

F.R.  
**IN THE HIGH COURT OF SIKKIM AT GANGTOK****GOVT. APPEAL No. 01 of 2009**

State of Sikkim

...Appellant

-versus-

1. Thukchuk Lachungpa,  
Resident of Yama House,  
M.G. Marg, Gangtok.
2. Sonam Chajor Lachungpa,  
@ Purkey Sonam  
...Respondents.

**For the Appellant:**

Mr. J.B. Pradhan, Public Prosecutor,  
with Mr. Karma Thinlay, Additional  
Public Prosecutor and Mr. S.K. Chettri,  
Assistant Public Prosecutor for  
Appellant-State.

**For the respondents:**

Mr. K.T. Bhutia, Senior Advocate with  
Mr. S.S. Hamal, and Mr. Thupden  
Youngda Rinzing, Advocates for  
Respondents No. 1.

Ms. Manita Pradhan, Amicus Curie  
representing respondent No. 2.

**Date of Hearing** : **03.03.2010**

**Date of Judgment** : **03.03.2010**

**PRESENT: HON'BLE THE CHIEF JUSTICE  
DR. JUSTICE AFTAB H. SAIKIA**


**JUDGMENT AND ORDER (ORAL)**

***Dr. Saikia, CJ***

Heard Mr. J.B. Pradhan, learned Public Prosecutor, Sikkim (for short, 'PP') assisted by Mr. Karma Thinlay, learned Additional Public Prosecutor and Mr. S.K. Chhetri, learned Assistant Public Prosecutor for the appellant. Also heard Mr. K.T. Bhutia, learned Senior Counsel assisted by Mr. S.S. Hamal and Mr. Thupden Youngda Rinzing, learned Counsel for respondent No. 1 and Ms. Manita Pradhan, learned Amicus Curie representing respondent No. 2.


**2.** The factual matrix of the case in brief as projected by the prosecution is that it was alleged by Dadul Bhutia, PW 1 in his FIR lodged with the Officer In-charge, Ranipool Police Station on 14.05.2000 that on 14.05.2000 at around 12.30 p.m. his son Dawa Tashi Bhutia (hereinafter referred to as 'the deceased') went to the river along with his other village mates for taking bath. It came to be known that while his other friends had begun to take bath, his son came near the swimming pool for roaming. At that time, on the behest of Thukchuk Lachungpa, respondent No. 1 herein, his son was severely assaulted with rod, iron grill, stone, etc. He was being assaulted even when he laid unconscious and he was thrown





away and was nearly killed. Two of his friends reached the place of incidence and caught hold of the feet of the assaulters and begged for forgiveness. His friends also received beating from the assaulters and afterwards he was brought to the hospital for check up where his nose bone was found to be broken, head cracked and his face was worthy not being seen. There was no finding as yet as to the external injuries. It was mentioned in the FIR that his son was assaulted by 10-15 persons. The condition of his son was critical and anything could happen at anytime. Be it so mentioned that the victim succumbed to his injuries on the next day, i.e. on 15.05.2000 at around 7 a.m.

**3.** On the behest of the FIR the investigation ensued. The police arrested both the respondents. On completion of the investigation, the police had submitted the charge sheet against both the respondents. Respondent No. 1 was charged under Sections 109/114/147/148/149/302 IPC read with Section 25 of the Arms Act, 1959 when Sections 143/148/149/302 IPC were slapped against Respondent No. 2. Since the matter was triable by the Court of the learned Sessions Judge, the same was committed to the said Court for trial of the respondents. During the trial the prosecution





examined as many as 31 witnesses including 9 (nine) official witnesses, namely 7 (seven) doctors being PW 11 Dr. Kadang Zangmu Bhutia, PW 12 Dr. A. Rai, PW 13 Dr. Samsey Denzongpa, PW 14 Dr. K. Giri, PW 20 Dr. Passang D. Phempo, PW 23 Dr. Chimi Denma Namgyal and PW 24 Dr. K.B. Gurung including 2 (two) Investigating Officers (for short, 'I.O.')

namely PW 29 Kharga Bahadur Gurung and PW 30 Chewang Norbu Kazi.

**4.** The respondents were also examined under Section 313 of the Code of Criminal Procedure (for short, Cr. P.C.). Defence did not adduce any evidence. The respondents pleaded not guilty and sought for trial.

**5.** Having carefully appreciated and scrutinised the evidence on record and also upon hearing the learned counsel for the parties, the learned Sessions Judge , East and North Sikkim at Gangtok (for short, 'the learned Sessions Judge') by his Judgment and Order dated 29.02.2008 rendered in S.T. Case No. 1 of 2007 found that the prosecution failed to bring home the charges as already quoted hereinabove against the respondents and also was not able to prove all those charges beyond reasonable doubts and resultantly both the respondents were acquitted.

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**6.** Being highly dissatisfied with the impugned judgment and order dated 29.02.2008 passed by the learned Sessions Judge, the appellant has preferred this Government Appeal basically on two counts:

(i) that the learned Sessions Judge failed to appreciate and scrutinise the testimony of the witnesses more particularly PWs 3, 4 and 5 in its proper perspective although they were declared to be hostile witnesses; and

(ii) that the learned Sessions Judge ought to have believed, accepted and approved the evidence of PWs 1, 6 and 7 as regards the dying declaration so given by the deceased to them while he was struggling with his injuries so inflicted upon him as being assaulted by the respondents.

**7.** To drive these points to home, Mr. Pradhan, learned PP has strenuously argued that PW3 Tshering Wangchuk Lepcha, PW 4 Pema Wangyal Bhutia and PW 5 Tashi Lepcha, despite they being declared as hostile witnesses, there are convincing and ample evidence which would be sufficient and adequate to rope in the respondents under the charges so framed against them. Drawing this Court's close attention to the evidence of those three witnesses, being produced them as the eye witnesses, the learned PP has submitted that the


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evidence on record of those eye-witnesses in totality would go to show that both the respondents are directly involved in the assault upon the deceased. It has been emphasised by the learned PP that the assault was inflicted at the behest and instigation of respondent No. 1 who was a political heavy weight and an ex-minister. He has also argued that the evidence of hostile witnesses cannot be easily brushed aside or ignored in toto. On careful scrutiny of those evidence of the hostile witnesses PWs 3, 4 and 5 would go to show that their evidence can be accepted and approved, being trustworthy and corroborative and the same can be the basis of conviction of the respondents.

**8.** In support of his submission as regards the hostile witnesses, the learned PP has relied on two decisions of the Apex Court pronounced in *Vishram vs. State of Madhya Pradesh* (AIR 1993 SC 250) and *State of Gujarat vs. Anirdudhsing and another* ([1997] 6 SCC 514).

**9.** Having considered the facts and circumstances of the cases involved herein in cited cases hereinabove, this Court is of the view that the ratio laid down in those cases will not be applicable in the case in hand.






**10.** Coming to the question of dying declaration, it is stated on behalf of the State-appellant that PW 1, the father of the deceased and the informant, was very much categorical in his deposition that his son while languishing in the STNM Hospital with his injuries on his person, informed him on his query that following an argument with respondent No. 1 regarding some Bengali tourists, the deceased, his son, was assaulted by some boys of the respondent No. 1. At the same breath, PWs 6 and 7 who were the elder brothers of the deceased, in their deposition, specifically mentioned that the deceased named the respondents being responsible for the fatal assault on him.

**11.** The learned PP has taken this Court to the entire evidence of PWs 6 and 7.

**12.** PW 6 in his deposition testified that at about 8 – 9 p.m. at STNM Hospital when he asked the deceased, who was in speaking condition, about what actually happened on the fateful day, the deceased replied that he along with his friends went to Rey Khola for swimming and he saw some Bengali tourists being chased by the boys of respondent No. 1 and on seeing this he intervened and requested the respondent No. 1 not to allow his boys to do so. At that moment, the

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respondent No. 1 got enraged and asked him not to interfere in his affairs and go away from there. In the process, a quarrel ensued between him and the boys of the respondent no. 1. The boys started assaulting the deceased with rods, beams, iron grills, etc. at the direction of respondent No. 1.

**13.** PW 7 also deposed same version as that of the statement of PW 6. This witness, in his cross, stated a very significant fact. He deposed that he visited Manipal Hospital on 14.05.2000 where his brother, the deceased, made those statements in the nature of dying declaration to him, when in fact the deceased was not in Manipal Hospital at that relevant time but he was brought as injured to STNM Hospital.

**14.** Nevertheless, the learned PP has forcefully insisted that there is a total corroboration and consistency in the evidence of all those three witnesses as regards making the statements of dying declaration before them and on the basis of said dying declaration so mentioned by these three witnesses PWs 1, 6 and 7, the respondents ought to have been convicted.


**15.** To buttress his point, Mr. Pradhan, learned PP has relied on basically two legal authorities held by the Supreme





Court in *P.V. Radhakrishna vs. State of Karnataka* ([2003] 6 SCC 443) and *Ghanashyam Das vs. State of Assam* ([2005] 13 SCC 387). Relying upon *P.V. Radhakrishna's Case* (supra.), the learned PP has tried to hammer on the point that the declaration so made by the deceased to the PWs 1, 6 and 7 was true and voluntary. The statement of the deceased was not as a result of either tutoring or prompting or a product of any imagination. An ordinary reading of this evidence would make it clear that the deceased was not under any pressure or coercion to disclose the names of the respondents particularly respondent No.1 indicating his involvement in the commission of that assault to all these witnesses. As such, the trial Court ought to have relied on the statements of these three witnesses accepting the dying declaration so made by the deceased.

**16.** Mr. Pradhan, learned PP has further submitted that if the evidence of all those witnesses, so examined by the prosecution to bring home its case, would have been appreciated and scrutinised by the trial Court, the respondents ought to have been convicted instead of getting acquittal and accordingly, it is a fit case where this impugned judgment and order deserve interference of this Court.





**17.** Supporting the impugned Judgment and Order acquitting the respondents as well as refuting the contentions and submissions made on behalf of the State, Mr. K.T. Bhutia learned Senior Counsel representing respondent No. 1 and Ms. Manita Pradhan, the learned Amicus Curie for respondent No. 2 have jointly argued that simply there is no scope for interference with this impugned judgment of acquittal. According to both of them, the reasons are clear and loud.

**18.** Harping on the point of evidence of hostile witnesses namely PWs 3, 4 and 5, both of them have categorically submitted that although it is true that the evidence of hostile witnesses cannot be brushed aside in its entirety, the trial court on careful analysis of those evidence found that such evidence of those hostile witnesses was not consistent with the prosecution case and it was, therefore, not acceptable to the trial court.

**19.** In a case in hand, it appears that on proper scrutiny and careful perusal the evidence of all these three witnesses in its entirety would candidly go to reflect that those were not credible testimony which can be accepted. Nothing inspiring or cogent reasons have been emerged out from the evidence of these witnesses though they are hostile so far as to

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make the basis for conviction of both the respondents and the learned Sessions Judge was correct and justified in rejecting the evidence of all these three witnesses though they were examined by the prosecution as eye witnesses.

**20.** Insofar as dying declaration so made by the deceased to PWs 1, 6 and 7 is concerned, both the learned counsel have submitted that such dying declaration as relied upon by the prosecution cannot be accepted at all. According to them, the deposition of all those three witnesses as regards the making of dying declaration to them by the deceased, *ex-facie*, are full of contradiction, infirmities and incorrectness.

**21.** In support of such submission, at the very outset, the FIR dated 14.5.2000 has been referred to. It is stated on behalf of the respondents that according to PW 1, the father of the deceased, he met the deceased in STNM Hospital because he did not find him in Manipal Hospital where he was initially admitted and where from he was evacuated to the STNM Hospital. In the STNM Hospital according to this witness, PW 1, the deceased told him as already mentioned hereinabove that he was assaulted by some of the boys of respondent No. 1. On cross, this witness said that his eldest son PW 7 Karma Wanchuk Bhutia came straight to the STNM


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Hospital and did not go to the Manipal Hospital. This piece of evidence, according to learned counsel for the respondents, was completely false, unreliable and wholly dislodged by the evidence of PW 7 himself who even in his deposition pinpointedly stated that on hearing such incident he proceeded to Manipal Hospital and found the deceased, his brother, bleeding profusely. PW 7 deposed that at Manipal Hospital he asked his youngest brother (the deceased) as to what actually happened to him which made him to come to hospital. Then the deceased informed PW 7 that he was assaulted by the boys of respondent No. 1 on his direction.

**22.** On the other hand, the PW 6 in his evidence went one step further wherein he gave a vivid picture of assault which was disclosed before him by way of dying declaration by the deceased. In his statement, PW 6 said that on the fateful day he was at Jorethang and on being informed about such incident at Namchi where he arrived at the house of his sister, he rushed to Gangtok in the evening and arrived at STNM Hospital after dropping in his house. At about 8.00-9.00 p.m. after the deceased was given medical aid, he was in a speaking condition. This witness asked the deceased as to what had


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actually happened on the same day and he narrated the story as already recorded hereinabove.

**23.** Both the counsel representing the respondents have vehemently submitted that the testimony of these three witnesses as regards the statement made by way of dying declaration by the deceased to them, cannot be accepted and as such there was no infirmity or incorrectness found in the impugned judgment acquitting the respondents by not believing so called dying declaration given by the deceased to those witnesses i.e. PWs 1, 6 and 7 and the appeal so filed by the Government is liable to be dismissed.

**24.** Due consideration has been given to the extensive submissions and contentions put forward by the learned Counsel for the parties. The entire evidence on record particularly the evidence of all those witnesses so relied upon by the learned Counsel for the parties, namely, PWs, 1, 2, 3, 4, 5, 6, 7 including the evidence of PWs 29 and 30 have been meticulously scrutinised and thoroughly appreciated. The inconsistencies and infirmities in the testimony of PWs 1, 6 and 7 are in abundance. PW 1, being the father, who was the first person to get the disclosure as regards the names of the persons involved from his son, the deceased, by way of dying







declaration claimed to have made to him by the deceased, did not mention that facts in the FIR though he lodged the FIR with the concerned Police Station only after meeting the deceased in the STNM Hospital. That apart, PW 1's own version was that he went to the STNM Hospital with his eldest son i.e. PW 7. Significantly PW 7 belied such situation giving a different story that he went to the Manipal Hospital but not to the STNM Hospital and only in Manipal Hospital his brother gave the statement of dying declaration involving the respondents to PW 7.

**25.** At the same time, the statements of PW 7 are also found to be unreliable and unbelievable because it appears that he gave a prompted and tutored version. He narrated the assaulted story as disclosed by his brother deceased who was at the time profusely bleeding. His clear narrative description of the assault so inflicted on the deceased would itself go to indicate that this piece of evidence cannot be the basis to accept the dying declaration in question as the same smacks doubt and suspicion.

**26.** It may be put on record that such making of dying declaration by the deceased to these witnesses is also doubtful keeping in view the testimony of two Investigating Officers i.e.






PW 29 Karna Bahadur Gurung and PW 30 Chewang Norbu Kazi. On close perusal of the evidence of those two witnesses, it transpires that PW 29, on cross, deposed that he did not know whether Sonam Topden Bhutia, PW 6 and Karma Wangchuk PW 7 were the brothers of the deceased and he did not record the statements of PWs 6 and 7 and there was no whisper that these two witnesses had ever stated about any dying declaration. The same was the view of that of PW 30, the Investigating Officer from Criminal Investigating Department. He also recorded the statements of PWs 6 and 7 after one month. Having scrutinised the entire evidence of those two I.O.s, this Court does not find anything about mentioning of any dying declaration.

**27.** It appears that for the first time those three witnesses, PWs 1, 6 and 7 have, in their deposition, mentioned as regards the dying declaration in the Court and under such circumstances this Court is not in a position to believe and trust the testimony of all three witnesses so to accept the dying declaration which is claimed to have been made by the deceased to them.

**28.** The law governing dying declaration has already been settled. In *P.V. Radhakrishna's* case (supra.) in



paragraph 12 at page 449, the Supreme Court has observed and ruled as under:

“12. ....This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat*.

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*)

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav* and *Ramawati Devi v. State of Bihar*)

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor*)

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.*)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P.*)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.*)



(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurti Laxmipati Naidu*)


(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar*)

(ix) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.*)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan*)


(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra*)”


**29.** The principles relating to interference by the High Court in appeals against acquittal are also well established. While the High Court can review the entire evidence and reach its own conclusions, it will not interfere with the acquittal by the trial court unless there are strong reasons based on evidence which can dislodge the findings arrived at by the trial



court, which were the basis for the acquittal. The High Court has to give due importance to the conclusions of the trial court, if they had been arrived at after proper appreciation of the evidence. The High Court will interfere in appeals against acquittals, only where the trial court makes wrong assumptions of material facts or fails to appreciate the evidence properly. If two views are reasonably possible from the evidence on record, one favouring the accused and one against the accused, the High Court is not expected to reverse the acquittal merely because it would have taken the view against the accused had it tried the case. The very fact that two views are possible makes it clear that the prosecution has not proved the guilt of the accused beyond reasonable doubt and consequently the accused is entitled to benefit of doubt. (see *Sambhaji Hindurao Deshmukh v. State of Maharashtra* reported in [(2008) 11 SCC 186 at para 13].

**30.** In the instant case, having meticulously considered the impugned judgment and order, this Court is of the view that the trial court did not make any wrong assumption on materials of facts nor had it failed to appreciate the evidence properly. Even this Court, being the first Appellate Court, has extensively appreciated and thoroughly assessed the entire





evidence on record and this Court does not find any such convincing or plausible reasons to reverse the acquittal of the respondents.

**31.** In view of what has been discussed, stated and observed above, this Court is of the firm view that no case has been made out in this Government Appeal to disturb the impugned judgment and order of acquittal.

**32.** Accordingly, this appeal stands dismissed.

**33.** Sent down the LCR forthwith.

**34.** Before parting with this Appeal, we would like to put on record our appreciation to Ms. Manita Pradhan, who has been appointed as Amicus Curie on behalf of respondent No. 2, for her valuable assistance in arriving at a decision in this appeal, as discussed above. Accordingly, it is ordered that she is entitled to get her professional fee which is quantified as Rs.5,000/- (Rupees five thousand) and the same shall be paid to her by the Government of Sikkim at the earliest possible date.



Chief Justice