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**IN THE HIGH COURT OF SIKKIM AT GANGTOK****CRIMINAL APPEAL No. 01 OF 2009**

(Jail Appeal)

Damber Bahadur Chhetri,  
Son of Late Chandra Bahadur Chhetri,  
Resident of 7<sup>th</sup> Mile, P.O. Makha,  
P.S. Singtam, East Sikkim.  
A/P Rongyek Jail

...Appellant

-versus-

State of Sikkim  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok, East Sikkim.

... Respondent

**For the Appellant:** Mr. N. Rai, Senior Advocate with Ms. Jyoti Kharka, Advocate.

**For the respondent:** Mr. J.B. Pradhan, Public Prosecutor with Mr. Karma Thinlay, Additional Public Prosecutor for the State.

**Date of Hearing** : 19.04.2010


**Date of Judgment** : 23.04.2010

**PRESENT: HON'BLE THE CHIEF JUSTICE  
MR. JUSTICE BARIN GHOSH  
HON'BLE MR. JUSTICE S.P. WANGDI, JUDGE**

**JUDGMENT AND ORDER*****Ghosh, CJ***


Homicide of Dawa Tamang was reported by a First Information Report. Accordingly, Sadar Police Station case was registered under Section 302 IPC against unknown persons. In course of investigation, pursuant to the said First Information Report, led to arrests, search and seizures. On completion of investigation, charge sheet was filed against the appellant and against one Kishore Thapa. The appellant was the first accused and Kishore Thapa was the second. On the basis of the charge sheet and supporting materials, charges were framed against both the accused persons under Section 450 read with Section 34, Section 302 read with Section 34 and Section 380 read with Section 34 of IPC. In order to prove its case, prosecution examined as many as 19 witnesses and produced many exhibits.

2. The trend of the evidence thus produced suggests that the deceased was in disturbed mind before his homicide. In course of a conversation with PW 5, which took place 7-8 days before his death, the deceased told that one of his friends called Damber, who may not be the appellant, along with friends of Damber used to rag him and also used to ask for



money from him. This conversation was overheard by PW 6. The death took place on 16<sup>th</sup> September, 2003. The deceased was a Stenographer working with the Government, had a Maruti Taxi and was living alone in a rented accommodation since he was a bachelor. At about 5.30 p.m. on 16<sup>th</sup> September, 2003 the driver of the deceased finding that the rented accommodation of the deceased was locked up, deposited the keys of the taxi as well as earnings therefrom with the neighbour of the deceased and left. On the morning of 17<sup>th</sup> September, 2003, the driver as usual went to the residence of the deceased and found the residence of the deceased locked up in the similar fashion. The same thing happened on 18<sup>th</sup> September, 2003 and the situation did not alter even in the morning of 19<sup>th</sup> September, 2003. The driver thus contacted the elder brother of the deceased, whereupon enquiries were made which revealed that the deceased did not attend office since 17<sup>th</sup> September, 2003. Accordingly, the brother of the deceased and the driver of the deceased went to Sadar Police Station to lodge a missing report of the deceased. However on the advice of Sadar Police Station, those two gentlemen returned to the rented accommodation of the deceased, met the landlord thereof and later on through an alternative entry behind the verandah of the rented





accommodation of the deceased entered the same and discovered the dead body of the deceased.

3. Upon the arrest of the appellant and the accused No. 2, the accused No. 2 gave a statement before the police, which was witnessed by independent witnesses. The said statement was recorded in Nepali language, English translation whereof is as under: -

“ TRANSLATED COPY OF THE DISCLOSURE STATEMENT U/S 27 OF EVIDENCE ACT

Disclosure Statement U/S 27 Evidence Act.

EXT. 10

Date : 23/09/2003

Time : 14 00 hrs.

Place : Sadar P.S. Gangtok.

This is my true statement that on the night of 16/09/2003 I, Kishor Thapa and my friend Damber Chettri went to the rented room of Dawa Tamang below Lall Bazar and killed Dawa Tamang there and took away his hi-tech shoes from his house at about 10.30 P.M. I have hidden those shoes in my rented room at Upper Tathangchen. I will handover those Hi-tech shoes in front of the police and the witnesses from my house.

Together with this, I have thrown away hammer having handle of iron pipe below Sheree Punjab Hotel above Arithang Road in the bush. I have thrown that hammer after killing Dawa Tamang and while returning with my friend Damber Chettri on the night of 16/09/2003. I can also take out that iron hammer before the police and the witnesses.



Prepared by : (I.O.)

P.M. Rai, P.I.

O/C Sadar P.S.

Gangtok.

Sd/-

29.9/03

EXT. 10(b)

Sd/-

Kishor Thapa

Kishor Thapa

In presence of following witnesses:

(1) Karma Loday Lepcha-----Sd/-  
23/9/03

S/O Maa Tshering Lepcha  
R/O Upper Syari, E/Sikkim  
(Peon of A.G. Office)

Ext.10(a)

EXT.10(a)

(2) Arjun Tamang, -----Sd/-  
23/9/03

S/O Shriman Tamang  
Upper Arithang (Near Lotus Lodge)  
Gangtok  
(L.D.C. of Law Dett.)

Ext.10(c) ”

4. The above disclosure statement led to seizure of a pair of hi-tech shoe from the residence of the accused No. 2 and also the hammer at or around the place as was mentioned in the said statement.

5. Independent search at the residence of the appellant resulted in seizure of, amongst others, a trouser and a shirt containing blood stains.




6. The medical evidence suggested that the cause of death was a combined effect of ante mortem head injury produced by blunt force and ante mortem strangulation by ligature. The CFSL report did not suggest that the blood stains contained in the shirt and trousers seized from the residence of the appellant were not by the blood of the appellant or the same were by the blood of the deceased. The search at the residence of the accused No. 2 also resulted in seizure of a polythene bag containing the name of the deceased.

7. On the basis of the evidence as above, the appellant too had been convicted.

8. From the judgment and order under appeal, it appears that the learned Sessions Judge did not make any effort to ascertain from the evidence on record the linkage of the appellant with the homicide of the deceased. The learned Sessions Judge accepted the disclosure statement of the accused No. 2 as the primary link of the appellant with the homicide. As it appears, the learned Sessions Judge felt that it was the appellant, who along with his friends ragged the deceased and used to ask for money from him. The learned Sessions Judge, accordingly, completed the chain of

A handwritten signature in blue ink, consisting of stylized initials.



circumstances in holding that the appellant too was guilty of homicide.

9. The disclosure statement as quoted above was under Section 27 of the Indian Evidence Act, 1872 and the same had also been indicated there. Section 27 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act. A look at Sections 25, 26 and 27 of the said Act would amply demonstrate the same. Those are as follows:


**“25. Confession to police officer not to be proved.-** No confession made to a police officer, shall be proved as against a person accused of any offence.

**26. Confession by accused while in custody of police not to be proved against him.-** No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.-In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

**27. How much of information received from accused may be proved.** – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”






**10.** Confession statement as quoted above having been made in custody of police and before a police officer, as recorded in the statement itself, could not be proved even against the accused No. 2, except to the extent the same led to discoveries mentioned above. When the statement of the accused No. 2 to the effect that I and the appellant went to the rented room of the deceased and killed him could not be proved against the accused No. 2, no reliance thereon could be placed against the appellant. That part of the statement, in law, should be deemed to be no part of the evidence on record. In the instant case, accused No. 2 was not examined by the prosecution.

**11.** In that view of the matter, the only acceptable evidence on record against the appellant was that he ragged the deceased and asked money from him about 7-8 days before his death. There was no other evidence on record which can lead to any circumstances, leading to an inference that the appellant entered the house of the deceased on the fateful night and murdered him.

**12.** However, in terms of the aforementioned disclosure statement a pair of hi-tech shoe belonging to the deceased was seized from the residence of the accused No. 2 and a hammer





was also seized. The hammer was projected as one of the instruments used to commit the murder. The disclosure statement did not talk about the polythene bag containing the name of the deceased. The same was, however, discovered while the house of the accused No. 2 was being searched. There is no evidence that the appellant was associated with the alleged theft of either the polythene bag or the pair of hi-tech shoe. That being the situation, there is no evidence on record that the appellant had committed theft of any article from the residence of the deceased.

**13.** In that view of the matter, the appeal is allowed. The judgment and sentence as against the appellant is, accordingly, set aside. There shall be no order as to costs.



Judge



Chief Justice

jks/