THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 27th March, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.17 of 2021

Appellant : Chingba @ Robin Tamang

versus

Respondent : State of Sikkim

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

Appearance

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant was convicted of the offences under Section 307/323/448 of the Indian Penal Code, 1860 (hereinafter, the "IPC") and sentenced to undergo seven years rigorous imprisonment and to pay a fine of ₹5,000/-(Rupees five thousand) only, under Section 307 of the IPC with a default clause of imprisonment, six months simple imprisonment under Section 323 of the IPC and six months simple imprisonment under Section 448 of the IPC. The sentences were ordered to run concurrently, setting off the period of imprisonment already undergone by the Appellant. Aggrieved thereof, he is before this Court assailing the Judgment, dated 29-09-2021, in Sessions Trial Case No.05 of 2019 and Order on Sentence, dated 30-09-2021, of the Court of the Learned Sessions Judge, Special Division – I, East Sikkim, at Gangtok.

2. The Prosecution narrative is that Exhibit 1, the First Information Report (for short, the "FIR"), was lodged by P.W.1, Dr. N. Topden Bhutia posted at the Primary Health Centre (for short, the "PHC"), Rangpo, before the Rangpo Police Station, on 14-11-2018, at 2220 hours. The victim was brought to him on the same night at around 09.40 p.m. with laceration on the left side of his face extending upto his ear, the neck region and over his scalp, allegedly inflicted by a sharp object. Investigation by P.W.16, the Investigating Officer (for short, the "I.O.") of the case, revealed that the victim had performed local healing rituals on the wife of the Appellant but her condition deteriorated. Enraged, the Appellant held the victim responsible for her condition and assaulted him with a "*khukuri*", M.O.I. Charge-sheet was accordingly submitted against the Appellant under Sections 307/323/448 of the IPC. The Learned Trial Court framed charge against the Appellant under the above Sections of law to which he entered a plea of "not guilty" and claimed trial. The Prosecution examined sixteen witnesses, on closure thereof, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C"), to enable him to explain the incriminating circumstances appearing against him in the evidence. Thereafter, the final arguments were heard and on consideration of all materials by the Learned Trial Court, the impugned Judgment and Order on Sentence were pronounced.

3. Learned Legal Aid Counsel for the Appellant put forth multipronged arguments *viz*; in the first instance the identification of the accused is not established, as neither the victim P.W.11 nor his wife P.W.12 saw him on the night of the assault. That, the cross-examination of the victim indicates that he was coerced by

the Police to identify the Appellant as the assailant, in the teeth of his clear admission that he could not identify the person who had assaulted him. That, the victim's wife P.W.12 has also conceded in her evidence that the attack occurred during the night time and as she has a vision problem with her right eye she could not see properly. She has deposed that the attack was abrupt and she could not switch on the lights, therefore she did not see the assailant's face. That, although she claims to have identified the Appellant on recognising his voice, no forensic tests for voice recognition were performed during the investigation to verify this contention. It was also her unequivocal evidence that four to five persons had accompanied and attacked the victim on the relevant night but investigation failed to identify or arrest the said persons, rendering her evidence doubtful. P.W.5, 6 and 7 who helped evacuate the victim to the hospital did not witness the incident nor could they identify the Appellant as the assailant.

(i) Next it was contended that, there is a discrepancy with regard to the description of the weapon of offence M.O.I, the *"khukuri",* as P.W.11 in Exhibit 12, his "Dying Declaration" recorded on the night of the incident, claimed to have been hit with a 'fire wood' on his head following which he did not remember anything. Contrarily before the Court he deposed that he was assaulted with a "*khukuri*". P.W.12 his wife identified M.O.I the "*khukuri*" as the weapon of offence while at the same time admitting that the room was dark and she was unable to see the assailant. That, her identification of M.O.I is not plausible considering her inability to see in the darkness at the relevant time. Hence, no weight can be attached to the evidence of P.W.11 and P.W.12 with regard to the weapon of offence.

(ii) In the third prong of his arguments, it was urged that the CCTV footage was not seized as per law as no seizure memo was prepared. That, although M.O.XII is said to be the Compact Disc (for short, "CD") which contained the CCTV footage of the night when the Appellant allegedly went to the Police Station with the "*khukuri*" and "torch light" at around 2100 hours, the footage fails to reveal that the Appellant confessed to being the offender.

(iii) It was further urged that the forensic examination report, Exhibit 23, did not support the Prosecution case as the blood group of both the Appellant and the victim were "AB" hence it was not established as to whose blood M.O.I was stained with. In his ultimate argument it was contended that the motive behind the assault went unestablished by the Prosecution. That, in light of all the arguments advanced, the impugned Judgment and Order on Sentence be set aside and the Appellant acquitted of all charges.

4. Strongly repudiating the arguments of the Learned Counsel for the Appellant, Learned Additional Public Prosecutor contended that, P.W.2 the Police Personnel on duty at the Rangpo Police Station identified the Appellant as the assailant as he had entered the Police Station in an inebriated condition, at around 09.30 p.m. with the "*khukuri*", M.O.I containing blood stains. This is buttressed by the evidence of the I.O. P.W.16, who testified that the Appellant had identified himself at the Police Station and confessed to having assaulted the victim in his residence at IBM, Rangpo. That, the Learned Trial Court was privy to the contents of the CD which contained the CCTV footage and had rightly observed that the Appellant had entered the reporting room carrying the "*khukuri*" and "torch light", M.O.VI. Hence, the Learned Trial Court was correct in having convicted the Appellant under the above

provisions of law. P.W.12, the victim's wife, has also clearly stated that the Appellant had assaulted her husband several times and she could identify him from his voice as he uttered words during the assault, blaming the victim for his wife's condition. That, although the blood group of the Appellant and the victim was the same, but the blood stains on M.O.I was undoubtedly that of the victim as the medical examination of the Appellant revealed that he was devoid of any injuries. That, the evidence of P.W.12 regarding four other persons who came along with the Appellant has to be ignored considering that she is a rustic villager, thereby incapable of recalling and narrating the incident in all its minute details.

5. The submissions of Learned Counsel have been heard at length and all materials on records examined.

(i) It needs no reiteration that the standard of proof in a criminal case is for the Prosecution to prove its case beyond reasonable doubt. In ***Rajiv Singh*** vs. ***State of Bihar and Another***[1] it was held as follows;

> **"66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established canon of criminal justice is "fouler the crime higher the proof".** In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.
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> **67.** The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh v. State of Rajasthan [(2013) 5 SCC 722 : (2013) 4 SCC (Cri) 812] as succinctly summarised in para 21 as hereunder: (SCC pp. 731-32)
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> "*21.* ***Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason***

[1] (2015) 16 SCC 369

> ***that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sure conclusions.*** In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true, and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. ……. ……."
>
> **[Emphasis supplied]"**

(ii) Bearing in mind the standard prescribed, while dealing first with the identification of the Appellant, the Learned Trial Court observed that the victim had categorically stated in his evidence that, the Appellant entered his room abruptly at around 9 o'clock when he was asleep and hit him on his head with a "*khukuri*", upon which he fell unconscious. The Learned Trial Court also observed that P.W.11 had admitted that he was "told" that the person who assaulted him was the accused person. It was further observed that as the victim fell unconscious he did not get the opportunity to see and recognise the attacker. That, however P.W.12, his wife had clearly seen and recognised the Appellant assaulting the victim with the "*khukuri*", M.O.I.

At this juncture, it would be relevant to peruse and consider the cross-examination of both P.W.11 and P.W.12 who were the only persons present at the time of the incident. The evidence of P.W.11 reveals that he was accompanied by the Police to the Court who tutored him to identify the Appellant as the assailant. That, on the relevant night he did not see the assailant. The cross-examination of P.W.12 reveals that her husband had performed healing rituals on the wives of two persons in the village. On account of her inability to switch on the light when the attack ensued she could not see the face of her husband's assailant. She claims to have identified the voice of the Appellant but no evidence

has been furnished by the Prosecution to indicate that she was familiar with the Appellant and could identify his voice *sans* forensic tests.

The identification of the Appellant from the voice may be possible if there is evidence to show that the witness was sufficiently acquainted with the accused in order to recognize him or her by voice (see ***Dola alias Dolagobinda Pradhan and Another*** vs. ***State of Orissa***[2]). No evidence on this aspect was placed before the Learned Trial Court. Merely because the Appellant lived in the same locality as the victim it cannot be deduced that they were acquainted with him or that P.W.12 was familiar with his voice. The I.O. failed to conduct voice identification tests during the course of investigation to enable P.W.12 to confirm that the voice she heard that night was that of the assailant and none else. P.W.11 and P.W.12 are clear in their admission on their inability to recognise the Appellant as the assailant. They were told of his role by the Police. Despite the evidence of P.W.11 and P.W.12 the Learned Trial Court has proceeded erroneously to hold the assailant as the offender.

(iii) To identify the Appellant as the perpetrator of the offence, the Prosecution also took the assistance of the evidence of P.W.2, Keshar Singh Basnett, who was assigned the duty of night non-commissioned officer at the Rangpo Police Station, on the night of the incident. According, to him at around 09.30 p.m. the Appellant entered the Police Station in a drunken state carrying a naked "*khukuri*" with blood stains and "torch light" in his hand. He asked him to sit and inquired as to why he had come to the Police Station with a weapon, on which the Appellant stated that he had

[2] (2018) 18 SCC 695

come to report that he had killed a person. His cross-examination revealed that the Appellant did not tell him the name of the person whom he had assaulted with the "*khukuri*". His evidence is to be considered along with the evidence of P.W.1, the doctor posted at the PHC at the relevant time and who medically examined the Appellant at around 11.40 p.m., post the Appellant's arrival at the Police Station said to be at 09.30 p.m.(*supra*). Exhibit 9 is the medical report pertaining to the Appellant in which it is *inter alia* recorded as follows;

> *"Name: Changba (Robin Tamang) Age: 53 yrs Add: IBM*
> *…….*
> *O/E*
> *(1) Complexion: brown.*
> *(2)* ***Well oriented.***
> *(3)* ***Talking fluently.***
> *(4)* ***Pupil not dilated.***
> *(5)* ***Alcohol not consumed.***
> *(6) No inj sustained.*
> *(7) Standing straight but swaying.*
> *…….."*

The evidence of P.W.1 and P.W.2 are contradictory with regard to the consumption of alcohol. As per P.W.2 the Appellant was inebriated, whereas the doctor found that he had not consumed alcohol, and he was well oriented and speaking fluently. More weight in my considered opinion has to be attached to the evidence of P.W.1 who is a disinterested witness in the matter and had medically observed the Appellant. P.W.5 was a resident of the same locality as the Appellant and the victim. He is however, a hearsay witness who neither witnessed the incident nor did he identify the Appellant as the assailant, as is also the case with P.W.6 and P.W.7.

(iv) The next point that fails to support the Prosecution case is that P.W.12 had told her husband that there were four to five people who had attacked him on the relevant night. Her evidence further reveals that "*It is true that I was "told" by the police that it was the accused who had assaulted my husband on*

the relevant night. It is true that I did not see any weapon of offence at the relevant time of assault." It is therefore not the witness who identified the Appellant, it is the Police in fact who told her that he was the assailant. Even if the arguments of the Prosecution with regard to P.W.12 being a rustic villager and her evidence containing some discrepancies which should be ignored by the Court is to be considered, this Court cannot lose sight of the fact that as per P.W.12 "four to five" assailants entered the room and not one. Even a rustic villager would be able to comprehend the difference between one person and four people. The Prosecution has failed to put forth in its evidence as to what was the fate of the other four to five people as deposed by P.W.12 who had attacked the victim on the relevant night. There is no explanation whatsoever put forth on this count even by P.W.16, the I.O. of the case. Although P.W.2 stated that the Appellant confessed to having killed a person, without naming any person, but P.W.16 during the investigation did not deem it necessary to take steps to record the Section 164 Cr.P.C statement of the Appellant.

(v) The Learned Trial Court was impressed by the fact that the CCTV footage showed that the accused had gone to the Police Station with the "*khukuri*" and "torch light", however it is relevant to notice that P.W.16 in his evidence has not stated that the CCTV footage reveals the Appellant's alleged confession as deposed by P.W.2 nor is it revealed that he was wearing a blood stained T-shirt as stated by P.W.8 and P.W.9. The observation of the Learned Trial Court was that the CCTV footage was played in the open Court Room in the presence of the Appellant and his Counsel wherein it was seen that the Appellant had appeared carrying a "*khukuri*",

M.O.I and "torch light", M.O.IV. The Learned Trial Court is silent as to whether any confession was made by the Appellant in the footage, with regard to the offence.

(vi) Appositely, it has to be considered that P.W.8 and P.W.9 were witnesses to the seizure of the *"khukuri"*, M.O.I and "torch light", M.O.VI, vide Exhibit 16, on which they have affixed their signatures. Their evidence however does not reveal as to whom M.O.I and M.O.VI were seized from. In other words, they did not witness the Material Objects being seized by the Police from the possession of the Appellant and it is the specific evidence of P.W.9 that the Police told him that M.O.I and M.O.VI were brought by the Police. This evidence has not been considered by the Learned Trial Court. The Learned Trial Court also failed to consider that there was no proof of seizure of the CCTV footage. The evidence of P.W.13 corroborated by the evidence of P.W.16 establishes undoubtedly that Exhibit 21, a certificate under Section 65B of the Indian Evidence Act, 1872 was issued by P.W.13, the Station House Officer, posted at the Rangpo Police Station at the time of incident. However, not only did P.W.13 under cross-examination admit that he did not view the CCTV footage while signing Exhibit 21, he also admitted that the footage was not seized vide any Seizure Memo. That, there was no document to establish that I.O. of the case received the CCTV footage. The evidence on record is also revelatory of the fact that a copy of the CD was not made available to the Appellant.

(vii) In the absence of any cogent proof that the Appellant was the assailant, augmented with the vacillating unestablished evidence of P.W.12 that there were four to five assailants who entered along with the Appellant, I am of the considered opinion

that the Prosecution has not been able to establish that the Appellant was in fact the assailant responsible for the assault on the victim on the relevant night. Merely because the "*khukuri*" was blood stained with the blood group "AB" is not clinching evidence with regard to the identification of the Appellant and the consequent alleged assault. The blood group of both the Appellant and the victim admittedly is "AB" as discovered on forensic test of their blood samples by P.W.15 Prem Kumar Sharma, Junior Scientific Officer in the Biological Division of RFSL, Saramsa, East Sikkim. It is not anyone's case, including that of P.W.2, that the "*khukuri*" contained "fresh" blood stains. P.W. 15 also examined M.O.I to M.O.VII, forwarded to him by the Sub-Divisional Police Officer, Rangpo Sub-Division, on 05-12-2018. The witness has failed to elucidate as to whether the blood groups were AB +ve or AB –ve. In his cross-examination admittedly he did not conduct tests to assess the age of the blood on the "*khukuri*". The forensic report of this witness is thus inconclusive with regard to the blood found on M.O.I or on the other Material Objects forwarded to him and thereby renders no assistance to the Prosecution case in any manner.

(viii) So far as reliance of the Learned Counsel for the Appellant on the discrepancy with regard to the weapon of offence given by P.W.11 in his "Dying Declaration", Exhibit 12 and in his evidence before the Court, although it is settled law that the document obviously cannot be considered as a "Dying Declaration" if the person making the statement survives the assault, however, nothing debars the Court from considering the contradictory evidence revealed *supra* with regard to the weapon of offence.

(ix) The other shortcomings that are found in the Prosecution case is that according to P.W.16 he received a distress call from the Mobile No.8597643649 concerning the assault at the IBM. Neither his investigation nor his evidence revealed who the caller was or the identification of the subscriber to the number and P.W.16 under cross-examination has admitted that the said person was not made a Prosecution witness. The identity of the caller has thus remained undisclosed. A minor discrepancy also arises with regard to the arrival of P.W.11 and P.W.12 at the PHC. As per P.W.16 both P.W.11 and P.W.12 were taken to the PHC together, which is however belied by the evidence of P.W.1 and P.W.12 herself.

(x) It is also clear that the Prosecution has failed to establish motive. In ***R. Shaji*** vs. ***State of Kerala***[3], the Supreme Court while discussing the importance or otherwise of motive observed as follows;

> "**33.** Motive is primarily known to the accused himself and therefore, it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime. In a case of circumstantial evidence, motive may be considered as a circumstance, which is a relevant factor for the purpose of assessing evidence, in the event that there is no unambiguous evidence to prove the guilt of the accused. Motive loses all its significance in a case of direct evidence provided by the eyewitnesses, where the same is available for the reason that in such a case, the absence or inadequacy of motive cannot stand in the way of conviction. However, the absence of motive in a case depending entirely on circumstantial evidence, is a factor that weighs in favour of the accused as it "often forms the fulcrum of the prosecution story". ……..."

In the absence of motive the Prosecution case flounders as there is no ocular evidence.

[3] (2013) 14 SCC 266

6. In the end result, for the foregoing reasons, I find that the Prosecution has failed to prove its case beyond a reasonable doubt.

7. Appeal is allowed.

8. The Judgment and Order on Sentence of the Learned Trial Court are set aside. The Appellant is acquitted of the offences under Section 307/323/448 of the IPC.

9. He be set at liberty forthwith, if not required in any other matter.

10. Fine, if any, deposited by the Appellant in terms of the impugned Order on sentence, be reimbursed to him.

11. Pending applications, if any, stand disposed of.

12. No order as to costs.

13. Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

(Meenakshi Madan Rai)
Judge
27-03-2023

Approved for reporting : **Yes**

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