having*

> *regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the court may direct. We also do not find any conflict in the earlier judgment in Mohd. Akhtar Hussain [Mohd. Akhtar Hussain v. Collector of Customs, (1988) 4 SCC 183 : 1988 SCC (Cri) 921] and Section 31 CrPC."*

112. A perusal of the impugned sentence makes it evident that the sentences against the Appellant has been directed to run 'consecutively', however, the learned Special Judge has failed to specify the order in which the sentences are to run which is the mandate of the law.

113. The learned Session Judge has held that: *"the intention of the accused was to rob the victim of his money bag and in the process, he had attacked him with a sharp weapon on a vital part of the body (i.e. front portion of the neck) though the victim survived, the circumstances would show that the accused had sufficient knowledge that the consequence of such murderous attack would result in the victim's death."* It is evident that the commission of attempt to murder was in pursuit of the act of robbery. As held by the Apex Court in re: ***O.M Cherian (supra)*** when the prosecution is based on single transaction where it constitutes two or more offences, sentences are to run concurrently. Imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. Although, the facts constituting the offence of attempt to murder and robbery are distinct and different. The Apex Court in re: ***Kuldeep Singh v. State***

of Haryana and Ors.[14] was examining the sentence imposed to run consecutively for offences under Section 307 and Section 148 read with Section 149 of the IPC. While doing so, the Apex Court held:-

> *"5. Since the occurrence is the same, and the punishment is under different provisions of the IPC, for the same incident, we are satisfied that the sentence awarded under the different provisions of the IPC ought to have been ordered to run concurrently, specially keeping in mind the facts and circumstances of the present case. Ordered accordingly."*

114. In the circumstances, it is held that the award of sentence on the Appellant to run consecutively was not correct and it ought to run concurrently as held by the Apex Court as above.

115. When the learned Session Judge found the Appellant guilty of the offence of robbery u/s 392, IPC it was incumbent upon him to sentence the Appellant with 'rigorous' imprisonment. Section 392 IPC does not grant any discretion there. The impugned sentence u/s 392, IPC is, therefore, required to be converted to 'rigorous' imprisonment for one year and 6 months, keeping the rest of the sentence as awarded by the learned Session Judges as it is. In re: ***State of Himachal Pradesh v. Nirmala Devi***[15] . the Apex Court held that:-

> *"15. .....*
>
> *In an appeal from conviction, if the conviction is maintained, the Appellant Court has the power to alter the nature or the extent, or the nature and extent, if the sentence (though it cannot enhance the same). However, such a power has to be exercised in terms of the provisions of Indian Penal Code etc. for which the accused has been convicted. Power to alter the sentence would not extend to exercising the powers contrary to law."*

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[15] **2017 SCC online SC 374**

116. Evidently this is also a case of heavenly retribution. The Appellant, as per the impugned sentence passed by the learned Session Judge, suffers from paralysis of the lower half of the body as it appears from his appearance and requires help in performing daily chores. Incapacitation, in the present case, also seems to have been achieved by the heavenly retribution. Both the offences committed by the Appellant being heinous offences the deterrence theory as a rationale for punishing the Appellant were more relevant, without anything more.

117. The act of discouraging criminality may perhaps have been partially achieved by the paraplegic incapacitation. When the Appellant, the offender, suffered serious physical injury in a bid to escape after the crime and in the process physically incapacitated himself, this fact, would be relevant for sentencing specially if there are long lasting consequences. Although the present case involves heinous crimes committed by the Appellant, in the present case, in the peculiar facts, the learned Special Judge has passed the impugned sentence keeping in mind both the aggravating as well as mitigating circumstances.

118. *G*iving this Courts anxious consideration to the facts and peculiar circumstances of the present cas*e* and the law laid down by the Apex Court, this Court is of the view that the cause of criminal justice would be purposefully and adequately served if the sentences imposed by the learned Session Judge is directed to run concurrently and not consecutively. At the same time the sentence imposed for the offence of robbery under Section 392 by the learned Session Judge is changed from simple imprisonment to

rigorous imprisonment as per the law. As the learned Counsel for the Appellant claims that the Appellant suffers from disability it is hoped that the prison authorities would keep in mind the disability, on being so satisfied, and protect his human rights, which is paramount.

119. In view of the above, the Appeal is partly allowed. The sentences under Section 307 and 392 IPC are directed to run concurrently. The sentence imposed under Section 392 IPC is to be rigorous imprisonment. The rest of the sentences, fines and directions passed by the learned Session Judge is upheld

120. Copy of this judgment be remitted to the Court of learned Session Judge forthwith along with records of the Court for compliance.

121. The Appellant is on bail he shall surrender before the Court of learned Session Judge on 28.07.2017 to undergo sentence as pronounced.

122. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Counsels for the parties upon compliance of all formalities.

Sd/-
(Bhaskar Raj Pradhan)
Judge
26.07.2017

/avi Approved for reporting: yes.
Internet: yes.