THE
SIKKIM LAW REPORTS

OCTOBER - 2018

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Mode of Citation
SLR (2018) SIKKIM

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over to the informant. Where such information is a written complaint or one which has been reduced to writing it shall be signed by the person giving the information. The substance of the information is to be entered in a book to be kept by such Officer in terms of the rules prescribed by the Government. The Section also requires that a copy of the information so recorded under Sub-Section (1) shall be given free of cost to the informant – Incumbent upon the Officer at the Police Station to record a complaint when a cognizable offence is reported and treat it as an FIR.
Mangala Mishra @ Dawa Tamang @ Jack* v. *State of Sikkim ***1373-A***

Code of Criminal Procedure, 1973 – S. 154 – Second F.I.R Permissibility – Although two F.I.Rs have not been exhibited herein the evidence on record indeed leads one to such conclusion. The missing report is actually the F.I.R being prior in time to Exhibit 8 which in sum and substance is a report of steps taken by P.W.9 pursuant to the missing report. Exhibit 8 surely does not classify as an F.I.R. The matter being riddled with anomalies, lacking clarity about the lodging of an F.I.R is therefore untenable in the eyes of law – There cannot be two F.I.Rs for the same offence.
Mangala Mishra @ Dawa Tamang @ Jack* v. *State of Sikkim ***1373-B***

Code of Criminal Procedure, 1973 – S. 164 – S. 164, Cr.P.C. permits the recording of the statement of a witness or a confession. Confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence – S. 164 Cr.P.C. does not prescribe any method to record admissions of an accused. S. 164 Cr.P.C. does not permit the recording of admission save confessions by an accused. Confessions recorded under S. 164 Cr.P.C. although *strictosensu* not evidence however, is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. If a statement recorded under Section 164 Cr.P.C. of an accused is found not to be confessional, its reliability would lose the strength attached to a confessional statement.
Somnath Sharma* v. *State of Sikkim ***1298-D***

Code of Criminal Procedure, 1973 – S. 389 – Suspension of Sentence Pending Appeal – The Applicant was convicted by the learned Special Judge for commission of sexual assault upon the victim under S. 8 of the

POCSO Act, 2012 and for criminal intimidation and threatening the child under S. 506, IPC on 09.11.2017. Appeal was preferred by the Applicant on 28.03.2018 and is yet to be finally disposed of – The Applicant's appeal having been admitted by this Court and pending final disposal it is clear that the conviction of the Applicant by the learned Special Judge is yet to be confirmed by this Court – Application allowed.
Arun Rai* v. *State of Sikkim ***1286-A***

Gangtok Rent Control Act, 1956 – Object – S. 4 provides that landlord may not ordinarily eject a tenant, however, when grounds enumerated therein are fulfilled which also includes rent in arrears amounting to four months or more, the landlord may evict the tenant by filing a suit for ejectment – The object of the Act of 1956 is to control rent and eviction from accommodation in the precincts of the Gangtok Bazar area. Shortage of accommodation is not a new phenomenon especially in the urban areas and disputes between landlords and tenants rear its head on trivial issues, but the legislation *supra* intervenes to prohibit eviction of the tenant on any frivolous ground.
Taramani Devi Agarwal* v. *M/s. Krishna Company ***1269-A***

Gangtok Rent Control Act, 1956 – S. 4 – S. 4 nowhere speaks of "wilful default". All that the provision envisages is that the landlord may evict the tenant "when the rent in arrears amount to four months rent or more" – "wilful default" does not find place in the Section and is therefore alien to it. The requirement for eviction under the provision would therefore be rent in arrears for the period specified, and not wilful default as sought to be emphasized by the learned Trial Court.
Taramani Devi Agarwal* v. *M/s. Krishna Company ***1269-D***

Indian Evidence Act, 1872 – Evidence – Independent witness means independent of sources which are likely to be tainted. The fact that the deceased who was murdered allegedly by the Appellant was the relative of Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2), and that PemaChakkiBhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2) who accompanied her to the Ranipool Police Station where the alleged extra judicial confession was made by the Appellant was a factor which ought to have been considered by the learned Sessions Judge while examining their evidences. The mere fact that the said prosecution witnesses were relatives of the deceased would not lead to Trial Court throwing out their depositions but their evidence ought to have been carefully scrutinised.
Somnath Sharma* v. *State of Sikkim ***1298-B***

Indian Evidence Act, 1872 – Result of an Investigation can Never be Accepted as Substantive Evidence – The solitary seizure witness quite candidly admitted that he does not know from whom and where the police recovered the said Nokia mobile phone which was lying on the table of the Investigating Officer – Evidently the prosecution had failed to establish that the said Nokia mobile phone was seized from Mahendra Poudyal (PW-12) leave alone the fact that the said mobile phone belonged to the Appellant and that it was snatched from Chandra Kala Sharma by him. The learned Sessions Judge would quite correctly disbelieve the evidence of the Investigating Officer regarding the text message sent from the said mobile phone butwould go on to hold that the evidence tendered by him against the Appellant had remained firm and could not be demolished despite lengthy cross-examination. The learned Sessions Judge failed to appreciate that the Investigating Officer was not a witness to the crime and he was in fact the Investigating Officer of the case. The learned Sessions Judge thus failed to appreciate that the result of investigation can never be accepted as substantive evidence.

Somnath Sharma* v. *State of Sikkim ***1298-F***

Indian Evidence Act, 1872 – Last Seen Theory – To apply the last seen theory, it is necessary to establish that the Appellant was last seen with the deceased – Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. The time gap between 19.12.2013 and 24.12.2013 is five days. There is no explanation as to what transpired in the interregnum. SajanTamang who first saw the dead body and informed the police not being examined it cannot be safely concluded that in between the period there was no possibility of any person other than the Appellant being the perpetrator of the crime. The circumstance of last seen theory cannot therefore be pressed against the Appellant.

Somnath Sharma* v. *State of Sikkim ***1298-G***

Indian Evidence Act, 1872 – Suspicion However Strong Cannot Substitute Legal Proof – The chain of circumstances required to be proved in a criminal prosecution establishing the guilt of the accused has not been cogently proved. In fact none of the circumstances stands proved save the fact that the Appellant had eaten vegetable *"momos"* with an unknown girl on the date of the alleged incident i.e.19.12.2013 at Melli. This may

create a serious doubt upon the Appellant. However, it is shockingly obvious that the prosecution did not deem it important to conduct the investigation in such a manner that would eliminate all possibility about the innocence of the Appellant. The prosecution seem to have rested its case on procuring statements of the Appellant and Chandra Kala Sharma under S. 164 Cr.P.C. without even realising that both had not confessed to their alleged crimes, a statement of the Appellant under S. 27 of the Indian Evidence Act, 1872 and evidence regarding some investigation done by the relatives of the deceased themselves. No effort has been made to prove vital documentary evidences. Material witnesses to the making of the said documents have been left out. SajanTamang the first informant about the recovery of the dead body has also been left out by the Investigating Officer without even an explanation. The offence of murder having not been proved the bare fact that the Appellant went and lodged a missing report after the deceased went missing or that he gave some statement under S. 313 Cr.P.C would not *ipso facto* lead to the conclusion that the said report was false. In the present case the alleged links, save one, in the chain are in themselves not proved and therefore incomplete. Even if the prosecution allegation of a false plea or a false defence is accepted it cannot be called into aid to saddle the Appellant with culpability. The charges have not been proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence. In such circumstances the question of indicting or punishing an accused does not arise, merely being carried away by the presumed heinous nature of the crime or the gruesome manner in which it was presumed to have been committed. Mere suspicion, however strong or probable it may be cannot substitute legal proof required substantiating the charge of commission of a crime and graver the charge greater ought to be the standard of proof required. The criminal Courts should etch the words of the Supreme Court, so often reiterated, in their memory that there is a long mental distance between *"may be true"* and *"must be true"*and this basic and golden rule only helps to maintain the vital distinction between *"conjectures"* and *"sure conclusions"* to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

Somnath Sharma* v. *State of Sikkim ***1298-I***

Indian Evidence Act, 1872 – S. 25 and 26 – The deposition of Deepak Sharma (P.W.1) that on 22.12.2013 the Appellant made a confessional statement to the police in his presence while the Appellant was in custody;

The deposition of Netra Devi Sharma (P.W.2) that the Appellant confessed to his crime in her presence which was recorded by the police at the Police Station; The deposition of Pema Chakki Bhutia (P.W.3) that the Appellant confessed before the police which have been accepted by the learned Sessions Judge as extra-judicial confession would be barred under Ss. 25 and 26 of the Indian Evidence Act, 1872 as being confession made to a Police Officer as well as while in the custody of the Police Officer.

Somnath Sharma* v. *State of Sikkim ***1298-C***

Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Exhibit-3 is the disclosure statement of the Appellant. It is recorded in Nepali. The date of the disclosure statement is 22.12.2013 and the time 1400 hours. It is recorded at the Ranipool Police Station. The said disclosure statement bears the signature of the Appellant as well as the signature of two witnesses to the disclosure i.e. Netra Devi Sharma (PW-2) and Pema Chakki Bhutia (PW-3). PW-2 is related to the deceased and PW-3 is Netra Devi Sharma's staff and thereafter their evidence must be carefully examined although admissible. The confession of the Appellant recorded in the disclosure statement heavily relied upon by the learned Sessions Judge in the impugned judgment to hold the Appellant guilty of murder is not admissible – What is admissible is provided in S. 27 of the Indian Evidence Act, 1872 which provides that when any fact is deposed to as discovered in consequence of information received from a person 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 – For the application of S. 27 the Indian Evidence Act, 1872 the disclosure statement must be split into its components to separate the admissible portion if duly proved. Only those components or portions which were the immediate cause of the discovery may be proved. The rest of the portions must be eliminated from consideration. In so doing the only portion of the disclosure statement (Exhibit-3) which may be proved is, as translated "I can show the place I pushed my wife and I can also show the body of my wife if it has not been carried away by the river" after discarding the underlined portion. The words in the above disclosure statement "I pushed my wife" are inadmissible since they do not relate to the discovery of the body of the deceased. Now it would be relevant to examine whether the fact was discovered pursuant to the purported disclosure statement dated 22.12.2013 made by the Appellant – The evidence of a vital witness who is said to have seen the dead body first lying near the bank of river Teesta near Melli, South Sikkim has been withheld from the Court with no explanation. Police Inspector-Karma Chedup Bhutia who is said to have registered the UD Case No. 16 of

2013 was also not examined. The fact that the investigation for the search of the dead body of the deceased was directed towards Melli after the disclosure statement would have been relevant. However, Sajan Tamang the most crucial witness who had admittedly discovered the dead body having not been examined how and under what circumstances the dead body was discovered by him remains unexplained. In such circumstances, it cannot be said that the dead body of the deceased was discovered in consequence of information received from the Appellant – The evidence of the prosecution fall short of the quality of evidence required in a criminal case. The only person who identified the dead body found at bank of river Teesta was PW-11. The inquest reports do not name him as the person who identified the dead body. The Investigating Officer also throws no light upon this evidence. Even if this Court were to believe the evidence of PW-11 to be true it is certain that there is no evidence to show that the discovery of the dead body at the bank of river Teesta near Yuksom Breweries, Melli on 24.12.2013 was in consequence of the information received from the Appellant in custody of a police officer as required under the mandate of S. 27 of the Indian Evidence Act, 1872 to make it provable and hold against the Appellant.

Somnath Sharma* v. *State of Sikkim ***1298-H***

Indian Evidence Act, 1872 – S. 35 – The Investigating Officer has exhibited loose sheets of paper as the entries made in the Rangpo check post in two pages and identified the signatures of second officer in-charge-Sub-Inspector Pema Rana as (exhibit-36). S. 35 of the Indian Evidence Act, 1872 provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made in performance of a duty especially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact – Sub-Inspector Pema Rana was not examined. The purported entries from the purported vehicle movement register have not been seized through any seizure memo. The vehicle movement register has also not been placed before the Court. The maker of the entries has also not been examined. The Investigating Officer-Mahendra Subba is definitely not the person who had any personal knowledge about the entries. The loose sheet of pages cannot be accepted as evidence. The prosecution failed to prove the entries.

Somnath Sharma* v. *State of Sikkim ***1298-E***

Indian Evidence Act, 1872 – S. 35 – Relevancy of Entry in Public Record or an Electronic Record made in Performance of Duty – Such

entries must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.
Mangala Mishra @ Dawa Tamang @ Jack* v. *State of Sikkim ***1373-C***

Indian Evidence Act, 1872 – S. 45 – Opinions of Experts – Medical evidence as is well settled is an opinion given by an expert and deserves respect by the Court, however, this does not necessarily conclude as always being binding upon the Court. The expert's evidence may be an opinion on facts such as a Doctor giving his opinion as to the cause of a person's death or injury but when calling an expert's evidence, the prosecution must first establish the expertise of the witness by furnishing evidence to convince the Court that the witness is a competent witness.
Mangala Mishra @ Dawa Tamang @ Jack* v. *State of Sikkim ***1373-E***

Indian Evidence Act, 1872 – S. 101 – Burden of Proof – Burden of proving a fact always lies upon the person who asserts it. Unless such burden is discharged the other party is not required to be called upon to prove his case – The onus of proof undoubtedly shifts to the tenant to prove by sufficient and satisfactory evidence that they tendered the rent. Unfortunately no evidence whatsoever obtains in this context from the side of the Defendant who has failed to establish by proof that as soon as the rent for the month of December 2010, was refused, efforts were made for payment thereof by way of Money Order or any other available process – There is no documentary evidence or the presence of a witness to fortify the claim of DW-2 that he went to tender the rent to PW-1 and his brother. In the absence of any such proof, the Courts would be beleaguered to accept the verbal testimony.
Taramani Devi Agarwal* v. *M/s. Krishna Company ***1269-C***

Investigation and Trial – Object Discussed – The process of justice dispensation in a criminal case mandates a thorough and sincere investigation by the investigating agency to place the absolute truth-the inflexible reality before the Court. The Investigating Officer is required to be professional, ethical, unbiased and adept with the laws. The trial of criminal cases must have the paramount objective to establish the truth. The object of investigation would be to bring home the offence to the offender however, without out-stepping from the path of truth. The sole objective of the trial

would be to render justice, however harsh the outcome may be. The ultimate object of both investigation and trial is to arrive at the truth. The prosecution as well as the defence lawyers must play a crucial role in the adversarial proceeding. During trial the trial Judge has a fundamental duty to ensure fair play and the acceptance of oral as well as documentary evidence in the manner prescribed by law is fundamental. The understanding of the Indian Evidence Act, 1872, the procedural law as provided in the Code of Criminal Procedure, 1973 and the ingredients of the offence as defined in the substantive law is vital in the process of investigation as well as trial. The Judgment rendered by the Trial Judge must reflect the deep understanding of these laws and the appreciation of the facts that have unfolded during trial. There would be no room for conjectures and surmises or even presumptions save what is permitted. Cogent evidence must lead to precise answers. It is only when there is failure in investigation and prosecution that conjectures and surmises, most unfortunately, are resorted to. That however, would be not only an incorrect but also an illegal approach. Prejudging a case inevitably leads to disastrous consequences. Sound judicial principles must guide the Trial judge while arriving at his conclusion. The adage *"innocent until proven guilty"* is the fundamental principle of criminal jurisprudence. Conviction must be secured by adducing cogent and conclusive evidence by due process of the laws.

Somnath Sharma* v. *State of Sikkim ***1298-A***

Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 94 – Presumption and Determination of Age – Although the said provision for is to gauge the age of a child in need of care and protection or a child in conflict with law and consequently for the use of the Child Welfare Committee or the Juvenile Justice Board, nevertheless this does not debar any Court from taking assistance of the provisions of this Section to assess the age of the victim by the methods prescribed therein – If in the first instance, the date of birth from the school or matriculation certificate of the child is unavailable then resort can be taken to a birth certificate issued by a Corporation or a Municipal Authority. It is only thereafter that the prosecution can rely on the ossification test.

Mangala Mishra @ Dawa Tamang @ Jack* v. *State of Sikkim 1373-D

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The certified copy of the Judgment was ready on 15.12.2017. The copy remained unclaimed by the Appellant Company till 29.12.2017. In the circumstance, it cannot be said that the delay arose out of belated supply of

the Judgment. Apart from the above carelessness, evident from the conduct of the Appellant, it is also evident that the dates or the number of days which each office took to consider the matter lacks mention in the Petition. The Appellant Company has deigned it fit only to state that after the certified copy of the Judgment was received, it was forwarded to the Branch Manager, Gangtok. How many days this exercise involved has not been reflected in the Petition – Appeal has been filed on 02.05.2018 leading to a delay of sixty-four days. No explanation yields as to the delay obtained therein. The Counsel has failed to explain what restrained him from filing the Appeal soon after his appointment, besides submitting that he was a new Counsel and that he had not done motor accidents appeal matters – This ground would not merit consideration.

The Branch Manager, National Insurance Co. Ltd* v. *Krishna Bahadur Chettri and Others ***1291-A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – It is a well-settled principle of law that the rules of limitation are not in place to obliterate the rights of the parties but the rules do not intend that the parties resort to dilatory tactics while seeking remedy. The Court is to adjudicate and advance substantial justice to the parties. This Court is alive to the principle that rules of procedure are the handmaids of justice, nevertheless the Court is to weigh whether the delay prejudices the party opposing the application at the same time whether there are *bona fides* for the delay. The delay has to be sufficiently explained, in sum and substance, this means that Courts are to give priority to meting out even handed justice on the merits of a case – It is essential to point out that "sufficient cause" means that there must be adequate cause for the delay – The Claimants are aged parents of the victim, their son, who they have lost in the tragic accident. If the Appellant was of the opinion that the Judgment of the Tribunal was incorrect they ought to have proceeded within time and if they had failed to proceed within time then satisfactory explanation for the delay ought to be put forth which is sadly lacking in the instant matter.

The Branch Manager, National Insurance Co. Ltd* v. *Krishna Bahadur Chettri and Others ***1291-B***

Transfer of Property Act, 1882 – S. 106 – Notice for Eviction – Provides that in the absence of a contract or local law or usage to the contract, a lease of immovable property shall be deemed to be a lease from month to month terminable on the part of either a lesser or lessee by fifteen days notice – Gangtok Rent Control Act of 1956 envisages no notice for

SLR (2018) SIKKIM 1269

(Before Hon'ble the Acting Chief Justice)

R.F.A. No. 10 of 2016

Taramani Devi Agarwal ….. **APPELLANT**

Versus

M/s. Krishna Company ….. **RESPONDENT**

For the Appellant: Mr. Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates.

For the Respondent: Mr. Sudipto Mazumdar, Mr. Dibakar Roy and Mr. Bhushan Nepal, Advocates.

Date of decision: 1st October 2018

A. Gangtok Rent Control Act, 1956 – Object – S. 4 provides that landlord may not ordinarily eject a tenant, however, when grounds enumerated therein are fulfilled which also includes rent in arrears amounting to four months or more, the landlord may evict the tenant by filing a suit for ejectment – The object of the Act of 1956 is to control rent and eviction from accommodation in the precincts of the Gangtok Bazar area. Shortage of accommodation is not a new phenomenon especially in the urban areas and disputes between landlords and tenants rear its head on trivial issues, but the legislation *supra* intervenes to prohibit eviction of the tenant on any frivolous ground.

(Para 13)

B. Transfer of Property Act, 1882 – S. 106 – Notice for Eviction – Provides that in the absence of a contract or local law or usage to the contract, a lease of immovable property shall be deemed to be a lease from month to month terminable on the part of either a lesser or lessee by fifteen days notice – Gangtok Rent Control Act of 1956 envisages no notice for eviction of a tenant, it merely requires proof of default in rent for four months or more – Notice is not a mandate under the Act of 1956 –

Irrespective of lack of demand for payment of rent by the Plaintiff to the Defendant, it was incumbent upon the Defendant to pay the rent either at the end of the month or by the next month as was the practice, even if it was beyond the 10th of the next month.

(Para 18)

C. Indian Evidence Act, 1872 – S. 101 – Burden of Proof – Burden of proving a fact always lies upon the person who asserts it. Unless such burden is discharged the other party is not required to be called upon to prove his case – The onus of proof undoubtedly shifts to the tenant to prove by sufficient and satisfactory evidence that they tendered the rent. Unfortunately no evidence whatsoever obtains in this context from the side of the Defendant who has failed to establish by proof that as soon as the rent for the month of December 2010, was refused, efforts were made for payment thereof by way of Money Order or any other available process – There is no documentary evidence or the presence of a witness to fortify the claim of DW-2 that he went to tender the rent to PW-1 and his brother. In the absence of any such proof, the Courts would be beleaguered to accept the verbal testimony.

(Paras 21, 22 and 25)

D. Gangtok Rent Control Act, 1956 – S. 4 – S. 4 nowhere speaks of "wilful default". All that the provision envisages is that the landlord may evict the tenant "when the rent in arrears amount to four months rent or more" **–** "wilful default" does not find place in the Section and is therefore alien to it. The requirement for eviction under the provision would therefore be rent in arrears for the period specified, and not wilful default as sought to be emphasized by the learned Trial Court.

(Para 30)

Appeal partially allowed.

Chronological list of cases cited:

1. S. Sundaram Pillai and Others v. V.R. Pattabiraman and Others, AIR 1985 SC 582.
2. Gian Chand and Brothers and Another v. Rattan Lal *alias* Rattan Singh, (2013) 2 SCC 606.
3. R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Another, (2003) 8 SCC 752.

4. Nirakar Das v. Gourhari Das and Others, AIR 1995 Ori. 270.
5. Sidhharth Viyas and Another v. Ravi Nath Misra and Others, (2015) 2 SCC 701.
6. Malpe Vishwanath Acharya and Others v. State of Maharashtra and Another, (1998) 2 SCC 1.
7. Rangammal v. Kuppuswami and Another, (2011) 12 SCC 220.
8. Addagada Raghavamma and Another v. Addagada Chenchamma and Another, AIR 1964 SC 136.
9. Anil Rishi v. Gurbaksh Singh, (2006) 5 SCC 558.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. This Appeal assails the Judgment and Decree, both dated 22-04-2016, of the Learned District Judge, Special Division – II, East Sikkim, at Gangtok, being Eviction Suit No.12 of 2013, *Smt. Taramani Devi Agarwal* vs. *M/s. Krishna Company*. The Learned Trial Court dismissed the Suit of the Plaintiff seeking eviction of the Defendant from the suit premises on account of default in payment of rent for four months. (The Appellant shall hereinafter be referred to as the "Plaintiff" and the Respondent as the "Defendant".)

2. The facts, as per the Plaintiff, summarised herein are that, the Defendant in the year 2001 took on rent a shop space belonging to the Plaintiff, consisting of the entire first basement floor measuring an area of 1,230 sq. ft., on a monthly rent of Rs.6,000/- (Rupees six thousand) only, payable by the 10th day of each succeeding English Calendar month. The rents were thereafter successively enhanced in various years @ 20% on the previous rent. From April, 2010 to March, 2012, the rent was increased to Rs.11,520/- (Rupees eleven thousand, five hundred and twenty) only. Although enhancement of rent for the years 2010 to 2012 was made from April, 2010, but payment by the Defendant was made in July, 2010, only, for the months of April to June, 2010, being a consolidated amount of Rs.34,560/- (Rupees thirty four thousand, five hundred and sixty) only. Thereafter, the Defendant tendered the monthly rents belatedly viz; for the months of July, 2010 on 20-08-2010, for August, 2010 on 18-09-2010, for

October, 2010 on 20-11-2010 and for November, 2010 on 13-12-2010 much beyond the 10th day as stipulated. This was followed by default in payment of rents for the months of December, 2010, to March, 2011, rendering the Defendant liable for eviction under the Gangtok Rent Control and Eviction Act I 1956 (hereinafter "the Act of 1956"). Besides the shop premises were closed for the last two and half years. On account of the default, a lawyers notice dated 29-04-2011 was issued by the Plaintiff and responded to by the Defendant on 02-06-2011 denying arrears of rent as alleged or of closure of the shop. The Defendant also sent along with its reply a Demand Draft bearing No.000334 for Rs.69,120/- (Rupees sixty nine thousand, one hundred and twenty) only, dated 01-06-2011, in favour of the Plaintiff, drawn on the Union Bank of India, Gangtok Branch, as payment of rent for the months of December, 2010 up to May, 2011, which the Plaintiff declined to receive. A Notice dated 09-06-2011 was issued thereafter by the Plaintiff, demanding immediate vacation of the premises by the Defendant, which the Defendant failed to comply with but continued sending Demand Draft of Rs.11,520/- (Rupees eleven thousand, five hundred and twenty) only, every month as tender of monthly rent. It is averred that the reason for the refusal of rent sent by the first Demand Draft and others thereafter is that tenancy had determined on account of default in payment of rent from December 2010 to March 2011. Hence, the prayers for eviction of the Defendant and 'khas' possession of "Schedule B" premises from the Defendant, arrears of rent for the months of December, 2010 to March, 2011.

3. The Defendant contested the Suit *inter alia* contending that tenancy was on mutual understanding and good faith, the rents were payable on demand and not on the 10th day of each successive English Calendar Month as claimed. That, for the last few years rent receipts were being issued on payment of rent however no agreement for enhancing rent at a fixed percentage existed. Admittedly rent was enhanced on 09-07-2010 @ Rs.11,520/- (Rupees eleven thousand, five hundred and twenty) only, retrospectively from April to June, 2010, after a water tank was installed by them on the terrace of the Plaintiffs building and on agreement entered between the parties to construct a toilet in the tenanted premises. The Defendant was paying the said amount till November, 2010, but from the month of December, 2010, the Plaintiff stopped demanding rent. The Defendant thus sought to make the payment personally through his staff which was refused by the Plaintiff citing taxation problems faced by the

Plaintiffs husband, although rent was being accepted in the Plaintiffs name. The explanation for such refusal was that the rent would be accepted after the issue was resolved, which was accepted by the Defendant in good faith due to the long period of tenancy with the Plaintiff. Only when the Plaintiffs legal notice dated 29-04-2011 was received by the Defendant, the Plaintiffs *mala fide* purposes for refusal of rent came to light. The Defendant denied non-payment of rent but admitted that the Plaintiff returned the Demand Draft, dated 09-06-2011, for a sum of Rs.69,120/- (Rupees sixty nine thousand, one hundred and twenty) only, which was issued for the months of December, 2010 to May, 2011 and that the Plaintiff demanded that the suit premises be vacated and handed over by the Defendant. That, the Suit being harrasive deserves dismissal.

4. The issues struck by the Learned Trial Court for determination were as follows;

> **"**1. Whether the Defendant failed to pay the monthly rents in respect of the "Schedule B" shop premises to the Plaintiff for the months of December, 2010, January, 2011, February, 2011 and March, 2011, making the Defendant a defaulter, under the provisions of the Gangtok Rent Control Act, 1956 and liable to be evicted?
>
> 2. Whether the Defendant has closed the shop premises for the last more than two and half years and not been running their business from the "Schedule B" premises for the same period?
>
> 3. Any other reliefs?**"**

5. The Plaintiff examined herself as P.W.1 and her son Shyam Agarwal as P.W.2, one Pawan Agarwal, P.W.3, Govind Agarwal, P.W.4 and Rajesh Somani, P.W.5. However, during the stage of cross-examination on the non-appearance of P.W.4 and P.W.5, the Plaintiff sought to and was allowed to drop the said witnesses. The Defendant examined himself and two witnesses, being one Sushil Marda as D.W.1 and his staff Naresh Kumar

Sharma as D.W.2. The other witnesses cited by the Defendant were dropped by the Defendant.

6. Thereupon, the arguments of the parties were heard and the Learned Trial Court took up each of the Issues for determination. After examining the evidence on record and hearing the final arguments of the parties, vide the impugned Judgment the Suit of the Plaintiff was dismissed.

7. While discussing Issue No.1, the Learned Trial Court embarked on an exhaustive discussion of "wilful default", garnering strength from the ratio of ***S. Sundaram Pillai and Others*** vs. ***V. R. Pattabiraman and Others***[1] and decisions of various High Courts. The Learned Trial Court concluded that the default for the months of December, 2010 up to March, 2011 did not amount to "wilful default". Issue No.2 was next taken up for discussion and it was concluded that the Plaintiff was unable to substantiate her claims with documentary evidence, and the term "Business" would include all aspects of business including storage, the Issue thus stood decided against the Plaintiff. While deciding Issue No.3 it was reasoned that the Plaintiff is not entitled to any relief other than the arrears of rent for the month of December, 2010, January, 2011, February, 2011 and March, 2011 as also arrears in rent till the filing of the Suit. In conclusion it was held that the Plaintiff failed to establish her case which was accordingly ordered to be dismissed.

8. Before this Court, Learned Counsel for the Plaintiff advancing his arguments would contend that as averred in the Plaint and as proved by the evidence of P.W.1, it is established that the Defendant had defaulted in payment of rent for the months of December, 2010, January, 2011, February, 2011 and March, 2011. The evidence of the Plaintiff pertaining to default stood undemolished in view of which the Defendant was liable to vacate the suit premises in terms of the provisions of the Act of 1956. That, P.W.2, the Plaintiffs son, has also supported and substantiated the evidence of the Plaintiff indicating that the Defendant was a defaulter and that the Defendant instead of paying the monthly rent on the 10th day of the successive English Calendar Month had started paying the rent belatedly. Besides, although it was averred by the Defendant that the suit premises was being utilised as a shop, the evidence of P.W.3, the Plaintiffs neighbour and thereby an independent witnesses, would indicate that the suit premises

[1] AIR 1985 SC 582

was being used as a store for their goods. The Defendant being defaulters ought to vacate the suit premises.

9. The *contra* arguments of Learned Counsel for the Defendant was that, the cross-examination of the Plaintiff, the alleged recipient of the rents, reveals that she did not understand the contents of any of the documents that she had relied on and was confronted with. Her evidence reveals her ignorance of the standard rent for the tenanted premises. According to her she had not signed any documents pertaining to rent for the last fifteen years but has furnished exhibits purporting to be the rent receipts in the name of the Plaintiff which do not bear her signature. The evidence reveals that she was unaware of the rent for the period of April, 2007 to March, 2012 of the tenanted premises. It was her specific evidence that she had not filed the instant case against anyone and it was her sons who used to hand over the rent to her from time to time informing her that it was rent from the tenancy. It is also her admission that the rent of the tenanted premises used to be tendered to her husband in his shop at M. G. Marg. Contending that there was variance in pleading and proof as the Respondent had not stated that her son took care of the rents, but P.W.2. her son, had deposed to this effect, hence his evidence cannot be looked into, reliance was placed on ***Gian Chand and Brothers and Another*** vs. ***Rattan Lal alias Rattan Singh***[2]**.** It was next advanced that the title of the property was not established, in such a circumstance the Plaintiff was not entitled to dispossess the Defendant. Reliance was placed on ***R.V.E. Venkatachala Gounder*** vs. ***Arulmigu Viswesaraswami & V. P. Temple and Another***[3]. That, the Plaintiff has to establish her own case on the basis of evidence led by her, on which point succour was drawn from ***Nirakar Das*** vs. ***Gourhari Das and Others***[4]. The Plaintiff having failed to prove her case the finding of the Learned Trial Court bears no error.

10. The arguments of Learned Counsel were heard at length and given due consideration. The pleadings, documents and the evidence of the parties have been duly perused and considered by me as also the impugned Judgment.

11. This Court is to determine whether there was a default in payment of rent in terms of the Act of 1956, making the Defendant liable to be evicted from the suit premises on account of such default.

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[2] (2013) 2 SCC 606
[3] (2003) 8 SCC 752
[4] AIR 1995 Ori 270

12. The Act of 1956 was pressed into service by the Plaintiff to prove their case. Section 4 of the Act of 1956 which is relevant for the present purposes reads as follows;

> **"GANGTOK RENT CONTROL AND EVICTION ACT I OF 1956**
>
> **(Received assent of His Highness the Maharaja of Sikkim on 3Ist May 1956)**
>
> **Preamble.** Whereas it is deemed expedient and necessary to control rent and eviction of accommodation in Gangtok Bazar premises ; it is hereby enacted as follows :-
>
> .....
>
> 4. A Landlord may not ordinarily eject any tenant. When, however, the whole or part of the premises are required for the bonafide occupation of the landlord or his dependents or for thorough overhauling (excluding additions and alterations) or when the rent in arrears amount to four months rent or more, the landlord may evict the tenant on filing a suit of ejectment in the Court of the Chief Magistrate. .....
>
> ....."

13. The Section provides that the landlord may not ordinarily eject a tenant, however, when grounds enumerated therein are fulfilled which also includes rent in arrears amounting to four months or more, the landlord may evict the tenant by filing a Suit for ejectment. The object of the Act of 1956 is apparent, viz; to control rent and eviction from accommodation in the precincts of the Gangtok Bazar area. Shortage of accommodation is not a new phenomenon especially in the urban areas and disputes between landlords and tenants rear its head on trivial issues, but the legislation *supra* intervenes to prohibit eviction of the tenant on any frivolous ground.

14. In ***Sidhharth Viyas and Another*** vs. ***Ravi Nath Misra and Others***[5] the Hon'ble Supreme Court was held that;

[5] (2015) 2 SCC 701

> **"10.** The object of rent law is to balance the competing claims of the landlord on the one hand to recover possession of building let out to the tenant and of the tenant to be protected against arbitrary increase of rent or arbitrary eviction, when there is acute shortage of accommodation. Though, it is for the legislature to resolve such competing claims in terms of statutory provisions, while interpreting the provisions the object of the Act has to be kept in view by the Court. Unless otherwise provided, a tenant who has already acquired alternative accommodation is not intended to be protected by the Rent Act.**"**

15. In ***Malpe Vishwanath Acharya and Others*** vs. ***State of Maharashtra and Another***[6] the Hon'ble Supreme Court said;

> **"29.** Insofar as social legislation, like the Rent Control Act is concerned, the law must strike a balance between rival interests and it should try to be just to all. The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society. When there is shortage of accommodation it is desirable, may, necessary that some protection should be given to the tenants in order to ensure that they are not exploited. At the same time such a law has to be revised periodically so as to ensure that a disproportionately larger benefit than the one which was intended is not given to the tenants.**"**

16. Bearing the premise *supra* in mind, on the anvil of the provision of the Act of 1956 and the evidence furnished by the parties, it would be appropriate to examine whether the Plaintiff has been able to establish a case for eviction.

17. Addressing the argument of Learned Counsel for the Defendant that there was variance in pleadings and proof of the Plaintiff, reference can be

[6] (1998) 2 SCC 1

made to Order VI Rule 2 of the Code of Civil Procedure, 1908, which requires pleadings to state the material facts. Sub-Rule (1) of Rule 2 requires that every pleading shall contain a statement in concise form of the material facts on which the party pleading relies for his claim or defence. This essentially is for the purpose of enabling the Opposite Parties to have knowledge of the case that he is required to meet. On this point, we may briefly look at material facts in the pleadings of the Plaintiff. It is her categorical statement that the Defendant failed and neglected to tender monthly rents in respect of Schedule 'B' premises for the months of December, 2010, up to March, 2011, even by the 10th April, 2011, and thereby became a defaulter under the provisions of the Act of 1956. In view of the default of four months the Defendant has made itself liable to be evicted from the schedule premises. Her evidence is no different. She has deposed that the Defendant defaulted and was in arrears of rent for four months. The fact that she did not state that her son was looking after the affairs pertaining to rent, which however was elaborated in the evidence of P.W.2 does not in my considered opinion tantamount to non statement of material fact thereby resulting in variance of pleadings and proof. The material facts which reveal the cause of action has been categorically averred by her in her pleadings. Her evidence concerning the default thereby rendering the Defendants liable for eviction has withstood the cross-examination and remain undecimated. No specific question was evidently put to the witness in this context under cross-examination, neither was she confronted with the Demand Draft of Rs.69,120/- (Rupees sixty nine thousand, one hundred and twenty) only, although it was her specific statement that upon receipt of the reply of the Defendant together with the Demand Draft of Rs.69,120/- (Rupees sixty nine thousand, one hundred and twenty) only, she returned the same and demanded immediate vacation of the Schedule 'B' shop premises. Her evidence thus establishes default in payment of rent.

18. The next contention of Learned Counsel for the Defendant was that the rent was payable on demand. Evidently no Lease Deed existed between the parties. The Plaintiff could furnish no document to establish that the rent was payable by the 10th of the succeeding month, similarly the Defendant was not in possession of any document to prove that rent was payable on demand. In the absence of such a document it is relevant to resort to the provisions of Section 106 of the Transfer of Property Act, 1882 (hereinafter "the TP Act"), which *inter alia* provides that in the absence of a contract

or local law or usage to the contract, a lease of immovable property shall be deemed to be a lease from month to month terminable on the part of either a lesser or lessee by fifteen days notice. I hasten to add that the Act of 1956 envisages no notice for eviction of a tenant, it merely requires proof of default in rent for four months or more hence Notice is not a mandate under the Act of 1956. Therefore, on applying the provisions of Section 106 of the TP Act it is evident that the tenancy shall be presumed to be a tenancy on a month to month basis. In this view of the matter, irrespective of lack of demand for payment of rent by the Plaintiff to the Defendant, it became incumbent upon the Defendant to pay the rent either at the end of the month or by the next month as was the practice, even if it was beyond the 10th of the next month. Although the Defendant was at pains to establish that rents were paid on varied dates and not the 10th of the succeeding month by cross-examining the Plaintiff on the contents of Exhibit 3 to Exhibit 44, it surely does not absolve the Defendant from payment of monthly rent, nor can rent for four months remain unpaid by them at any given point of time.

19. This leads us to another question, i.e., whether the Plaintiff has discharged the burden of proof. The Plaintiff indubitably has asserted that the Defendant was a defaulter in view of the grounds put forth above. To the contrary, the Defendant would hold that all efforts were made for payment of the rent for months when default was alleged but rent was infact refused by the Plaintiff. We may briefly look at the law on this aspect. Section 3 of the Indian Evidence Act, 1872 (hereinafter "the Evidence Act"), defines "proved" which reads as follows;

> **"3.** ……
>
> **"Proved"**.A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> ……**"**

20. In ***R.V.E. Venkatachala Gounder*** (*supra*) the Hon'ble Supreme Court laid down as follows;

"28. Whether a civil or a criminal case, the anvil for testing of "proved", "disproved" and "not proved", as defined in Section 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be "proved" when, if considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by the applicability of the rule, which makes the difference.

> "The probative effects of evidence in civil and criminal cases are not, however, always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. Best says: 'There is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required.' (Best, § 95) While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See *Sarkar on Evidence*, 15th Edn., pp. 58-59.)

In the words of Denning, L.J. (*Bater* v. *Bater* [(1950) 2 All ER 458 : 1951 P 35 (CA)], All ER at p. 459 B-C):

> It is true that by our law there is a higher standard of proof in criminal cases

> than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability.
>
> Agreeing with this statement of law, Hodson, L.J. said:
>
> "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (*Hornal* v. *Neuberger Products Ltd.* [(1956) 3 All ER 970 : (1957) 1 QB 247 : (1956) 3 WLR 1034 (CA)], All ER at p. 977 D)."

21. Section 101 of the Evidence Act deals with burden of proof and provides as hereinbelow;

> **"101. Burden of proof–**Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

22. In ***Rangammal*** vs. ***Kuppuswami and Another***[7], the Hon'ble Supreme Court would hold that when a person is bound to prove the existence of any fact, it is said the burden of proof lies on that person. Thus, the burden of proving a fact always lies upon the person who asserts it. Unless such burden is discharged the other party is not required to be called upon to prove his case.

[7] (2011) 12 SCC 220

23. In ***Addagada Raghavamma and Another*** vs. ***Addagada Chenchamma and Another***[8] the Hon'ble Supreme Court has held that;

> **"12.** ..... There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence. The criticism levelled against the judgment, of the lower Courts, therefore, only pertain to the domain of appreciation of evidence. We shall, therefore, broadly consider the evidence not for the purpose of revaluation, but to see whether the treatment of the case by the courts below is such that it falls in the category of exceptional cases where this Court, in the interest of justice, should depart from its usual practice.**"**

24. The Hon'ble Supreme Court in ***Anil Rishi*** vs. ***Gurbaksh Singh***[9] laid down the following;

> **"9.** In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.**"**

[8] AIR 1964 SC 136
[9] (2006) 5 SCC 558

25. The law on burden of proof and preponderance of probability as proof in a civil dispute is thus firmly in place. P.W.1 and P.W.2 both deny that rent was tendered by the Defendant for the months of December, 2010 to March, 2011. P.W.2 denied that D.W.2 ever came to tender the rent on behalf of the Defendant. To the contrary, the Defendants sole attempt was to establish that infact D.W.2 had been dispatched to do the necessary, D.W.2 for his part asserted that he did indeed go to P.W.2 and his brother to tender the rent which was refused. If this be so, the onus undoubtedly shifts to the tenant to prove by sufficient and satisfactory evidence that they tendered the rent. Unfortunately no evidence whatsoever obtains in this context from the side of the Defendant who has failed to establish by proof that as soon as the rent for the month of December, 2010, was refused, efforts were made for payment thereof by way of Money Order or any other available process. There is no documentary evidence or the presence of a witness to fortify the claim of D.W.2 that he went to tender the rent to P.W.1 and his brother. In the absence of any such proof, the Courts would be beleaguered to accept the verbal testimony. On the contrary, the Defendant has to his detriment relied upon Exhibit JJJ which is a Demand Draft dated 01-06-2011 indicating payment of a sum of Rs.69,120/- (Rupees sixty nine thousand, one hundred and twenty) only, in favour of the Plaintiff. The fact that the said Demand Draft of the aforestated sum was for the rents of December, 2010 to May, 2011, was admitted by the D.W.1, Sushil Marda and duly identified by D.W.2, Naresh Kumar Sharma, establishing default in payment of rent of not only four months, but more than four months.

26. There is no merit in the argument of Learned Counsel for the Defendant that according to the Plaintiff she had not signed any document pertaining to the rent and the rent receipts do not bear her signature. This argument was advanced to establish the ignorance of the Plaintiff pertaining to the matter in issue in the Suit. The purpose of filing the rent receipts was apparently to buttress the claim of the Plaintiff that the Defendant had deposited rent beyond the stipulated time of the 10th of every succeeding month, making him a tenant who deposited rent erratically. This is not the concern in the instant matter, default in payment of rent for four months or more is the issue at hand.

27. While considering the argument advanced by the Defendant that the Plaintiff has not been able to establish her title over the suit premises, this

Court restrains itself from adjudicating on an issue irrelevant to the matter at hand apart from which no pleadings on this count ensues.

28. The contention of the Plaintiff that the Defendant has closed the shop premises is not relevant for the present purposes either. Whether the premises are being run as a shop or otherwise, the fact admittedly remains that the premises were rented out to the Defendant and in the absence of any Lease Agreement, the Court is not in a position to adjudicate as to whether the Defendant ought to have been running it only as a shop or otherwise. The only relevant consideration would be the payment of rent regularly or default in payment thereof as already stated.

29. That having been said, at this juncture, it is but apposite to notice that the Learned Trial Court while discussing Issue No.1 already extracted hereinabove, would conclude that there was no "wilful default" on the part of the Defendant, this conclusion having been reached *inter alia* on such grounds that P.W.1 when confronted with Exhibits 45 and 46, 47, 49, 55 and Exhibit 1 failed to indentify the Exhibits besides admitting that she had not filed the case against anyone. That apart, she lacked knowledge regarding the tenancy and P.W.2, her son, admitted that they had not demanded the rent for the months of December, 2010 to March, 2011. Besides Exhibit 3 to Exhibit 44 and Exhibit A to Exhibit 3 were received by one Pramod Agarwal, but he was not examined, while the rent receipts relied on by both parties revealed that the rents were being tendered on demand. The Learned Trial Court would also hold that there were no pleadings about the role of her son P.W.2 and the Plaintiff has failed to discharge the burden of proof.

30. Pausing here for an instant, it can be noticed on scrutiny of the Act of 1956 that Section 4 nowhere speaks of "wilful default". All that the provision envisages is that the landlord may evict the tenant **"***when the rent in arrears amount to four months rent or more***"**, "wilful default" does not find place in the Section and is therefore alien to it. The requirement for eviction under the provision would therefore be rent in arrears for the period specified, and not wilful default as sought to be emphasised by the Learned Trial Court.

31. Further, it is worth recording that although the Learned Trial Court concluded that there existed default in payment of rent nevertheless proceeded to order as follows in Issue No.3;

> **"**82. In view of the detailed discussions, observations, findings and analysis of the evidence, the plaintiff is not entitled to any relief other than the arrear rents for the month of December, 2010 January 2011, February 2011 and March 2011 and also arrear rent till the filing of the suit. Further, plaintiff also is entitled to recover the arrear rent deposited by the defendant in the office of Nazir, District court East, vide order of the Court dated 28.10.2013 during the pendency of this suit.**"**

32. The conclusion of the Learned Trial Court in Issue No.3, extracted *supra*, is in my considered opinion unfathomable. Accordingly, the impugned Judgment of the Learned Trial Court deserves to be and is accordingly set aside, save the relief granted for payment of the arrears of rent.

33. In the result, the Appeal is allowed to the extent as detailed hereinabove.

34. Consequently, the Defendant shall vacate the suit premises on or before 31-12-2018 and hand over vacant possession to the Plaintiff. The Defendant shall also pay the arrears in rent from the month of December, 2010, till the time that they hand over vacant possession of the suit premises to the Plaintiff, as ordered herein. No interest accrues on the defaulted rent amounts.

35. Copy of this Judgment and records of the Learned Trial Court be remitted forthwith.

36. No order as to costs.

37. Appeal disposed of.

SLR (2018) SIKKIM 1286

(Before Hon'ble the Acting Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

I.A No. 02 of 2018 in **Crl. Appeal No. 06 of 2018**

Arun Rai ….. **APPLICANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Applicant: Ms. Gita Bista, Legal Aid Counsel.

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor with Mr. S. K Chettri, Assistant Public Prosecutor.

Date of decision: 9th October 2018

A. Code of Criminal Procedure, 1973 – S. 389 – Suspension of sentence pending appeal – The Applicant was convicted by the learned Special Judge for commission of sexual assault upon the victim under S. 8 of the POCSO Act, 2012 and for criminal intimidation and threatening the child under S. 506 IPC on 09.11.2017. Appeal was preferred by the Applicant on 28.03.2018 and is yet to be finally disposed of – The Applicant's appeal having been admitted by this Court and pending final disposal it is clear that the conviction of the Applicant by the learned Special Judge is yet to be confirmed by this Court – Application allowed.

(Paras 11 and 12)

Application allowed.

Case cited:

1. Taraman Kami v. State of Sikkim, SLR (2017) SIKKIM 781.

ORDER

Order of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. On a joint trial conducted of the three convicted persons the learned Special Judge, (POCSO), West Sikkim at Gyalshing vide judgment dated 09.11.2017 convicted all of them including the present Applicant.

2. An appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) was preferred by the Applicant on 28.03.2018.

3. The present application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence pending the appeal was preferred by the Applicant on 28.03.2018 itself. The Applicant pleads that he is the only earning member of his family consisting of himself, his wife and two minor children who has been in judicial custody since 11.02.2017. The Applicant also pleads that although there was no material against the Applicant he was convicted under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and under Section 506 of the Indian Penal Code, 1860 (IPC). It is pleaded that since the appeal may take considerable time for final disposal he may be released on bail. The Applicant is willing to appear before this Court on every date of hearing and abide by any stringent terms and conditions imposed. The Applicant is also ready to produce reliable sureties to the satisfaction of this Court.

4. On 04.05.2018 the appeal was admitted for hearing.

5. On 10.05.2018 a reply to the said application was filed by the State-Respondent. The State-Respondent alleges that the offences are heinous and there are sufficient materials against the Applicant who was convicted not only for sexual assault upon the victim but also for criminally intimidating and threatening the victim.

6. On 08.10.2018 the connected matters on the joint request of the parties was listed for hearing on 18.04.2019.

7. Heard Ms. Gita Bista, learned legal aid counsel for the Applicant and Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor for the State-Respondent.

8. Ms. Gita Bista would point out that the Applicant although not named in the First Information Report (FIR) lodged against the other convicts was charge-sheeted nevertheless by the Investigating Officer in the same case on the basis of a statement of the victim recorded under Section 164 Cr.P.C. pursuant to the FIR lodged against the other two convicts. It is also submitted that the allegation in the statement of the victim recorded under Section 164 Cr.P.C. would reveal that the alleged incident was unconnected with the said FIR lodged against the other convicts. It is submitted therefore, that the entire prosecution against the Applicant was faulty relying upon a Division Bench judgment of this Court in re: ***Taraman Kami* v. *State of Sikkim***[1] in which it was held that if the Investigating Officer had during investigation of a particular case against a particular person stumbled upon an offence of the like nature committed against the victim by another it was his duty to record the facts stated, treat it as a fresh complaint and carry out investigation into the matter, the alleged offence being independent of the offence being investigated previously.

9. Ms. Gita Bista would also submit that in view of the fact that the connected matters would be listed for hearing only on 18.04.2019 the Applicant may be released on bail as it is causing immense hardship to his family.

10. A bare reading of Section 389 Cr.P.C. makes it evident that during the pendency of an appeal, an Appellate Court has the requisite power to suspend sentence on the Appellant by releasing him on bail. However, this power can be exercised after affording opportunity to the Public Prosecutor in case of offence punishable with death or imprisonment for life or imprisonment for 10 years or more and after recording reasons in writing.

11. The Applicant was convicted by the learned Special Judge for commission of sexual assault upon the victim under Section 8 of the POCSO Act, 2012 and for criminal intimidation and threatening the child under Section 506 IPC on 09.11.2017. Appeal, as stated before was preferred by the Applicant on 28.03.2018 and is yet to be finally disposed of.

12. The Applicant's appeal having been admitted by this Court and pending final disposal it is clear that the conviction of the Applicant by the learned Special Judge is yet to be confirmed by this Court.

[1] SLR (2017) SIKKIM 781

13. The learned Special Judge has convicted the Applicant holding that the statement of the victim under Section 164 Cr.P.C. was consistent with the testimony given by the victim before the Court stating that:

> **"***Thereafter I have given my statement in the Court, here in Gyalshing, where I had also told the Madam about Arun Rai, a driver who had also tried to sexually molest me. After I had reported the matter to the police about Khantary and Tshering, Arun Rai had come and threatened me not to inform the police about it.***"**

14. The learned Special Judge has sentenced the Applicant under Section 8 of the POCSO Act, 2012 to undergo rigorous imprisonment for a term of 3 years and 6 months and to pay a fine of Rs.10,000/- and in default to undergo further imprisonment for a term of 1 year. The learned Special Judge has also sentenced the Applicant to undergo imprisonment for a term of 1 year under Section 506 IPC. It has been directed that both the sentences shall run concurrently.

15. The learned Special Judge has noted that the Applicant has been under detention since 11.02.2017 and this detention is to be set of as provided under Section 428 Cr.P.C.

16. The Applicant has thus served 1 year 7 months and 28 days out of the total of 3 years and 6 months of imprisonment sentenced upon him. This is not an offence punishable with death or imprisonment for life or imprisonment for 10 years or more.

17. We have considered the gravity of the offence, the nature of the crime as well as the age and family condition of the Applicant as pleaded. The State-Respondent has not placed any adverse material against the Applicant regarding his criminal antecedents or otherwise.

18. In view of the aforesaid, we are of the considered view that the prayer of the Applicant must be granted. We direct pending hearing of the appeal, the order of execution of sentence against the Applicant shall remain suspended and the Applicant be released on bail to the satisfaction of the learned Special Judge, (POCSO), West Sikkim at Gyalshing on a bond of

Rs.35,000/- with two sureties of the like amount each. The Applicant shall not travel beyond Sikkim during the pendency of the appeal and attend every date of hearing. The Applicant shall report to the Officer In-charge of the Gyalshing Police Station on every Monday of each week during office hours and stay away from the victim. The application is allowed and disposed of.

SLR (2018) SIKKIM 1291

(Before Hon'ble the Acting Chief Justice)

I.A. No. 01 of 2018 in **MAC App. No. 07 of 2018**

The Branch Manager,
National Insurance Co. Ltd. ….. APPLICANT

Versus

Krishna Bahadur Chettri and Others ….. RESPONDENT

For the Applicant: Mr. Sudhir Prasad, Advocate.
For Respondent 1 and 2: Mr. Rahul Rathi, Advocate.
For Respondent 3 and 4: None.

Date of decision: 9th October 2018

A. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The certified copy of the Judgment was ready on 15.12.2017. The copy remained unclaimed by the Appellant Company till 29.12.2017. In the circumstance, it cannot be said that the delay arose out of belated supply of the Judgment. Apart from the above carelessness, evident from the conduct of the Appellant, it is also evident that the dates or the number of days which each office took to consider the matter lacks mention in the Petition. The Appellant Company has deigned it fit only to state that after the certified copy of the Judgment was received, it was forwarded to the Branch Manager, Gangtok. How many days this exercise involved has not been reflected in the Petition – Appeal has been filed on 02.05.2018 leading to a delay of sixty-four days. No explanation yields as to the delay obtained therein. The Counsel has failed to explain what restrained him from filing the Appeal soon after his appointment, besides submitting that he was a new Counsel and that he had not done motor accidents appeal matters – This ground would not merit consideration.

(Paras 6 and 7)

B. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – It is a well-settled principle of law that the rules of limitation are not in place to obliterate the rights of the parties but the rules do not intend that

the parties resort to dilatory tactics while seeking remedy. The Court is to adjudicate and advance substantial justice to the parties. This Court is alive to the principle that rules of procedure are the handmaids of justice, nevertheless the Court is to weigh whether the delay prejudices the party opposing the application at the same time whether there are *bona fides* for the delay. The delay has to be sufficiently explained, in sum and substance, this means that Courts are to give priority to meting out even handed justice on the merits of a case – It is essential to point out that "sufficient cause" means that there must be adequate cause for the delay – The Claimants are aged parents of the victim, their son, who they have lost in the tragic accident. If the Appellant was of the opinion that the Judgment of the Tribunal was incorrect they ought to have proceeded within time and if they had failed to proceed within time then satisfactory explanation for the delay ought to be put forth which is sadly lacking in the instant matter.

(Paras 8, 9 and 10)

Application dismissed.

Chronological list of cases cited:

1. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SC 649.
2. Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others, (1987) 2 SCC 107.
3. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.
4. Syed Mehaboob v. New India Assurance Co. Ltd., (2011) 11 SCC 625.

ORDER

Meenakshi Madan Rai, ACJ

1. By filing this Application under Section 173(1) of the Motor Vehicles Act, 1988, read with Section 151 of the Code of Civil Procedure, 1908, the Appellant seeks Condonation of 64 days delay in filing the Appeal.

2. The grounds put forth for the delay are that, pursuant to the Judgment pronounced by the learned Motor Accidents Claims Tribunal, East Sikkim at Gangtok, in MACT Case No. 38 of 2016 on 28.11.2017, copy thereof was made over to the Appellant on 29.12.2017. After receiving a

certified copy of the Judgment and Award from the concerned Advocate at Gangtok Court, the Branch Manager of the Appellant at Gangtok examined the Judgment. On verification of the policy papers, he forwarded the matter to the Senior Divisional Manager at Siliguri Divisional Office. Pursuant thereto, the matter "... was forwarded to Branch Manager, Gangtok Branch (sic)." The Divisional Office at Siliguri then sought the opinion of the Counsel at Siliguri who advised that the matter was a fit case for preferring Appeal. Mr. Sudhir Prasad, Advocate, was then appointed as Counsel for the Appellant vide letter dated 19.02.2018, to prefer an Appeal before this Court. The appointment letter was received by Mr. Prasad on 22.02.2018. While drafting the Memo of Appeal, certain clarifications were sought from the Appellant Company including additional documents related to the matter. Added to the above grounds was the inexperience of the Counsel in motor accidents appeal matters, thus the Appeal came to be filed on 02.05.2018. That, the above grounds prevented the Appellant from preferring the Appeal within the statutory period of 90 days and is sufficient cause. That, the Appellant Company has a strong *prima facie* case on merits and should the delay not be condoned, prejudice will be caused to them, hence the prayer for Condonation of delay.

3. Learned Counsel for the Respondents, on the other hand, vehemently objected to the Petition for Condonation of delay, *inter alia*, on grounds that in the first instance, the certified copy of the Judgment, as records would reveal, was ready on 15.12.2017, the Judgment having been pronounced on 28.11.2017. The Appellant Company failed to collect the Judgment from the relevant Section of the Court on 15.12.2017 and cannot lay the blame at the door of the Tribunal. The Claim Petition before the learned Motor Accident Claims Tribunal was under Section 163A of the Motor Vehicles Act, 1988 where compensation of Rs.5,43,650/- (Rupees Five Lakhs, Fourty Three Thousand, Six Hundred and Fifty) only, was granted based on the salary of the victim placed at Rs.3,325/- (Rupees Three Thousand, Three Hundred and Twenty Five) only, per month. There is no error in the Multiplier of 17 adopted by the learned Tribunal as per the Second Schedule to the Motor Vehicles Act, 1988 as the age of the deceased was about 33 years. Besides, the Appeal is filed on a wrong interpretation of the insurance cover as it is clear that the Petition is one under Section 163A of the Motor Vehicles Act, 1988 and as per the conditions of the Insurance Policy, Driver's Clause has been included. The deceased was self-employed and the owner of the vehicle in accident which

he was driving and as owner he was not barred from driving the vehicle and hence an extra coverage to the tune of Rs.2,00,000/- (Rupees Two Lakhs) only, had been obtained under the Personal Accident Claim benefit. It was mandatory that the Claimants be granted Rs.2,00,000/- (Rupees Two Lakhs) only, under the said claim benefit. Further, the policy issued was a package policy and not limited to Rs.2,00,000/- (Rupees two lakhs) only, as it is also covered by IMT No.15/extra premium of Rs.100/- (Rupees One Hundred) only. Hence, the petition for Condonation of delay is a ruse to prevent the Claimants from obtaining their rightful reliefs under the benevolent legislation and deserves dismissal as also the Appeal.

4. I have considered the submissions of learned Counsel for both parties and perused the Petition seeking Condonation of delay. It is but apposite to pause here and remark that the Petition appears to have been drafted with nary a care to detail, anomalies appearing on the face of the Petition, are extracted herein below:-

> "4. That the Branch Manager, Gangtok Branch after verification of the policy papers thereafter forwarded the same to the Sr. Divisional Manager at Siliguri Divisional Office.
>
> *5. That thereafter the same was forwarded to Branch Manager, Gangtok Branch.*
>
> 6. The Divisional Office at Siliguri then sought the opinion of their Counsel, at Siliguri on the Award passed by the Ld. Tribunal, East Sikkim at Gangtok and he opined that his is a fit case for preferring an appeal."

5. Once the matter was forwarded to the Divisional Office at Siliguri, it is not clear why it was reverted back to the Gangtok Branch sans steps as reflected in paragraph 5 *supra*. It is a clear indication of carelessness in drafting and lack of application of mind which has been derided by the Hon'ble Supreme Court in ***Esha Bhattacharjee* vs. *Managing Committee of Raghunathpur Nafar Academy and Others*[1].** Referring to various authorities on Condonation of delay, the Hon'ble Supreme Court would hold *inter alia* as follows;

[1] (2013) 12 SC 649

> "22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system. .....
>
> 22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchallant manner requires to be curbed, of course, within legal parameters."

The above observation clearly cautions the party seeking Condonation of delay to desist from such practices.

6. Now turning to address the grounds furnished by the Appellant for the delay, one such ground urged was belated supply of the copy of the Judgment. Evidently, this is an erroneous statement. As pointed out by learned Counsel for the Respondents, the certified copy of the Judgment was ready on 15.12.2017 and is visible on the stamp affixed by the concerned authority of the District Courts on the copy of the Judgment. The same clearly reveals as follows;

> ***"****Member, MACT*
> *Date of application 28.11.17*
> .....
> .....
> *Date of ready on 15.12.17*
> *Date of issue/delivery on 29.12.17*
> *Total Number of words Thirty Four Pages*
> *Total Cost paid Rs.34/-****"***

The copy remained unclaimed by the Appellant Company till 29.12.2017. In the circumstance, it cannot be said that the delay arose out of belated supply of the Judgment. Apart from the above carelessness, evident from the conduct of the Appellant, it is also evident that the dates or the number of days which each office took to consider the matter lacks mention in the Petition. The Appellant Company has deigned it fit only to

state that after the certified copy of the Judgment was received, it was forwarded to the Branch Manager, Gangtok. How many days this exercise involved has not been reflected in the Petition.

7. It is the next contention of the Appellant that the Branch Manager at Gangtok verified the policy papers and forwarded it to the Senior Divisional Manager at Siliguri Divisional Office. The number of days that such verification required, the date of receipt of the Judgment by the Gangtok Branch or the date on which it was forwarded to the next office is unaccounted for in the Petition. Learned Counsel would further contend that the Divisional Office at Siliguri sought the opinion of their Counsel at Siliguri. No dates have been mentioned on this count as well and no effort has been made to disclose as to how many days it took to obtain the opinion of the Counsel. The date mentioned at para 7 of the Petition, *viz.* '19.02.2018,' according to learned Counsel was the date on which he was appointed by the Appellant. Thereafter, the Appeal has been filed on 02.05.2018 leading to a delay of 64 (sixty-four) days. No explanation yields as to the delay obtained therein. The Counsel has failed to explain what restrained him from filing the Appeal soon after his appointment, besides submitting that he was a new Counsel and that he had not done motor accidents appeal matters. Surely, this ground would not merit consideration.

8. It has been laid down in ***Collector, Land Acquisition, Anantnag and Another*** **vs.** ***Mst. Katiji and Others***[2] that everydays delay must be explained. This does not mean that a pedantic or hypertechnical approach ought to be adopted but at the same time there has to be a justice-oriented approach adopted by the Court. It is a well-settled principle of law that the rules of limitation are not in place to obliterate the rights of the parties but the rules do not intend that the parties resort to dilatory tactics while seeking remedy. The Court is to adjudicate and advance substantial justice to the parties. This Court is alive to the principle that rules of procedure are the handmaids of justice, nevertheless the Court is to weigh whether the delay prejudices the party opposing the application at the same time whether there are *bona fides* for the delay. The delay has to be sufficiently explained, in sum and substance, this means that Courts are to give priority to meting out even handed justice on the merits of a case.

9. It is essential to point out that "sufficient cause" means that there must be adequate cause for the delay. While explaining "sufficient cause",

[2] (1987) 2 SCC 107

the Honble Apex Court in ***Basawaraj and Another* vs. *Special Land Acquisition Officer***[3], referred to the decision in ***Arjun Singh* vs. *Mohindra Kumar***, wherein it was held as follows;

> "10. In *Arjun Singh* v. *Mohindra Kumar* this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause". 11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. *(Vide Madanlal* v. *Shyamlal : [(2002) 1 SCC 535] and Ram Nath Sao* v. *Gobardhan Sao [(2002) 3 SCC 195]"*

10. In consideration of the grounds put forth and the discussions hereinabove, there is evidently negligence and inaction on the part of the Appellant, the explanation extended is neither reasonable nor satisfactory. The Appellant ought to keep in mind that the Honble Supreme Court has observed in ***Syed Mehaboob* vs. *New India Assurance Co. Ltd.***[4], that the *"Motor Vehicle Act is a beneficent legislation intended to place the claimant in the same position that he was before the accident and to compensate him for his loss. Thus it should be interpreted liberally so as to achieve the maximum benefit."* The Claimants herein are the aged parents of the victim, their son, who they have lost in the tragic accident. If the Appellant herein was of the opinion that the Judgment of the Tribunal was incorrect they ought to have proceeded within time and if they had failed to proceed within time then satisfactory explanation for the delay ought to be put forth which is sadly lacking in the instant matter. Consequently, the application for Condonation of Delay is rejected and disposed of, as also the Appeal.

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[3] (2013) 14 SCC 81
[4] (2011) 11 SCC 625

SLR (2018) SIKKIM 1298

(Before Hon'ble the Acting Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 14 of 2016

Somnath Sharma ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Ms. Tamanna Chettri and Ms. Malati Sharma, Advocates.

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor, Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 11th October 2018

A. Investigation and Trial – Object Discussed – The process of justice dispensation in a criminal case mandates a thorough and sincere investigation by the investigating agency to place the absolute truth-the inflexible reality before the Court. The Investigating Officer is required to be professional, ethical, unbiased and adept with the laws. The trial of criminal cases must have the paramount objective to establish the truth. The object of investigation would be to bring home the offence to the offender however, without out-stepping from the path of truth. The sole objective of the trial would be to render justice, however harsh the outcome may be. The ultimate object of both investigation and trial is to arrive at the truth. The prosecution as well as the defence lawyers must play a crucial role in the adversarial proceeding. During trial the trial Judge has a fundamental duty to ensure fair play and the acceptance of oral as well as documentary evidence in the manner prescribed by law is fundamental. The understanding of the Indian Evidence Act, 1872, the procedural law as provided in the Code of Criminal Procedure, 1973 and the ingredients of the offence as

defined in the substantive law is vital in the process of investigation as well as trial. The Judgment rendered by the Trial Judge must reflect the deep understanding of these laws and the appreciation of the facts that have unfolded during trial. There would be no room for conjectures and surmises or even presumptions save what is permitted. Cogent evidence must lead to precise answers. It is only when there is failure in investigation and prosecution that conjectures and surmises, most unfortunately, are resorted to. That however, would not only be an incorrect but also an illegal approach. Prejudging a case inevitably leads to disastrous consequences. Sound judicial principles must guide the Trial judge while arriving at his conclusion. The adage *"innocent until proven guilty"* is the fundamental principle of criminal jurisprudence. Conviction must be secured by adducing cogent and conclusive evidence by due process of the laws.

(Para 1)

B. Indian Evidence Act, 1872 – Evidence – Independent witness means independent of sources which are likely to be tainted. The fact that the deceased who was murdered allegedly by the Appellant was the relative of Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2), and that Pema Chakki Bhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2) who accompanied her to the Ranipool Police Station where the alleged extra judicial confession was made by the Appellant was a factor which ought to have been considered by the learned Sessions Judge while examining their evidences. The mere fact that the said prosecution witnesses were relatives of the deceased would not lead to Trial Court throwing out their depositions but their evidence ought to have been carefully scrutinised.

(Para 13)

C. Indian Evidence Act, 1872 – S. 25 and 26 – The deposition of Deepak Sharma (P.W.1) that on 22.12.2013 the Appellant made a confessional statement to the police in his presence while the Appellant was in custody; The deposition of Netra Devi Sharma (P.W.2) that the Appellant confessed to his crime in her presence which was recorded by the police at the Police Station; The deposition of Pema Chakki Bhutia (P.W.3) that the Appellant confessed before the police which have been accepted by the learned Sessions Judge as extra-judicial confession would be barred under Ss. 25 and 26 of the Indian Evidence Act, 1872 as being confession made to a Police Officer as well as while in the custody of the Police Officer.

(Para 20)

D. Code of Criminal Procedure, 1973 – S. 164 – S. 164, Cr.P.C. permits the recording of the statement of a witness or a confession. Confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence – S. 164 Cr.P.C. does not prescribe any method to record admissions of an accused. S. 164 Cr.P.C. does not permit the recording of admission save confessions by an accused. Confessions recorded under S. 164 Cr.P.C. although *stricto sensu* not evidence however, is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. If a statement recorded under S. 164 Cr.P.C. of an accused is found not to be confessional, its reliability would lose the strength attached to a confessional statement.

(Paras 29 and 30)

E. Indian Evidence Act, 1872 – S. 35 – The Investigating Officer has exhibited loose sheets of paper as the entries made in the Rangpo check post in two pages and identified the signatures of second officer in-charge-Sub-Inspector Pema Rana as (exhibit-36). S. 35 of the Indian Evidence Act, 1872 provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made in performance of a duty especially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact – Sub-Inspector Pema Rana was not examined. The purported entries from the purported vehicle movement register have not been seized through any seizure memo. The vehicle movement register has also not been placed before the Court. The maker of the entries has also not been examined. The Investigating Officer-Mahendra Subba is definitely not the person who had any personal knowledge about the entries. The loose sheet of pages cannot be accepted as evidence. The prosecution failed to prove the entries.

(Para 41)

F. Indian Evidence Act, 1872 – Result of an Investigation can Never be Accepted as Substantive Evidence – The solitary seizure witness quite candidly admitted that he does not know from whom and where the police recovered the said Nokia mobile phone which was lying on the table of the Investigating Officer – Evidently the prosecution had

failed to establish that the said Nokia mobile phone was seized from Mahendra Poudyal (PW-12) leave alone the fact that the said mobile phone belonged to the Appellant and that it was snatched from Chandra Kala Sharma by him. The learned Sessions Judge would quite correctly disbelieve the evidence of the Investigating Officer regarding the text message sent from the said mobile phone but would go on to hold that the evidence tendered by him against the Appellant had remained firm and could not be demolished despite lengthy cross-examination. The learned Sessions Judge failed to appreciate that the Investigating Officer was not a witness to the crime and he was in fact the Investigating Officer of the case. The learned Sessions Judge thus failed to appreciate that the result of investigation can never be accepted as substantive evidence.

(Para 69)

G. Indian Evidence Act, 1872 – Last Seen Theory – To apply the last seen theory, it is necessary to establish that the Appellant was last seen with the deceased – Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. The time gap between 19.12.2013 and 24.12.2013 is five days. There is no explanation as to what transpired in the interregnum. Sajan Tamang who first saw the dead body and informed the police not being examined it cannot be safely concluded that in between the period there was no possibility of any person other than the Appellant being the perpetrator of the crime. The circumstance of last seen theory cannot therefore be pressed against the Appellant.

(Paras 75 and 77)

H. Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Exhibit-3 is the disclosure statement of the Appellant. It is recorded in Nepali. The date of the disclosure statement is 22.12.2013 and the time 1400 hours. It is recorded at the Ranipool Police Station. The said disclosure statement bears the signature of the Appellant as well as the signature of two witnesses to the disclosure i.e. Netra Devi Sharma (PW-2) and Pema Chakki Bhutia (PW-3). PW-2 is related to the deceased and PW-3 is Netra Devi Sharma's staff and thereafter their evidence must be carefully examined although admissible. The confession of the Appellant recorded in the disclosure statement heavily relied upon by the learned

Sessions Judge in the impugned judgment to hold the Appellant guilty of murder is not admissible – What is admissible is provided in S. 27 of the Indian Evidence Act, 1872 which provides that when any fact is deposed to as discovered in consequence of information received from a person 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 – For the application of S. 27 of the Indian Evidence Act, 1872 the disclosure statement must be split into its components to separate the admissible portion if duly proved. Only those components or portions which were the immediate cause of the discovery may be proved. The rest of the portions must be eliminated from consideration. In so doing the only portion of the disclosure statement (Exhibit-3) which may be proved is, as translated "I can show the place I pushed my wife and I can also show the body of my wife if it has not been carried away by the river" after discarding the underlined portion. The words in the above disclosure statement "I pushed my wife" are inadmissible since they do not relate to the discovery of the body of the deceased. Now it would be relevant to examine whether the fact was discovered pursuant to the purported disclosure statement dated 22.12.2013 made by the Appellant – The evidence of a vital witness who is said to have seen the dead body first lying near the bank of river Teesta near Melli, South Sikkim has been withheld from the Court with no explanation. Police Inspector-Karma Chedup Bhutia who is said to have registered the UD Case No. 16 of 2013 was also not examined. The fact that the investigation for the search of the dead body of the deceased was directed towards Melli after the disclosure statement would have been relevant. However, Sajan Tamang the most crucial witness who had admittedly discovered the dead body having not been examined how and under what circumstances the dead body was discovered by him remains unexplained. In such circumstances, it cannot be said that the dead body of the deceased was discovered in consequence of information received from the Appellant – The evidence of the prosecution fall short of the quality of evidence required in a criminal case. The only person who identified the dead body found at bank of river Teesta was PW-11. The inquest reports do not name him as the person who identified the dead body. The Investigating Officer also throws no light upon this evidence. Even if this Court were to believe the evidence of PW-11 to be true it is certain that there is no evidence to show that the discovery of the dead body at the bank of river Teesta near Yuksom Breweries, Melli on 24.12.2013 was in consequence of the information received from the

Appellant in custody of a police officer as required under the mandate of S. 27 of the Indian Evidence Act, 1872 to make it provable and hold against the Appellant.

(Paras 83, 97 and 98)

I. Indian Evidence Act, 1872 – Suspicion However Strong Cannot Substitute Legal Proof – The chain of circumstances required to be proved in a criminal prosecution establishing the guilt of the accused has not been cogently proved. In fact none of the circumstances stands proved save the fact that the Appellant had eaten vegetable *"momos"* with an unknown girl on the date of the alleged incident i.e.19.12.2013 at Melli. This may create a serious doubt upon the Appellant. However, it is shockingly obvious that the prosecution did not deem it important to conduct the investigation in such a manner that would eliminate all possibility about the innocence of the Appellant. The prosecution seem to have rested its case on procuring statements of the Appellant and Chandra Kala Sharma under S. 164 Cr.P.C. without even realising that both had not confessed to their alleged crimes, a statement of the Appellant under S. 27 of the Indian Evidence Act, 1872 and evidence regarding some investigation done by the relatives of the deceased themselves. No effort has been made to prove vital documentary evidences. Material witnesses to the making of the said documents have been left out. Sajan Tamang the first informant about the recovery of the dead body has also been left out by the Investigating Officer without even an explanation. The offence of murder having not been proved the bare fact that the Appellant went and lodged a missing report after the deceased went missing or that he gave some statement under S. 313 Cr.P.C would not *ipso facto* lead to the conclusion that the said report was false. In the present case the alleged links, save one, in the chain are in themselves not proved and therefore incomplete. Even if the prosecution allegation of a false plea or a false defence is accepted it cannot be called into aid to saddle the Appellant with culpability. The charges have not been proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence. In such circumstances the question of indicting or punishing an accused does not arise, merely being carried away by the presumed heinous nature of the crime or the gruesome manner in which it was presumed to have been committed. Mere suspicion, however strong or probable it may be cannot substitute legal proof required substantiating the charge of commission of a crime and graver the charge greater ought to be the standard of proof required. The criminal Courts

should etch the words of the Supreme Court, so often reiterated, in their memory that there is a long mental distance between *"may be true"* and *"must be true"* and this basic and golden rule only helps to maintain the vital distinction between *"conjectures"* and *"sure conclusions"* to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

(Para 123)

Appeal allowed.

Chronological list of cases cited:

1. Ashish Batham v. State of M.P., (2002) 7 SCC 317.
2. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.
3. Kishore Chand v. State of Himachal Pradesh, (1991) 1 SCC 286.
4. State of Sikkim v. Suren Rai, 2018 SCC OnLine Sikk 12.
5. State of T.N. v. Kutty *alias* Lakshmi Narasimhan, (2001) 6 SCC 550.
6. K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin, (1997) 3 SCC 721.
7. N. Somashekar (Dead) By LRS. v. State of Karnataka, (2004) 11 SCC 334.
8. Rambraksh v. State of Chhattisgarh, (2016) 12 SCC 251.
9. Shri Kharga Bahadur Pradhan v. State of Sikkim, 2015 SCC OnLine Sikk 53.
10. Vijender v. State of Delhi, (1997) 6 SCC 171.
11. Datar Singh v. State of Punjab, (1975) 4 SCC 272.
12. Pulukuri Kottaya and Others v. The King Emperor, 1946 SCC OnLine PC 47.
13. Anter Singh v. State of Rajasthan, (2004) 10 SCC 657.
14. Salim Akhtar v. State of U.P., (2003) 5 SCC 499.
15. Aslam Parwez v. Govt. of NCT of Delhi, (2003) 9 SCC 141.
16. (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

17. Charandas Swami v. State of Gujarat, (2017) 7 SCC 177.
18. State of Karnataka v. Suvarnamma, (2015) 1 SCC 323.
19. Raj Kumar Singh v. State of Rajasthan, (2013) 5 SCC 722.
20. Jose *alias* Pappachan v. Sub-Inspector of Police, Koyilandy & Anr., (2016) 10 SCC 519.

JUDGMENT

Judgment of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. The process of justice dispensation in a criminal case mandates a thorough and sincere investigation by the investigating agency to place the absolute truth-the inflexible reality before the Court. The Investigating Officer is required to be professional, ethical, unbiased and adept with the laws. The trial of criminal cases must have the paramount objective to establish the truth. The object of investigation would be to bring home the offence to the offender however, without out stepping from the path of truth. The sole objective of the trial would be to render justice, however harsh the outcome may be. The ultimate object of both investigation and trial is to arrive at the truth. The prosecution as well as the defence lawyers must play a crucial role in the adversarial proceeding. During trial the trial Judge has a fundamental duty to ensure fair play and the acceptance of oral as well as documentary evidence in the manner prescribed by law is fundamental. The understanding of the Indian Evidence Act, 1872, the procedural law as provided in the Code of Criminal Procedure, 1973 (Cr.P.C.) and the ingredients of the offence as defined in the substantive law is vital in the process of investigation as well as trial. The Judgment rendered by the Trial Judge must reflect the deep understanding of these laws and the appreciation of the facts that have unfolded during trial. There would be no room for conjectures and surmises or even presumptions save what is permitted. Cogent evidence must lead to precise answers. It is only when there is failure in investigation and prosecution that conjectures and surmises, most unfortunately, are resorted to. That however, would be not only an incorrect but also an illegal approach. Prejudging a case inevitably leads to disastrous consequences. Sound judicial principles must guide the Trial judge while arriving at his conclusion. The adage *"innocent until proven guilty"* is the fundamental principle of criminal jurisprudence. Conviction must be secured by adducing cogent and conclusive evidence by due process of the laws.

2. In re: ***Ashish Batham v. State of M.P***[1] the Supreme Court would once again reiterate:

> ***"8.*** *Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.***"**

3. The indictment of the Appellant for the offence of murder of his wife (deceased) in criminal conspiracy with Chandra Kala Sharma and thereafter giving false information with the intention of screening himself from legal punishment would result in the impugned judgment of conviction dated 29.02.2016 by the learned Sessions Judge, Special Division-II at Gangtok, East Sikkim. The conviction of the Appellant would be under Section 302 and 201 Indian Penal Code, 1860 (IPC). The impugned order

[1] (2002) 7 SCC 317

on sentence dated 29.02.2016 would punish the Appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand) only under Section 302 IPC and in default of payment of fine to further undergo six months simple imprisonment. For the offence under Section 201 IPC the Appellant would be sentenced to undergo two years simple imprisonment and to pay a fine of Rs.5000/- (Rupees five thousand) only and in default to further undergo three months of simple imprisonment.

The convictions as well as the sentences are questioned in the present appeal.

4. The learned Sessions Judge while convicting the Appellant as aforesaid would primarily rely upon:-

(i) *Purported "extra judicial confession" made by the Appellant before Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2), Pema Chakki Bhutia (P.W.3) and "confession" made before Ganga Ram Pathak (P.W.9) and the Investigating Officer-Mahendra Subba (P.W.28).*

(ii) *Purported "confessional" statement of the Appellant recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the Chief Judicial Magistrate, Suraj Chettri (P.W.27).*

(iii) *The admission of an affair with Chandra Kala Sharma – the accused no.2 during the trial in the confession of the Appellant under Section 164 Cr.P.C.*

(iv) *Purported "confession" of Chandra Kala Sharma – the accused no.2 during the trial, made to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) on the ground that when more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence, should be taken into consideration against the other accused.*

(v) *Last seen theory as per the evidence of Anand Munda (P.W.10) and the identification of the Appellant in the Test Identification Parade conducted.*

(vi) The records of the vehicle movement register at Rangpo check post.

(vii) Purported Call Detail Record of the calls made by the Appellant and the deceased and the seizure of the mobile phone of the Appellant by which the calls were allegedly made showing the location.

(viii) The disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872.

(ix) The filing of the false missing report by the Appellant, inconsistent and contradictory statement of the Appellant regarding the whereabouts of the deceased along with his conduct-tearing of the deceased face from her photographs, false plea of the Appellant having lost his wallet along with the key of the box belonging to the deceased.

(x) The making of calls to various relatives inquiring about the whereabouts of the deceased by the Appellant and misleading his parents, relatives and the police.

(xi) The failure of the Appellant to satisfactorily explain the circumstances appearing against him during his examination under Section 313 Cr.P.C.

(xii) The time of death being closely connected to the date of incident.

5. Heard, Mr. N. Rai, learned Senior Advocate and legal aid Counsel for the Appellant as well as Mr. Karma Thinlay, learned Additional Public Prosecutor for the State-Respondent.

6. Mr. N. Rai would submit that this was a case based on circumstantial evidence and the prosecution had failed to prove that the circumstances are wholly consistent with the guilt of the accused and excludes every other hypothesis of the innocence of the Appellant and that further the prosecution has also failed to prove the links in the chain of circumstances beyond reasonable doubt. He would also submit that the

prosecution must stand on its own strength and it is not permissible to take advantage of the weakness of the defence. Mr. N. Rai would submit that the prosecution has failed to prove that the Appellant and the deceased were together at the time of the incident. He would also submit that the prosecution failed to prove any motive. He would submit that the alleged extra judicial confessions are untrustworthy and tutored. Delay in registering the First Information Report (FIR) and forwarding the same to the Magistrate is unexplained. He would contend that the very fact the dead body of the deceased was found in a cave in a sitting position contrary to the allegation of the prosecution that the Appellant had disclosed that he had pushed the deceased from *"Jalewa Bhir"* in the disclosure statement of the Appellant recorded under Section 27 of the Indian Evidence Act, 1872 would falsify the prosecution's story. Mr. N. Rai would submit suspicion however strong cannot substitute legal proof. Mr. N. Rai would question the impugned judgment as well as the order on sentence as being rendered on conjectures and surmises without any cogent evidence.

7. *Per contra* Mr. Karma Thinlay would submit that the conviction and sentence passed by the learned Sessions Judge was perfectly justified in the facts and circumstances of the present case and that the prosecution had been able to prove the case based on circumstantial evidence, beyond reasonable doubt. He would submit that the conduct of the Appellant during the period as proved by the evidence of Deepak Sharma (P.W.1), Hema Sharma (P.W.4), Indralall Sharma (P.W.5), Bindu Mati Adhikari (P.W.8), Pushpa Lal Kafley (P.W.11), Rajesh Prasad Gupta (P.W.14) and the Investigating Officer-Mahendra Subba (P.W.28) along with the vehicle movement register (Exhibit-36) would prove the guilt of the Appellant. He would submit that the deposition of Anand Munda (P.W.10) would show that in fact on 19.12.2013 the Appellant had been to the place of occurrence with the deceased. He would submit that the disclosure statement of the Appellant (Exhibit-3) recorded under Section 27 of the Indian Evidence Act, 1872 read with the confessional statement of the Appellant recorded under Section 164 Cr.P.C. would establish that it was the Appellant who had committed the crime alleged and none other.

8. There would be no eye witness to the occurrence. Admittedly, this would be a case based on circumstantial evidence. The method for proving a criminal case based on circumstantial evidence is well settled.

9. The prosecution story in short was that the Appellant had married the deceased in the year 2010. From June 2013 they shifted to a rented room in Ranipool. The deceased had joined a computer class at MIT, Ranipool. Chandra Kala Sharma (the cousin of the deceased and accused no.2 during trial who stands acquitted now) started living with the couple. Chandra Kala Sharma fell in love with the Appellant and developed physical relation with him. The deceased thus became a hindrance to their illicit love affair. The Appellant wanted to get rid of his pregnant wife and hatched a plan to eliminate her and shared it with Chandra Kala Sharma. On 19.12.2013 morning the Appellant dropped Chandra Kala Sharma to the tuition class at Gangtok in his vehicle SK-01P-6697 (Alto) and thereafter persuaded the deceased to go for a long drive with him to Melli. They left for Melli in the afternoon and on reaching there they had vegetable *"momos"* at a Hotel and thereafter proceeded further on, the Appellant looking for an opportune moment to commit her murder. They crossed the Rangpo check post towards the West Bengal side at around 1335 hours. The Appellant stopped the vehicle at *"Jalewa Bhir"* on the West Bengal side about 3 kilometres away from Sikkim on the pretext of feeding the monkeys there. The deceased unaware of the ill intention of the Appellant also got out of the vehicle and loitered around. At around 1710-1740 hours, the Appellant on the cover of darkness pushed the deceased towards a treacherous steep cliff of approximately 900/1000 feet and left the spot immediately entering Rangpo check post around 1755 hours. After reaching home the Appellant disclosed the facts to Chandra Kala Sharma and both craftily decided to file false missing report at the Ranipool Police Station. The Appellant and Chandra Kala Sharma even visited the MIT Computer Centre at Ranipool and enquired as to whether the deceased had come there knowing that it was a Thursday and the centre would remain closed. The Appellant also lodged a missing First Information Report (FIR) on 20.12.2013 at the Ranipool Police Station. Call Detail Records of the mobile number of the deceased, the Appellant and the Appellant's mobile used by Chandra Kala Sharma were sought for from the service provider which confirmed that the Appellant had contacted his wife thrice on 19.12.2013 before 0930 hours on the other hand it was revealed that the Appellant had contacted Chandra Kala Sharma twice first at 14.44 hours and at 17:07:08 hours and the tower details indicated Melli and Turuk, South Sikkim. After his arrest the Appellant admitted to the crime. The Appellant made a disclosure statement in presence of witnesses. The vigorous search conducted with the assistance of the relatives and river rafters at the place of occurrence as per the disclosure statement yielded no

result. On 24.12.2013 while proceeding for further extensive search verbal intimation was received from the Station House Officer, Melli Police Station, South Sikkim that one unidentified dead body had been recovered from the banks of river Teesta having similar features as that of the deceased. On reaching the spot the Appellant as well as Deepak Sharma (P.W.1) recognised the body as that of the deceased. Magisterial inquest was conducted on the body and thereafter an autopsy which confirmed that the deceased was pregnant with 4-5 months old male foetus.

10. The present appeal is filed by the Appellant against his conviction and sentence. Chandra Kala Sharma the co-accused in the trial was acquitted by the learned Sessions Judge. The State has not preferred any appeal against the said acquittal.

11. Mr. N. Rai would illuminate on how a criminal case must be established on the basis of circumstantial evidence by citing the *locus classicus* on the subject rendered by the Supreme Court in re: ***Sharad Birdhichand Sarda v. State of Maharashtra***[2] in which it would be held:

> ***"152.*** *Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :*

[2] (1984) 4 SCC 116

> *"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

12. On the settled principles of examining a criminal case based on circumstantial evidence we venture to re-examine the circumstances which led the learned Sessions Judge to convict and sentence the Appellant for murder of his wife – the deceased as well as giving false information to screen himself. We are conscious that this is an appeal against conviction. We are also conscious while hearing an appeal against conviction we must consider the factual aspects of the case. The power of the Appellate Court dealing with an appeal from conviction is the same as the power of the Appellate Court while dealing with an appeal against acquittal. The appeal against conviction is as of right.

(i) Purported "extra judicial confession" made by the Appellant before Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2), Pema Chakki Bhutia (P.W.3) and "confession" made before Ganga Ram Pathak (P.W.9) and the Investigating Officer-Mahendra Subba (P.W.28).

13. Before we examine the evidence of Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) it is necessary to

keep in mind the principles laid down by the Supreme Court, discussed hereinafter, while examining evidences of close relatives and friends of the deceased as admittedly Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2) were closely related to the deceased and Pema Chakki Bhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2). Deepak Sharma (P.W.1) is the elder brother of the deceased and the Appellant is his brother-in-law. The Appellant is the brother-in-law married to Netra Devi Sharma's (P.W.2) sister-in-law. Chandra Kala Sharma-the co-accused during trial but acquitted by the learned Sessions Judge is Netra Devi Sharma's (P.W.2) younger paternal uncle's daughter. Pema Chakki Bhutia (P.W.3) as per the deposition of Netra Devi Sharma (P.W.2) was her staff who was present when the Appellant made the alleged confessional statement to the police. The learned Sessions Judge in spite of evidence to the contrary would hold that Deepak Sharma (P.W.1), Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) were independent witnesses. Independent witness means independent of sources which are likely to be tainted. The fact that the deceased who was murdered allegedly by the Appellant was the relative of Deepak Sharma (P.W.1) and Netra Devi Sharma (P.W.2) and that Pema Chakki Bhutia (P.W.3) was the staff of Netra Devi Sharma (P.W.2) who accompanied her to the Ranipool Police Station where the alleged extra judicial confession was made by the Appellant was a factor which ought to have been considered by the learned Sessions Judge while examining their evidences. The mere fact that the said prosecution witnesses were relatives of the deceased would not lead to Trial Court throwing out their depositions but their evidence ought to have been carefully scrutinised.

14. In re: ***Sharad Birdhichand Sarda (supra)*** the Supreme Court would caution:

> ***"48.*** *Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or*

*add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.***"**

(emphasis supplied)

15. Deepak Sharma (P.W.1) would state in his examination-in-chief:

> ***"****On 22.12.2013, myself, Mahendra Sharma and the accused no.2 came to Ranipool Police Station and we lured the accused No.2 with the promise of a job and asked her about the deceased. On such promise, the accused No.2 told us that on the evening of 19.12.2013, the accused No.1 told her that he had done away with the deceased. By the time we reached Ranipool Police Station on 22.12.2013, the accused No.1 was already in Police Custody. At the Police Station, the accused No.1 told the Police that he had taken the deceased towards Rangpo and pushed her from a cliff into the River Teesta and lodged a false Police Report at the Ranipool Police Station on 19.12.2013 stating that the Victim was missing. He also informed the Police, that the Victim was pregnant at the time of the incident. On hearing such statements, I lodged the FIR at the Police Station. Exbt. 1 is the said FIR lodged by me on 22.12.2013 scribed by my brother Iswhar Prasad*

on my instructions. Exbt. 1 (a) is my full signature and Exbt. 1 (b) is my initial on Exbt. 1. My brother Ishwar Prasad had accompanied me on 22.12.2013 to the Ranipool Police Station.

*Exbt. 2 is the formal FIR drawn up by the Police at the Ranipool Police Station. Exbt. 2 (a) is my signature on Exbt.2.***"**

16. Netra Devi Sharma (P.W.2) would depose in her examination-in-chief that:

"*On 22.12.2013, I again came to Ranipool Thana to know about the details of Investigation. There the accused No.1 gave a statement in my presence stating that he had pushed his wife from one Jalewa Bhir at a distance of three kilometres beyond Rangpo, into the river Teesta, which was recorded by the Police. He also said that he had done the above act on 19.12.2013. Pema Chhiki Bhutia who is my staff, was also present when accused No.1 made the statement to the Police.***"**

17. Pema Chakki Bhutia (P.W.3) in her examination-in-chief would state:

"*..... I do not remember the date and the month but it was in the year 2013, accused Somnath Sharma disclosed to the police at Ranipool P.S. in my presence to the effect that he was having an affair with the sister-in-law, Chandra Kala Sharma. He also had physical relationship with the sister-in-law. That on the date of the incident, the accused took his wife for a drive to Melli. While returning back, on reaching between Melli and Rangpo popularly known as Jalewa Bhir, he stopped his car for a while and at that point of time, the wife also came out of the car and he pushed her from the cliff towards Teesta River (objected as the same is not in her 161 statement).***"**

18. Ganga Ram Pathak (P.W.9) was posted in Ranipool Police Station. On 21.12.2013 he was on plain clothes duty when the Officer In-charge of Ranipool Police Station had directed him to keep surveillance of the Appellant. He was the one who brought the Appellant to the Ranipool Police Station and questioned the Appellant. As per the deposition of Ganga Ram Pathak (P.W.9):

> **"***At Ranipool P.S., on enquiry to the accused Somnath by me, the accused pleaded guilty before me stating that he was having affairs with his sister-in-law and further stated that in collusion with his sister-in-law, accused Somnath took his wife for a drive in their Alto car bearing registration No. SK-01-P-6697 towards Melli in order to kill his wife. While returning back, on reaching in between Rangpo and Melli, he pushed his wife from the cliff towards river Teesta.*
>
> *Thereafter, I handed over the accused to P.I. Sahab (objected).***"**

19. The Investigating Officer-Mahendra Subba (P.W.28) would also depose in his examination-in-chief that:

> **"***Further during interrogation the accused disclosed of the fact in presence of independent witnesses that he forcefully pushed his wife towards the cliff along Rangpo-Melli, 31 N.H. Road on 19.12.2013 around 1720 hours approximately while they were on their way back from Melli Bazar, South Sikkim. Accordingly I recorded the disclosure statement. Exbt.3 already marked is the said disclosure statement. Exbt.3(a) and Exbt.3(b) are the signatures of the witnesses Netra Devi Sharma and Pema Chhiki Bhutia respectively on the same which I identify. Exbt.3(c) is the signature of the accused.***"**

20. The deposition of Deepak Sharma (P.W.1) that on 22.12.2013 the Appellant made a confessional statement to the police in his presence while the Appellant was in custody; The deposition of Netra Devi Sharma (P.W.2) that the Appellant confessed to his crime in her presence which was recorded by the police at the Police Station; The deposition of Pema Chakki Bhutia (P.W.3) that the Appellant confessed before the police which have been accepted by the learned Sessions Judge as extra judicial confession would be barred under Sections 25 and 26 of the Indian Evidence Act, 1872 as being confession made to a Police Officer as well as while in the custody of the Police Officer.

21. In a similar fact situation examined by the Supreme Court in re: ***Kishore Chand v. State of Himachal Pradesh***[3] it would hold:

> ***"8****.....Therefore, it would be legitimate to conclude that the appellant was taken into the police custody and while the accused was in the custody, the extra-judicial confession was obtained through PW 10 who accommodated the prosecution (sic appellant). Thereby we can safely reach an irresistible conclusion that the alleged extra-judicial confession statement was made while the appellant was in the police custody. It is well settled law that Sections 25 and 26 shall be construed strictly. Therefore, by operation of Section 26 of the Evidence Act, the confession made by the appellant to PW 10 while he was in the custody of the police officer (PW 27) shall not be proved against the appellant. In this view it is unnecessary to go into the voluntary nature of the confession etc.***"**

22. The deposition of Ganga Ram Pathak (P.W.9) that the Appellant confessed to his crime at the Police Station after he had brought the Appellant there while doing his surveillance as per the instructions of the Officer In-charge of the Ranipool Police Station and the deposition of the Investigating Officer-Mahendra Subba (P.W.28) regarding the confession made by the Appellant to him in front of independent witnesses would all be

[3] (1991) 1 SCC 286

barred under Sections 25 and 26 of the Indian Evidence Act, 1872 as both of the said witnesses were Police Officers.

23. The learned Sessions Judge ought not to have relied upon the purported extra judicial confession and confession as circumstances against the Appellant.

(ii) Purported "confessional" statement of the Appellant recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) by the Chief Judicial Magistrate, Suraj Chettri (P.W.27).

(iii) The admission of an affair with Chandra Kala Sharma– the accused no.2 during the trial in the confession of the Appellant under Section 164 Cr.P.C.

24. A full Bench of this Court in Re: ***State of Sikkim* v. *Suren Rai***[4] would hold:

> ***"48.*** *"Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary. Although*

[4] 2018 SCC OnLine Sikk 12

the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: Pakala Narayanaswami v. *King Emperor5 has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though. As per Taylor's Treaties on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat. .....***"***

25. The purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C. by the learned Chief Judicial Magistrate on 27.10.2015 would state:

"*I am a permanent resident of Aho Santi, East Sikkim. Deceased Nevika Sharma is my wife. I along with my wife used to reside at Ranipool. In February 2010 I got married with my deceased wife. I also know Chandra Kala Sharma. She is my sister-in-law. She is the daughter of the uncle (Kaka) of the deceased wife. On 24.12.2013 police from Ranipool P.S. took me to Malli, South Sikkim to identify the dead body of my wife Nevika Sharma. My wife was pregnant at the relevant time.*

[5] 66 IA 66

On 19.12.2013 my deceased wife told me that as she is pregnant and cannot go to visit any place, she wants to go for a drive. Accordingly, I drove her up to Malli via Singtam. Rangpo in my Alto car bearing No. SK01 P-6697. From Malli we came back towards Rangpo. I was having love affair with my sister-in-law Chandra Kala Sharma and I had told my deceased wife about my love affair and I want to marry my sister-in-law. While going to Malli and coming back, me and my deceased wife were discussing about my love affair with my sister-in-law. As my wife was pregnant I was driving slowly and we were halting and taking rest on the way. When we reached 2-3 Kms away from Rangpo towards Malli I stopped my vehicle on the side of the Road. I got down from my vehicle, took my cigarette and Rajaniganda from my car and went for short toilet. At that time also we were discussing about my affair with my sister-in-law. While I was doing short toilet at the wall side of the road my wife suddenly jumped towards the river side of the road where there is stiff cliff. At the time it was about to be dark. I call my wife and looked down but there was no answer. For about half an hour I remained there as I was nervous. Thereafter, I came back to Ranipool directly. At that time I was nervous and was not in the position to think anything. Thereafter, I called my mother, Hema Devi Sharma. My mother asked for my wife to which I told her that she is not at home. Thereafter, I started receiving phone calls from my in-laws and later my uncles (Kaka) also called me up. Later at night my uncles and co-villagers from Aho came to my rented room at Ranipool and started asking about the whereabouts of my deceased wife. As I was afraid I could not tell anyone that my wife jumped from the road. Thereafter, everybody decided to make a search of my wife. My uncle lodged missing report at

Ranipool P.S. The brother of my deceased wife was also asking me to lodge missing report immediately. My uncle L.P. Sharma was writing missing report and it was later lodged at Ranipool P.S.

*On 22.12.2013 I was arrested by Ranipool P.S. in connection with this case. It is true that I was having love affair with my sister-in-law Chandra Kala Sharma but I did not kill my wife.***"**

(emphasis supplied)

26. The purported "*confessional*" statement recorded under section 164 Cr.P.C. is evidently not a confession. The fact that the Appellant states "*while I was doing short toilet at the wall side of the road my wife suddenly jumped towards the river side of the road where there is stiff cliff*" makes it exculpatory. Mr. Karma Thinlay would ignore the exculpatory statement and submit that the rest of the statement given by the Appellant under Section 164 Cr.P.C. would unflinchingly prove his guilt. In fact he would rely upon various judgments of the Supreme Court on retracted confessions which we have perused and found them not to help the prosecution case any further. He would rely upon ***State of T.N.* v. *Kutty alias Lakshmi Narasimhan***[6]; ***K.I. Pavunny* v. *Assistant Collector (HQ), Central Excise Collectorate, Cochin***[7] ***and N. Somashekar (Dead) By LRS.* v. *State of Karnataka***[8]**.**

27. In re: ***N. Somashekar (supra)*** the Supreme Court would observe:

"9. *It needs first to be noted that merely because the statement of witness is recorded under Section 164 of the Code, that does not automatically dilute the worth of his evidence. (See State of Assam* v. *Jilkadar Ali and Vishwanath* v. *State of U.P.)***"**

[6] (2001) 6 SCC 550
[7] (1997) 3 SCC 721
[8] (2004) 11 SCC 334

28. Mr. Karma Thinlay would draw the attention of this Court to the afore-quoted sentence from the judgment and submit that the statement made by an accused to the Magistrate under Section 164 Cr.P.C. would be relevant even if the same is not a confession. We are afraid the Supreme Court did not say so. In the said case the Supreme Court was dealing with a statement of a witness recorded under Section 164 Cr.P.C. and not a purported *"confession"* of an accused as in the present case. A perusal of the rest of the sentences in paragraph 9 of the judgment would reflect that the witnesses who had earlier given their statement under 164 Cr.P.C. had been examined by the prosecution as witnesses and their evidence recorded. It was in this context that the Supreme Court would make the above observation.

29. Section 164 Cr.P.C. permits the recording of the statement of a witness or a confession. Confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The substantive offences alleged are murder and causing evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment knowing that the offence had been committed. The purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C., therefore, must admit said offences or at any rate all the facts which constitute the said offences. A perusal of the entire purported *"confessional"* statement recorded under Section 164 Cr.P.C. does not disclose that the Appellant had admitted having committed murder or at any rate all the facts which constitute the offence of murder. It also does not disclose any admission of causing any evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment knowing that the offence had been committed.

30. Section 164 Cr.P.C. does not prescribe any method to record admissions of an accused. Section 164 Cr.P.C. does not permit the recording of admission save confessions by an accused. Confessions recorder under Section 164 Cr.P.C. although *stricto sensu* not evidence however, is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. If a statement recorded under Section 164 Cr.P.C. of an

accused is found not to be confessional, its reliability would lose the strength attached to a confessional statement. In such circumstances no reliance can be placed on the purported statements of the Appellant recorded under Section 164 Cr.P.C., quite incorrectly, as his confessional statement as it would not be substantial evidence.

31. The prosecution has placed no evidence at all except the purported *"confessional"* statement of the Appellant recorded under Section 164 Cr.P.C., the purported extra judicial confession made to Pema Chakki Bhutia (P.W.3) and the purported confession made to Ganga Ram Pathak (P.W.9) to prove the allegation of the Appellant's affair with Chandra Kala Sharma as a motive for the alleged murder. We deem it improper to rely upon such confessions. Consequently, there would be no evidence to establish the alleged extra marital affair between the Appellant and Chandra Kala Sharma. The close relatives of the deceased who were produced as prosecution witnesses are all silent about it.

(iv) Purported "confession" of Chandra Kala Sharma-the accused no.2 during the trial, made to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) on the ground that when more persons than one are jointly tried for the same offence, theconfession made by one of them, if admissible in evidence, should be taken into consideration against the other accused.

32. The learned Sessions Judge would hold that Chandra Kala Sharma had confessed about the offence for committing the murder of the deceased to her brother Deepak Sharma (P.W.1) and her uncle Mahendra Poudyal (P.W.12) which fact could not be lost sight of. The learned Sessions Judge would hold that when more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence, should be taken into consideration against the other accused. Deepak Sharma (P.W.1) would state that on 22.12.2013 he, Mahendra Sharma and Chandra Kala Sharma came to Ranipool Police Station when they lured Chandra Kala Sharma with the promise of a job and asked her about the deceased and on such promise, Chandra Kala Sharma told them that in the evening of 19.12.2013 the Appellant told her that he had done away with the deceased. It is apparent that Chandra Kala Sharma had not confessed to have committed the crime to Deepak Sharma (P.W.1). Mahendra

Poudyal (P.W.12) did not state anything regarding Chandra Kala Sharma confessing to him. The deposition of Deepak Sharma (P.W.1) of what Chandra Kala Sharma had told him after they lured her with the promise of a job is merely a procured hearsay statement. It was purportedly heard from an accomplice. The oral evidence of what the accomplice said is narrated by Deepak Sharma (P.W.1) a relative of the deceased after she was admittedly induced with a promise of a job. Thus this hearsay statement would have no evidentiary worth. Illustration (b) of Section 114 of the Indian Evidence Act, 1872 provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. There is no corroboration to the said statement of Chandra Kala Sharma purportedly given to Deepak Sharma (P.W.1) at the Ranipool Police Station.

33. Chandra Kala Sharma is said to have made a confessional statement under Section 164 Cr.P.C. The said purported *"confessional"* statement (exhibit-27) records:

> ***"****On 19.12.2013 I got up in the morning, prepared food and went tuition. My brother-in-law reached me to Rediant Institute. I reached back home at around 2.30 pm. The room of my brother-in-law was locked. After some time my sister, Nevika Sharma called me and told me the keys of the room are above the door. She also told me to prepare snacks and to have it. She also told me that her computer class will be over by 5 pm. At around 5 pm she again called me that her class will be over at 8 pm only.*
>
> *At around 7.30 pm by (sic) brother-in-law came home and asked my about my sister. I told him that she has not come back and she was telling me that her computer class will be over only at 8 pm. Thereafter, I along with my brother-in-law went to the computer Institute at Ranipool Bazar from where we came to know that it was a holiday and the institute was closed on the relevant day. Thereafter, my brother-in-law called*

*his family members and asked about my sister. Later at night all the family members of my brother-in-law came in the rented room of my brother-in-law at Ranipool. Apart from above I do not know anything about the present case.***"**

34. Even the purported "*confessional*" statement of Chandra Kala Sharma recorded under Section 164 Cr.P.C. is not a confessional statement and the entire statement is exculpatory. In the circumstances, we are unable to fathom as to how the learned Sessions Judge could come to the finding that Chandra Kala Sharma had confessed to Deepak Sharma (P.W.1) and Mahendra Poudyal (P.W.12) and used the same to convict the Appellant.

(v) Last seen theory as per the evidence of Anand Munda (P.W.10) and the identification of the Appellant in the Test Identification Parade conducted.

(vi) The records of the vehicle movement register at Rangpo check post.

(vii) Purported Call Detail Record of the calls made by the Appellant and the deceased and the seizure of the mobile phone of the Appellant by which the calls were allegedly made showing the location.

35. In re: ***Rambraksh* v. *State of Chhattisgarh***[9] the Supreme Court would explain the application of the last seen theory in a criminal case based on circumstantial evidence in this manner:

"12. *It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of*

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*the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.***"**

(emphasis supplied)

36. A Division Bench of this Court in re: ***Shri Kharga Bahadur Pradhan* v. *State of Sikkim***[10] would hold:

> ***"11.*** *Apart from the above, we note that the deceased was allegedly seen alive in the company of the Appellant on 03.08.2009 and her dead body was found in abandoned condition in Budang jungle on 06.08.2009. Thus, there was a long time gap between the deceased lastly seen alive and the dead body found and in such situation, a possibility of any third person coming in between cannot be fully ruled out. We are of the view in light of the above facts and circumstances, the Sessions Judge was not justified in holding that the circumstance of last seen was fully established against the Appellant. We hold that the said circumstance was not fully established.***"**

37. The learned Sessions Judge would examine the evidence of Anand Munda (P.W.10), entries made in vehicle movement register of Rangpo check post (Exhibit-36) reflecting the movement of the Appellant's Alto car bearing registration no. SK-01-P-6697 and hold that the Appellant and the deceased were seen and found together at Melli Bazar at Holiday Hotel where they had vegetable *"momos"* and that the place of occurrence also falls within the periphery from where the dead body of the deceased was recovered in between Rangpo and Melli establishing the guilt of the Appellant. The learned Sessions Judge would also opine that from the call details of the relevant day the Appellant and the deceased had made calls from their respective mobiles within the reach of Melli-Turuk-Turung tower and its adjoining area at National Highway. The evidence of Pushpa Lal

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Kafley (P.W.11) that when he went to Ranipool Police Station he received the call details of the Appellant as well as the deceased from the office of Vodafone, Gangtok by which it was found that the deceased was within the reach of Turuk tower would be accepted. The evidence of Mahendra Poudyal (P.W.12) stating that they had gone to Ranipool Police Station where they were handed over the call details and the location of the tower as per which the deceased had made her last call from her mobile at 5.07 p.m. as per the network supported by Turung tower would also be accepted. The seizure of mobile phones (M.O.I and M.O.II) belonging to the Appellant would be found proved by the evidence of Hem Raj Gurung (P.W.17), Dhan Singh Subba (P.W.19). The seizure of a Nokia phone (M.O.V) in the presence of Sancharaj Subba (P.W.26) from Mahendra Poudyal (P.W.12) who is said to have snatched it from Chandra Kala Subba is also accepted. The fact that the Alto car bearing registration no. SK-01-P-6697 belonged to the Appellant on which the Appellant and the deceased is said to have travelled to Melli on 19.12.2013 would also be found proved by the evidence of Dilip Shah (P.W.18), Bindu Mati Adhikari (P.W.8) and Pema Tshering Lepcha (P.W.21).

38. In view of the aforesaid findings it is necessary to revisit the aforesaid evidences and come to the conclusion whether the learned Sessions Judge was right in concluding that the last seen theory pressed by the prosecution stood proved.

39. Bindu Mati Adhikari (P.W.8) would depose that on 15.11.2013 she sold one Alto car bearing registration no. SK-01-P-6697 to the Appellant at a consideration value of Rs.1,45,000/- and executed a sale deed. She would also depose that later she learnt that the vehicle had not been transferred in the name of the Appellant till date. Bindu Mati Adhikari (P.W.8) would depose before the Court on 18.06.2015. Although sale deed document (exhibit-40), application for intimation and transfer of ownership of the said Alto car bearing registration no. SK-01-P-6697 (exhibit-41), notice of transfer of ownership of motor vehicle (exhibit-42) have been exhibited the said documents were not even shown to Bindu Mati Adhikari (P.W.8) by the prosecution during her examination. The said documents were exhibited by the Investigating Officer-Mahendra Subba (P.W.28) as having been seized by him vide property seizure memo (exhibit-13) in the presence of two witnesses Vinod Mundra (P.W.25) and Dilip Shah (P.W.18) from one Bimal Neopaney who was not examined. Quite certainly the

Investigating Officer-Mahendra Subba (P.W.28) was not the maker of the said documents. Vinod Mundra (P.W.25) would depose that on 20.03.2014 he was called by Investigating Officer-Mahendra Subba (P.W.28) to stand witness to the seizure but could not say from whom the documents and key were seized. He could not even identify the other witness. Dilip Shah (P.W.18) would state that the aforesaid seizure was effected in his presence from Bimal Neopaney at Ranipool Police Station. He stated that the contents of property seizure memo (exhibit-13) were not read to him nor were the documents seized shown to him. He admitted that the police told him they had in fact seized the Alto car and prepared property seizure memo (exhibit-13). The prosecution has failed to prove the contents or the execution of sale deed document (exhibit-40), application for intimation and transfer of ownership of the said Alto car bearing registration no. SK-01-P-6697 (exhibit-41), notice of transfer of ownership of motor vehicle (exhibit-42). The *"best evidence rule"* has been completely given a go by the prosecution. The makers of the documents have not been examined. The person, from who the documents were allegedly seized, although his name is reflected in the property seizure memo (exhibit-3), has not being produced as a witness. The investigation has failed to disclose who Bimal Neopaney was, how the said documents were seized from him and what his connection to the present prosecution was. The prosecution has failed to connect the seizure of the said documents to the Appellant.

40. Through property seizure memo (exhibit-19) dated 24.12.2013 the Alto car bearing registration no. SK-01-P-6697, the RC book of the said vehicle in the name of Bindu Mati Adhikari (P.W.8), driving license bearing no. SK0120130021416 in the name of the Appellant, insurance certificate policy ignition key of the said vehicle and one leather hand bag (black in colour) would be seized by the Investigating Officer-Mahendra Subba (P.W.28) in the presence of one Saroj Lohar and Pema Tshering Lepcha (P.W.21) in front of the Police Station. The Investigating Officer-Mahendra Subba (P.W.28) in his deposition would state that he effected the seizure at the Ranipool Police Station in the presence of witnesses whose signatures he identified. Saroj Lohar would not be examined. Pema Tshering Lepcha (P.W.21) would also state that the aforesaid seizures were effected at the Ranipool Police Station. Property seizure memo (exhibit-19) does not reflect from whom the seizures were effected. The Investigating Officer-Mahendra Subba (P.W.28) as well as Pema Tshering Lepcha (P.W.21) the sole seizure witness examined are both silent about this fact too. The prosecution has

failed to establish from whom items purportedly seized vide property seizure memo (exhibit-19) were seized from. The prosecution has also failed to connect the seizures with the present prosecution against the Appellant.

41. The Investigating Officer-Mahendra Subba (P.W.28) would depose that the movement of the vehicle bearing registration no. SK-01-P-6697 was also found entered in the register maintained at Rangpo check post having passed at around 1335 hrs towards Bengal side and returned at around 1755 hrs on 19.12.2013 which matched with the time given by the Appellant in his disclosure statement. He also exhibited loose sheets of paper as the said entries made in the Rangpo check post in two pages and identified the signatures of second officer in-charge-Sub-Inspector Pema Rana as (exhibit-36). Section 35 of the Indian Evidence Act, 1872 provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made in performance of a duty especially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. Sub-Inspector Pema Rana was not examined. The purported entries from the purported vehicle movement register have not been seized through any seizure memo. The vehicle movement register has also not been placed before the Court. The maker of the entries has also not been examined. The Investigating Officer-Mahendra Subba (P.W.38) is definitely not the person who had any personal knowledge about the entries. The loose sheet of pages (exhibit-36) cannot be accepted as evidence. The prosecution has failed to prove the entries.

42. A perusal of the list of documents exhibited by the prosecution as reflected in the impugned judgment does not show that call detail records as adverted to by the learned Sessions Judge had been exhibited and proved.

43. Puspa Lal Kafley (P.W.11) a Government employee under the Energy and Power Department would depose that:

> **"***... Thereafter on the next day, I came back to Ranipool at the rented room or accused No.1 and we received the call details of accused No.1 and Nebika Sharma from the office of Vodafone, Gangtok. On the basis of call details, it was found that missing Nebika was within the reach*

*of Turuk tower. Accordingly, went to Turuk but we could not find Nebika and returned back to Ranipool.***"**

44. In cross-examination Puspa Lal Kafley (P.W.11) would admit:

"*... It is true that as per the call details of Nebika, it was within the reach of Turuk tower but not of West Bengal side.***"**

45. Puspa Lal Kafley (P.W.11) would also admit in cross-examination that the deceased was his sister-in-law.

46. Mahendra Poudyal (P.W.12) son of Kedarnath Sharma (P.W.15) is a Government servant who would state in his deposition that:

" *On the following day, at around 9 a.m., SHO, Ranipool P.S. informed us stating that tower location and call details has been received by his office. Accordingly, we went to police station and there we were handed over the call details and the location of the tower. On going through the call details, it was found that missing Nebika Sharma had made a last call from her mobile phone at around 5:7 p.m. as per the network supported by Turung tower, On our enquiry to SHO, Ranipool, he told us that Turung tower provides network to areas in between Melli, Rangpo and surrounding areas including 31A National Highway.***"**

47. In cross-examination the said Mahendra Poudyal (P.W. 12) could admit:

"*It is true that the information in connection with the call details of the mobile of Nebika Sharma supported by Turung tower was given to me by SHO, Ranipool. It is true that I do not remember to which company, said tower belong to.***"**

48. Thus as per Mahendra Poudyal (P.W.12) the call detail records was handed over to him by the Station House Officer of Ranipool Police Station. Mahendra Poudyal (P.W.12) however, also didn't produce it.

49. As per Deepak Sharma (P.W.1) the deceased's brother, Kedarnath Sharma (P.W.15) is his younger paternal uncle and that on 21.12.2013 he along with Kedarnath Sharma (P.W.15) and his son Mahendra Sharma had gone to the Ranipool Thana and inquired about the call records of the mobile phone of the victim if so procured by the police. The police inspector informed them that the call detail records had shown the location of the deceased within reach of Turung tower at around 5:15 p.m. on 19.12.2013 from her mobile.

50. The Investigating Officer-Mahendra Subba (P.W.28) would state:

> ***"****I also received the call details from (sic) of phone Nos. 0974959259 of the accused Som Nath Sharma and 09593782036 of the deceased Nabika Sharma in seven pages from the office of Vodafone at Gangtok i.e. from 18.12.2013 to 20.12.2013 which showed the tower details of Melli, Turuk and Turung adjacent to 31A-National Highway (P.O).....*
>
> *It also shown in the call details that the accused had contacted deceased Nabika Sharma on 19.12.2013 thrice over her phone and as well the accused also contacted the accused Chandra Kala Sharma twice at around 14.44 hours and 17.07.08 hours which indicates the tower which covers between Melli and Taruk, adjoining National Highway.****"***

51. The Investigating Officer-Mahendra Subba (P.W.28) in cross-examination admitted that he had not cited the employees of Vodafone and Reliance Company as witness in the present case.

52. Section 61 of the Indian Evidence Act, 1872 provides that the contents of documents may be proved either by primary or secondary evidence. Section 62 of the Indian Evidence Act, 1872 provides that

primary evidence means the document itself produced for the inspection of the Court. Section 62 of the Indian Evidence Act, 1872 states what secondary evidence means and includes. Apparently the prosecution has not produced either the primary evidence or the secondary evidence of the purported call detail records. Section 64 of the Indian Evidence Act, 1872 provides that documents must be proved by primary evidence except in the cases mentioned in Section 65 thereof. No case to bring it within the exceptions enumerated in Section 65 of the Indian Evidence Act, 1872 has been made out by the prosecution. In such circumstances, no amount of oral evidence regarding the call detail records can be accepted since the prosecution failed to exhibit and prove the call detail records. This circumstance cannot also be taken against the Appellant.

53. The learned Sessions Judge would hold that the seizure of the two mobile phones i.e., Micromax (M.O.I) and Spice (M.O.II) as well as the fact that the said mobile phones were not of the Appellant could not be demolished by the defence. The learned Sessions Judge would also hold that the Appellant also could not demolish the fact that he had made calls within the reach of Melli Turuk and Turung tower and adjoining area of National Highway which has been corroborated by the call detail records vide exhibit-37 and 38.

54. In so far as the finding regarding the call detail records, as held above, there was no documentary evidence to establish the same. The learned Sessions Judge, unfortunately and in the most callous manner, without even perusing exhibits-37 and 38 would hold that the said exhibits corroborated that the Appellant had made calls. Exhibit-38 is a communication dated 13.01.2014 forwarding the water discharge data w.e.f. 19.12.2013 to 25.12.2013 of Teesta-V Power Station from NHPC Limited and exhibit-37 is the said hourly water discharge data. We cannot but express our anguish on such reasoning.

55. Property seizure memo (exhibit-12) is dated 22.12.2013. It would reflect that one mobile phone (Micromax), black in colour, having red border with SIM no. 7407375856 (Vodafone) and SIM no.9749592159 (Reliance) and another mobile phone (Spice) white and black in colour without SIM card were seized from the Appellant at the Ranipool Police Station in the presence of Dhan Singh Subba (P.W.19) and Hem Raj Gurung (P.W.17).

56. Hem Raj Gurung (P.W.17) is the seizure witness of the said mobile phones and in his deposition he would state:

> ***"****I know the accused No.1 present in the Court today. That on 22.12.2013, at around 1 p.m., SHO, Ranipool P.S. seized 2 Nos. of mobile of different make, i.e., Micromax mobile phone and Spice Mobile phone in my presence at Ranipool P.S. Thereafter, police prepared the seizure memo for the same wherein I signed as one of the attesting witnesses to the same. Exhibit-12 is the said seizure memo and Exhibit-12(a) is my signature. (At this stage, the sealed packet containing material exhibit has been opened by the prosecution in the presence of defence and the witness is confronted with the same) M.O.I is the said Micromax mobile phone and M.O.II is the said Spice mobile phone.****"***

57. In the cross-examination of Hem Raj Gurung (P.W.17) he would admit:

> ***"****.... It is true that when I reached Ranipool Thana, M.O. I and II were already kept at the table of P.O. Sahab. It is true that I do not know as to from whom, M.O.I and II were seized by the police. It is true that police did not pack and seal M.O.I and II in my presence. I is true that the seal cover of M.O.I and II does not bear my signature as well as any identification mark. It is true that police did not read over and explain the contents of Exhibit-12 to me. It is true that the other witness who signed on Exhibit-12 did not put his signature in my presence. It is not a fact that I am deposing falsely.****"***

58. Dhan Singh Subba (P.W.19) is the other seizure witness to the seizure of the said mobile phones. He would state:

"I know the accused No.1 as he is my co-villager. I do not remember the date and the month but it was in the year 2013, police seized two mobile phones in my presence from accused Somnath. Thereafter, police prepared seizure memo for the same wherein I signed as one of the attesting witnesses to the same. M.O.I and II already marked are the said mobile phones. Exhibit-12 (already marked) is the said seizure memo prepared in respect of M.O. I and II. Exhibit-12(b) is my signature on the same."

59. In the cross-examination of Dhan Singh Subba (P.W.19) he would admit:

" It is true that on the relevant day, I had gone to Ranipool thana as I was called by P.I. Mahendra Subba. It is true that on the relevant day, I went to Ranipool Thana as I was approached by the uncle of the deceased Nebika Sharma. It is true that when I reached Ranipool Thana, I saw M.O.I and II on the table of P.I. Sahab. It is true that I do not know as to from where the police had seized or recovered the M.O.I and II which I saw lying on the table of P.I. Mahendra Subba. It is not a fact that M.O.I and II were not packed and sealed in my presence. It is true that when M.O.I and II were sealed, my signature was not put on it. It is true that contents of Exhibit-12 was not read over to me. I am not sure whether another witness signed on Exhibit-12 in my presence or not. It is true that police did not record my 161 statement in connection with this case. It is true that I cannot say for sure as to whether M.O.I and II shown to me in the Court are the same articles which I had seen at Ranipool Thana or not. It is not a fact that I am deposing falsely."

60. The Investigating Officer-Mahendra Subba (P.W.28) would depose about the seizure of the two mobile handsets in this manner:

> ***"****I seized two nos. of mobile handsets having duel SIM No.7407375856 (Vodafone) make Micromax and SIM No. 9749592159 (Reliance) and one Spiece (sic) phone without SIM card from the possession of the accused in presence of the witnesses. Thereafter I prepared a seizure memo for the same. M.O.I already marked is the said mobile handsets having duel SIM No.7407375856 (Vodafone) make Micromax and SIM No. 9749592159 (Reliance) and M.O. II already marked is the said mobile phone (spiece) (sic) without SIM. Exbt.12 already marked is the seizure memo prepared in respect of M.O.I and M.O.II Exbt.12(a) and Exbt.12(b) are the signatures of the seizure witnesses Hemraj Gurung and Dhan Singh Subba respectively on the same which I identity. Exbt.12(c) is my signature on the same.****"***

61. The evidence brought forth by the prosecution does not convincingly establish the seizure of the said mobile phones from the Appellant. Both the seizure witnesses would depose that the mobile phones were already at the table of the Investigating Officer-Mahendra Subba (P.W.28) and therefore didn't know from whom they were seized. The prosecution has led no evidence to establish the said mobile phones belonged to the Appellant. The finding of the learned Sessions Judge that the Appellant could not demolish that the two mobile phones was his and that calls were made from the said mobiles by him within the reach of Melli Turuk and Turung tower and adjoining area of National Highway is perverse. It is evident that the learned Sessions Judge has in blatant disregard to the fundamentals of criminal jurisprudence and the Indian Evidence Act, 1872 put the entire burden of proof to establish his innocence upon the Appellant.

62. Property seizure memo (exhibit-24) dated 23.12.2013 would reflect seizure of one Nokia mobile phone with battery bearing SIM no.8145153105 from Mahendra Poudyal (P.W.12) at the Ranipool Police Station in the presence of a solitary seizure witness Sancha Raj Subba (P.W.26).

63. Mahendra Poudyal (P.W.12) did not speak a word about the property seizure memo (exhibit-24) or the seizure.

64. The Investigating Officer-Mahendra Subba (P.W.28) would however state:

> **"***Further during investigation it is found that one Nokia Mobile phone bearing SIM No 8145153105 IMEI No.356930033143544 belonging to the accused Som Nath was given to Chandra Kala Sharma. The same was seized from the possession of Shri Mahendra Poudyal as it was snatched from the Chandra Kala Sharma by him. Accordingly I prepared a seizure memo for the same. M.O.V already marked is the said Nokia mobile phone. Exbt.24 already marked is the said seizure memo prepared in respect of M.O.V Exbt.24 (a) already marked is the signature of witness Sancha Raj Subba which I identify. Exbt.24(b) is my signature on the same. On checking the text message in M.O.V it was found that on 19.12.2013 at around 1600 hours Chandra Kala Sharma had sent text message "Amoi Lai ajai site lagako" to the accused.***"**

65. In cross-examination the Investigating Officer-Mahendra Subba (P.W.28) would admit:

> **"***... It is true that one mobile phone of Nokia bearing SIM No. 8145153105, IMEI No.569300 33143544 was not seized from the possession of Chandra Kala Sharma. It is true that Mahendra Poudyal has not stated in his 161 statement that the aforesaid Nokia mobile had given to him by Chandra Kala Sharma.***"**

66. The evidence of the Investigating Officer-Mahendra Subba (P.W.28) that during investigation it was found that one Nokia mobile phone belonging to the accused Som Nath was given to Chandra Kala Sharma cannot be

accepted as evidence as it is the result of investigation by him. The best evidence of what Investigating Officer-Mahendra Subba (P.W.28) stated regarding the seizure of the said Nokia mobile phone from Mahendra Poudyal (P.W.12) would have been the said Mahendra Poudyal (P.W.12). Admittedly, Mahendra Poudyal (P.W.12) said nothing about the seizure. The fact that the Investigating Officer-Mahendra Subba (P.W.28) admitted that Mahendra Poudyal (P.W.12) had not stated that the Nokia mobile phone was given to Chandra Kala Sharma by the Appellant even in his statement recorded under Section 161 Cr.P.C makes his evidence not only doubtful but also unbelievable.

67. The seizure witness Sancha Raj Subba (P.W.26) would state:

> **"***That on 23.12.2013 police seized one Nokia mobile phone of accused Somnath Sharma from the possession of Mahendra Poudyal in my presence at Ranipool P.S. Thereafter police prepared the seizure memo for the same. (At this stage, the sealed packet containing material exhibits has been opened by the prosecution in the presence of defence and the witness is confronted with the same) M.O.V is the said mobile phone. Exhibit-24 is the said seizure memo prepared in respect of M.O.V. and Exhibit-24(a) is my signature on the same.***"**

68. In the cross-examination of Sancha Raj Subba (P.W.26) he would admit:

> **"***It is true that on the relevant day I went to Ranipool Thana as I was called by the brother of the deceased Mahendra Poudyal. It is true that when I reached Ranipool Thana, M.O.V was already at the table of P.I. Mahendra Subba. It is true that I do not know from where the police had recovered and seized the said mobile phone which was lying at the table of P.I. Mahendra Subba. It is true that M.O.V. does not bear any identification mark not does it bear my signature.*

*It is true that M.O.V was not packed and sealed in my presence. It is true that apart from me, no other person had signed in Exhibit-24 in my presence. It is true that contents of Exhibit-24 was not read over and explained to me by the police. It is true that police did not record my 161 statement in the present case. It is not a fact that I am deposing falsely.***"**

69. The solitary seizure witness has quite candidly admitted that he does not know from whom and where the police recovered the said Nokia mobile phone which was lying on the table of the Investigating Officer-Mahendra Subba (P.W.28). Evidently the prosecution had failed to establish that the said Nokia mobile phone was seized from Mahendra Poudyal (P.W. 12) leave alone the fact that the said mobile phone belonged to the Appellant and that it was snatched from Chandra Kala Sharma by him. The learned Sessions Judge would quite correctly disbelieve the evidence of the Investigating Officer-Mahendra Subba (P.W.28) regarding the text message sent from the said mobile phone but would go on to hold that the evidence tendered by him against the Appellant had remained firm and could not be demolished despite lengthy cross-examination. The learned Sessions Judge failed to appreciate that the Investigating Officer-Mahendra Subba (P.W.28) was not a witness to the crime and he was in fact the Investigating Officer of the case. The learned Sessions Judge thus failed to appreciate that the result of investigation can never be accepted as substantive evidence. It would be trite to reiterate what the Supreme Court had held in re: ***Vijender* v. *State of Delhi***[11].

"25*. We are constrained to say that the above observations have been made by the trial Judge casting away the basic principles regarding reception and appreciation of evidence, and misreading the evidence. ..... The reliance of the trial Judge on the result of investigation to base his findings is again patently wrong. If the observation of the trial Judge in this regard is taken to its logical conclusion it would mean that a finding of guilt can be recorded against an accused without a trial, relying solely upon the*

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*police report submitted under Section 173 CrPC, which is the outcome of an investigation. The result of investigation under Chapter XII of the Criminal Procedure Code is a conclusion that an Investigating Officer draws on the basis of materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance thereupon under Section 190(1)(b) CrPC and to proceed with the case for trial, where the materials collected during investigation are to be translated into legal evidence. The trial court is then required to base its conclusion solely on the evidence adduced during the trial; and it cannot rely on the investigation or the result thereof. Since this is an elementary principle of criminal law, we need not dilate on this point any further. Equally unsustainable is the trial Judge's reliance upon the statement made by Jeetu (PW2) before the police in view of the express bar of Section 162 CrPC, which we have discussed earlier. Indeed, we find, the trial Judge placed strong reliance on the purported statement made by Jitender before the police that they (the appellants) were hiding and that they were involved in kidnapping and murder of Khurshid to convict them.***"***

70. Anand Munda (P.W.10) would be the star witness of the prosecution. Great emphasis would be given to his evidence by Mr. Karma Thinlay during the course of the final arguments. Anand Munda (P.W.10) would depose:

"*I know the accused Somnath Sharma present in the Court today. That on 19.12.2013, accused Somnath Sharma and one girl came to our Hotel Holiday at Melli Bazar, Sikkim. The accused Somnath Sharma ordered two plates of vegetable momos. Accordingly, I served the momos. After*

having momo, they paid the money and left the Hotel.

*Thereafter, I was called to Jail to identify the accused. At Jail, I identified accused Somnath Sharma. Before identifying the accused, I was examined by the officer there and signed one document. Exhibit-9 is the said document which I signed and Exhibit-9(a) is my signature on the same.***"**

71. In cross-examination the said Anand Munda (P.W.10) would admit:

".....*It is true that accused No.2 Chandra Kala Sharma did not come to our Hotel on that relevant day. It is not a fact that the accused was not accompanied by a lady but I cannot remember her face as of now. .....***"**

72. Exhibit-9 identified by Anand Munda (P.W.10) was the questionnaire put by the learned Chief Judicial Magistrate (P.W.27) to him before conducting the Test Identification Parade on 03.02.2014. The then learned Chief Judicial Magistrate (P.W.27) who conducted the Test Identification Parade on 03.02.2014 pursuant to the application for the same on 01.02.2014 (exhibit-33) would exhibit and prove the memorandum of Test Identification Parade (exhibit-34). As per the said memorandum and the deposition of Suraj Chettri (P.W.27) the said Anand Munda (P.W.10) positively identified the Appellant on three occasions. The identification of the Appellant by Anand Munda (P.W.10) was after 1 month and 15 days.

73. The identification of the Appellant by Anand Munda (P.W.10) as the person who had on 19.12.2013 come to Hotel Holiday at Melli Bazar, Sikkim with one girl, ordered two plates of vegetable *"momos"* and after having the said *"momos"* paid and left the hotel cannot be doubted. However, the prosecution has failed to establish the identity of the girl who had accompanied the Appellant on 19.12.2013. The prosecution has also failed to establish whether after leaving the said hotel the Appellant along with the said girl proceeded towards the place of occurrence or otherwise. "*Suspicion, however grave, cannot be a satisfactory basis for convicting an accused person"*. This is a settled principle.

74. In re: ***Datar Singh* v. *State of Punjab***[12] the Supreme Court would hold:

> ***"3.*** *It is often difficult for courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide., They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure built on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case.*
>
> ***4.*** *After having been taken through the evidence on record we have come to the conclusion that the superstructure of the prosecution case is based on the testimony of two alleged eyewitnesses whose evidence is not only of an inherently unreliable nature but the artificial and incredible versions of the shooting put forward by them are too unnatural to be accepted. It seems to us to be quite unsafe to convict the appellant on their testimony despite some circumstances which raise grave suspicion against the appellant. Suspicion, however grave, cannot be a satisfactory basis for convicting an accused person. We will, therefore,*

[12] (1975) 4 SCC 272

*examine the evidence of these two witnesses and set out our reasons for finding them quite unreliable and deal with other questions mentioned above in the course of an examination of evidence the credibility of which is assailed.***"**

75. To apply the last seen theory it is necessary to establish that the Appellant was last seen with the deceased. The evidence put forth by the prosecution falls short of establishing the fact. The oral evidence of Anand Munda (P.W.10) corroborated by the Test Identification of the Appellant by him although establishes that the Appellant was seen with a girl at the Hotel Holiday, Melli on 19.12.2013 it is not established that he was seen with the deceased. The Investigating Officer-Mahendra Subba (P.W.28) admits in cross-examination that:

"*It is true that there is no witness to prove that the accused Som Nath Sharma and his wife deceased Nabika Sharma had proceeded beyond Rangpo Checkpost. It is true that witness Anand Munda had not stated in his 161 statement where the accused and his deceased wife Nabika Sharma had proceeded after having momos from his hotel.***"**

76. The learned Sessions Judge failed to appreciate that the prosecution had not been able to legally prove that the Appellant had in fact travelled through Rangpo check post towards the place of occurrence by producing legally tenable evidence. The learned Sessions Judge finding about call detail records showing the Appellant's location within the reach of Melli-Turuk-Turung tower was made solely on the oral evidence of the relatives of the deceased which was not permissible in law. The prosecution has not even been able to prove conclusively the seizure of the mobile phones or the said vehicle bearing registration no.SK-01-P-6697 from the Appellant leave alone prove that the said mobile phones and the said vehicle were used by the Appellant on the relevant day.

77. The alleged incident is of 19.12.2013. The learned Sessions Judge has due to the positive identification of the Appellant by Anand Munda (P.W.10) as the one who had eaten vegetable "*momos*" along with the girl

at Hotel Holiday in Melli and the recovery of the dead body of the deceased invoked the last seen theory and found the Appellant guilty. Contrarily, as held above, Anand Munda (P.W.10) did not identify the deceased as the same girl who was with the Appellant on 19.12.2013 at Melli. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. The time gap between 19.12.2013 and 24.12.2013 is five days. There is no explanation as to what transpired in the interregnum. Sajan Tamang who first saw the dead body and informed the police not being examined it cannot be safely concluded that in between the period there was no possibility of any person other than the Appellant being the perpetrator of the crime. The circumstance of last seen theory cannot therefore be pressed against the Appellant.

(viii) The disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872.

78. In re: ***Pulukuri Kottaya and others* v. *The King Emperor***[13] the Privy Council would hold:

> ***"10.*** *Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in conesquence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of*

[13] 1946 SCC OnLine PC 47

the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the

accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

79. In re: ***Anter Singh* v. *State of Rajasthan***[14] and ***Salim Akhtar* v. *State of U.P.***[15] the Supreme Court would reiterate the same principle.

80. In re: ***Aslam Parwez* v. *Govt. of NCT of Delhi***[16] the Supreme Court would hold:

***"11.** Aslam Parwez has been convicted under Section 5 of the TADA on the ground that he made a disclosure statement on 3-5-1988 to the effect that A-1 had given him a revolver on 8-9-1989 which he had concealed near the building which was being constructed opposite the factory and that the said revolver was recovered by him after digging out the earth. It may be stated at the very outset that the evidence on record does not show that any effort was made by the police party to have any public witness with them when A-4 took them to the spot on 3-5-1988, where the revolver is alleged to have been recovered. Only two witnesses, namely, PW*

[14] (2004) 10 SCC 657
[15] (2003) 5 SCC 499
[16] (2003) 9 SCC 141

*10 Ram Narain, Head Constable and PW 14 Surinder Kumar, SI, who are both police personnel, have deposed about the aforesaid recovery. The recovery has been made after 8 months and that too from an open place which was by the side of a building under construction. The recovery has not been made from any closed or concealed place but from an open place which is accessible to all and everyone including those who were engaged in the construction of the building.***"**

81. In re: State ***(NCT of Delhi)* v. *Navjot Sandhu***[17] the Supreme Court would advert to all the previous decisions and restate the legal position thus:

> ***"121.*** *The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the*

[17] (2005) 11 SCC 600

information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)

"clearly the extent of the information admissible must depend on the exact nature of the fact discovered"

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10)

"Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

(emphasis supplied)

We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information

which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10)

"If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."

Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10)

"In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my

house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(emphasis supplied)

122. *The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus: (AIR p. 71, para 13)*

"… About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya."

The Privy Council held that: (AIR p. 71, para 14)

"14. The whole of that statement except the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible."

(emphasis supplied)

There is another important observation at para 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words: (AIR p. 71)

"Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."

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125. *We are of the view that Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.*

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127. *The crux of the ratio in Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] was explained by this Court in State of Maharashtra v. Damu [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088] . Thomas J. observed that: (SCC p. 283, para 35)*

"The decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section

embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In Mohd. Inayatullah v. *State of Maharashtra [(1976) 1 SCC 828 : 1976 SCC (Cri) 199] , Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)*

"Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] ; Udai Bhan v. *State of U.P. [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251])."*

***128**. So also in Udai Bhan* v. *State of U.P. [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251] J.L. Kapur, J. after referring to Kottaya case [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] stated the legal position as follows: (SCR p. 837)*

"A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence."

The above statement of law does not run counter to the contention of Mr Ram Jethmalani,

that the factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. However, what would be the position if the physical object was not recovered at the instance of the accused was not discussed in any of these cases.

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141. *We need not delve further into this aspect as we are of the view that another ingredient of the section, namely, that the information provable should relate distinctly to the fact thereby discovered is not satisfied, as we see later, when we refer to the circumstances against some of the accused.*

142. *There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is*

*verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.***"**

(emphasis supplied)

82. In re: ***Charandas Swami v. State of Gujarat***[18] the Supreme Court would examine its various pronouncement on Section 27 of the Indian Evidence Act, 1872. In the said case the Courts below had held that the accused therein had been last seen with the deceased and that the deceased was not seen thereafter till his dead body was found. This finding of the Courts below would be upheld by the Supreme Court. The dead body of the deceased was found in a burnt condition in a ditch behind a house. This fact was revealed by the accused in his disclosure statement. Till the disclosure was made by the accused the dead body which was discovered was noted as that of an unknown person. The Supreme Court would hold that if the accused had not disclosed about the location of the dead body dumped by him to the Investigating Officer then the investigation would not have made any headway.

83. Exhibit-3 is the disclosure statement of the Appellant. It is recorded in Nepali. The date of the disclosure statement is 22.12.2013 and the time 1400 hours. It is recorded at the Ranipool Police Station. The said disclosure statement bears the signature of the Appellant as well as the signature of two witnesses to the disclosure i.e. Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3). Netra Devi Sharma (P.W.2), as seen above, is related to the deceased and Pema Chakki Bhutia (P.W.3) is Netra Devi Sharma's (P.W.2) staff and thereafter their evidence must be carefully examined although admissible. The confession of the Appellant recorded in the disclosure statement (exhibit-3) heavily relied upon by the learned

[18] (2017) 7 SCC 177

Sessions Judge in the impugned judgment to hold the Appellant guilty of murder is not admissible. What is admissible is provided in Section 27 of the Indian Evidence Act, 1872. Section 27 of the Indian Evidence Act, 1872 provides that when any fact is deposed to as discovered in consequence of information received from a person 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. Thus, for the application of Section 27 the Indian Evidence Act, 1872 the disclosure statement (exhibit-3) must be split into its components to separate the admissible portion if duly proved. Only those components or portions which were the immediate cause of the discovery may be proved. The rest of the portions must be eliminated from consideration. In so doing the only portion of the disclosure statement (exhibit-3) which may be proved is, as translated *"I can show the place I pushed my wife and I can also show the body of my wife if it has not been carried away by the river"* after discarding the underlined portion. The words in the above disclosure statement *"I pushed my wife"* are inadmissible since they do not relate to the discovery of the body of the deceased. Now it would be relevant to examine whether the fact was discovered pursuant to the purported disclosure statement dated 22.12.2013 made by the Appellant.

84. Both Netra Devi Sharma (P.W.2) and Pema Chakki Bhutia (P.W.3) would depose that the Appellant gave a statement to the police in their presence that he had pushed his wife from *"Jalewa Bhir"*. This statement of the Appellant that he pushed his wife from *"Jalewa Bhir"* is not recorded in the disclosure statement (exhibit-3). Even the Investigating Officer-Mahendra Subba (P.W.28) would not depose about *"Jalewa Bhir"*. Netra Devi Sharma (P.W.2) and the Investigating Officer-Mahendra Subba (P.W.28) would all depose that when, pursuant to the disclosure statement (exhibit-3), they went to *"Jalewa Bhir"* they could not discover the body there. Pema Chakki Bhutia (P.W.3) would admit that she did not visit the place of occurrence and had no idea as to where the police recovered the body from. Neither Netra Devi Sharma (P.W.2) nor the Investigating Officer-Mahendra Subba (P.W.28) deposed that the Appellant had in fact disclosed that he could show the place from where he had pushed the deceased.

85. The Investigating Officer-Mahendra Subba (P.W.28) would not depose that he discovered the dead body in consequence of the information

received from the Appellant when he was in police custody which is the first ingredient of Section 27 of the Indian Evidence Act, 1872.

86. The dead body was recovered on 24.12.2013 two days after the recording of the disclosure statement (exhibit-3) on 22.12.2013. The Investigating Officer-Mahendra Subba (P.W.28) would also candidly state that on the basis of the disclosure statement of the Appellant they made a thorough search with constable man power and river rafters in the river Teesta but could not recover the dead body of the deceased. Mr. N. Rai would thus submit that the requirements of Section 27 of the Indian Evidence Act, 1872 had not been satisfied by the prosecution as no discovery of the dead body of the deceased was admittedly made on 22.12.2013 when pursuant to the purported disclosure statement the Investigating Officer-Mahendra Subba (P.W.28) proceeded to *"Jalewa Bhir"* at Melli.

87. The disclosure statement which is in *"Nepali"* does not mention *"Jalewa Bhir"* anywhere. The said disclosure statement does however disclose that the Appellant had proceeded from Melli Sikkim towards the West Bengal side where he pushed the deceased towards the Teesta river. The disclosure statement also records that the Appellant had stated that he could show the place as well as the body of the deceased if it had not been carried away by the river.

88. The dead body of the deceased would be stated to have been discovered on 24.12.2013 at 8.40 a.m. by one Sajan Tamang of Melli Bazar, South Sikkim. Two inquests would be conducted on the dead body. One pursuant to the FIR and the other pursuant to a purported UD case registered. As per the inquest report (exhibit-21) dated 24.12.2013 conducted at 12.30 p.m. the dead body would be found in a *"cave at the river bank of Teesta river"*. No further details regarding the exact location of the dead body are available in the said inquest report (exhibit-21). The second inquest report (Exhibit-4) would record that the dead body was found in *"cave on the river bank of river Teesta below power colony dara, South direction from the P.S."*. There would be two witnesses named in both the inquests i.e. Bishnu Neopaney and Lachuman Bhattarai. Both the said witnesses would not be examined. In fact they have not even been named in the final report. Both the inquest reports (exhibit-4 and exhibit-21) would record that the information regarding the finding of the dead body would be given by Sajan Tamang. Strangely again Sajan Tamang

would not be examined. The inquest report (exhibit-4) would record that the dead body was inspected and identified by Deepak Sharma (P.W.1) and the Appellant. Deepak Sharma (P.W.1) would say nothing about it in his deposition. Neither the documents relating to UD Case no. 16/2013 except the inquest report (exhibit-4) nor Police Inspector-Karma Chedup Bhutia who is set to have registered the said UD case would be produced before the Court. Both the inquest reports (exhibit-4 and exhibit-21) would bear the same time and date although Sub-Inspector-Santosh Kumar Rai (P.W.7) who conducted the inquest (exhibit-21) would state in his deposition that the Sub-Divisional Magistrate Jorethang, Tenzing Dorjee (P.W.24) who had conducted the inquest (exhibit-4) had come to the spot after he conducted the inquest.

89. Sub-Inspector-Santosh Kumar Rai (P.W.7) would state that when he reached the spot where he conducted the inquest and saw the dead body he realized that it matched the description of the deceased given in the hue and cry message dated 23.12.2013 from the Investigating Officer-Mahendra Subba (P.W.28). The hue and cry message dated 23.12.2013 has, however, not been exhibited neither by Sub-Inspector-Santosh Kumar Rai (P.W.7) nor by Investigating Officer-Mahendra Subba (P.W.28). He would admit that he did not know as to how the dead body was lying at the bank of river Teesta and that his entry in column of the inquest report (exhibit-4) stating: "*fall from a height*" was only on his assumption.

90. The dead body of the deceased would be found lying underneath a big boulder in sitting position, both legs half bent, hands lying straight, face towards right facing the Teesta river and both eyes closed. *Rigor mortis* would have developed. Two teeth would be missing. The left side of the skull would be cracked about two inches above left eye, the mouth would be semi open. There would be no injuries on the neck or the chest. The shoulder and right hand would have scratch marks. The skin layer, two inches below the left elbow would be removed. The right leg would be fractured below the knee. The left leg would have fractured ankle and skin abrasion. There would be punctured injury one inch deep and seven inches in diameter on the back. There would also be injury on the left buttock. Some sand particles would be attached to the dead body which would be discovered in semi deteriorated condition.

91. Deepak Sharma (P.W.1) who has been named in the inquest report (exhibit-4) as one of the person who identified the dead body as that of the

deceased spoke nothing about it in his deposition. The other person named therein is the Appellant-the accused.

92. Netra Devi Sharma (P.W.2) who was not named in either of the inquest reports (P.W.2) would state that on 24.12.2013 she was informed that the dead body of a girl was found on the river bank below Melli PHC and she went with her husband-Ishwar Prasad Sharma, Kedar Nath Sharma (P.W.15) (her younger paternal uncle) and Mahendra Sharma (her husband's elder brother). Ishwar Prasad Sharma has neither been named in the final report nor examined by the prosecution. Kedar Nath Sharma (P.W.15) also didn't throw any light on this aspect. One Mahendra Poudyal (P.W.12) son of Kedar Nath Sharma has been examined by the prosecution. There is no evidence that he is the same person named by Netra Devi Sharma (P.W.2) as Mahendra Sharma. In any case Mahendra Poudyal (P.W.12) also didn't say a word about the identification of the dead body.

93. Pema Chakki Bhutia (P.W.3), staff of Netra Devi Sharma would state in her deposition that the dead body was recovered from the bank of river Teesta. However, in cross-examination she would admit that she had not visited the place of occurrence personally and had no idea from where the police had recovered the dead body. She also admitted that she came to know that the dead body was of the deceased through the relatives.

94. The prosecution case that after completion of the post mortem examination the dead body was handed over to the relatives for disposal would sought to be proved by the handing and taking memo of dead body (exhibit-5). Sub-Inspector-Santosh Kumar Rai (P.W.7) would exhibit the said handing and taking memo (exhibit-5) and state that after the post mortem he along with the Investigating Officer-Mahendra Subba (P.W.28) had handed over the dead body of the deceased to Indralall Sharma (P.W.5) and their relatives. Indralall Sharma (P.W.5) would state nothing about the handing over of the body of the deceased to him. The said handing and taking memo would be purportedly signed by seven persons in token of having received the dead body. Four out of the seven would not be examined by the prosecution. The rest of the prosecution witnesses would not identify their signatures or prove the handing and taking memo (exhibit-5). Deepak Sharma (P.W.1), Puspa Lal Kafley (P.W.11) and Indralall Sharma (P.W.5) would not even speak about the handing and taking over of the dead body of the deceased.

95. Puspa Lal Kafley (P.W.11) would state that on 24.12.2013 he received a call from the police personnel of Ranipool Police Station stating that one dead body was found near the river bank near Yuksom Breweries, Melli and accordingly they rushed to the place and found the dead body lying near the river bank of the river Teesta below Yuksom Breweries and identified it to be of the deceased. As per his deposition the Appellant also identified the dead body. In cross-examination he would admit that he did not know as to how the dead body of the deceased was lying on the river bank of Teesta.

96. The Investigating Officer-Mahendra Subba (P.W.28) would depose that on 24.12.2013 at around 800 hours he received information from the Station House Officer, Melli Police Station informing about the unidentified female dead body recovered at the bank of river Teesta below Yuksom Breweries. He would also state that the brother of the deceased Deepak Sharma (P.W.1) and the relatives were informed and then he went to the place where he found the dead body. According to Investigating Officer-Mahendra Subba (P.W.28) it was the brother of the deceased-Deepak Sharma (P.W.1) who along with the Appellant identified the dead body as that of the deceased at the place of occurrence.

97. The evidence of a vital witness who is said to have seen the dead body first lying near the bank of river Teesta near Melli, South Sikkim has been withheld from the Court with no explanation. Police Inspector-Karma Chedup Bhutia who is said to have registered the UD Case No. 16 of 2013 was also not examined. The fact that the investigation for the search of the dead body of the deceased was directed towards Melli after the disclosure statement would have been relevant. However, Sajan Tamang the most crucial witness who had admittedly discovered the dead body having not been examined how and under what circumstances the dead body was discovered by him remains unexplained. In such circumstances, it cannot be said that the dead body of the deceased was discovered in consequence of information received from the Appellant.

98. The evidence of the prosecution fall short of the quality of evidence required in a criminal case. The only person who identified the dead body found at bank of river Teesta was Puspa Lal Kafley (P.W.11). The inquest reports do not name him as the person who identified the dead body. The Investigating Officer (P.W.28) also throws no light upon this evidence. Even

if this Court were to believe the evidence of Puspa Lal Kafley (P.W.11) to be true it is certain that there is no evidence to show that the discovery of the dead body at the bank of river Teesta near Yuksom Breweries, Melli on 24.12.2013 was in consequence of the information received from the Appellant in custody of a police officer as required under the mandate of Section 27 of the Indian Evidence Act, 1872 to make it provable and held against the Appellant.

(ix) The filing of the false missing report by the Appellant, inconsistent and contradictory statement of the Appellant regarding the whereabouts of the deceased along with his conduct-tearing of the deceased face from her photographs, false plea of the Appellant having lost his wallet along with the key of the box belonging to the deceased.

(x) The making of calls to various relatives inquiring about the whereabouts of the deceased by the Appellant and misleading his parents, relatives and the police.

(xi) The failure of the Appellant to satisfactorily explain the circumstances appearing against him during his examination under Section 313 Cr.P.C.

99. The learned Sessions Judge would hold that the Appellant was liable to be convicted for lodging false missing report despite the knowledge that he had committed the murder of his wife and mislead the police and relatives of the deceased with the intention of screening himself under Section 201 IPC and also sentenced him to undergo simple imprisonment and pay a fine of Rs. 5000/- (Rupees five thousand) only and in default to further undergo three months of simple imprisonment.

100. Section 201 IPC provides:

> ***"201. Causing disappearance of evidence of offence, or giving false information to screen offender.*** *- whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the Commission of that offence to disappear, with the intension of screening the offender from legal punishment, or*

*with the intention gives any information respecting the offence which he knows or believes to be false.***"**

101. The ingredient of the offence of giving false information would be the knowledge of commission of the offence and thereafter giving false information respecting the offence.

102. Exhibit-10 is the General Diary (G.D.) extract taken from Ranipool Police Station General Diary page no. 016 serial number 147 dated 19.12.2013 at 2100 hours. The entry records that:

> **"***At this noted hours, on missing diary report received from Som Nath Sharma of upper Aho A/P near Tendong Petrol Pump Ranipool E/ Sikkim, mentioning that his wife Nebika Sharma, having falling description is missing since today on 19.12.2013 from his residence.*
>
> *D/R. Name Nebikak Sharma, age 25 years, height 5 ft, complexion fair. Accordingly same detailed has been informed to Rangpo checkpost and 32 no. police booth for N/A.*
>
> *Noted.*
>
> *Sd/- Kesar Bdr. Basnett*
>
> *NK 2128***"**

103. Exhibit-11 is the General Diary extract taken from Ranipool Police Station General Diary page no. 30 serial number 152 dated 20.12.2013 at 0850 hours. The entry records that:

> **"***A written missing report was received from one Som Nath Sharma of Aho Busty A/P Ranipool Bazar mentioning that her (sic) wife having following descriptions is missing since 19/ 12/2013 from home. D/R name Nebika Sharma age 25 years, height 5 ft, complexion fair, accordingly hue and cry msg. flashed to all S.H.O. and ICS, Talash system made and despatched.*

Noted in G.D.
*Sd/- H/C Tshering Topgay Bhutia.***"**

104. Keshar Bahadur Basnett (P.W.16) was examined. He would depose that on 19.12.2013 at around 9.00 p.m. the Appellant came to Ranipool P.S. and verbally informed him that his wife had been missing since morning. He deposed that he had asked the Appellant for a photograph of the missing person and as he did not have it he asked the Appellant to bring the photograph the next day and accordingly he made the G.D. entry. Keshar Bahadur Basnett (P.W.16) would further depose that on the next day at around 8.30 p.m. the Appellant came to the police station with the details of the missing person and the photograph of the missing person and accordingly G.D. entry was made and thereafter hue and cry messages were sent. He exhibited the G.D. entry dated 19.12.2013 (exhibit-10) as well as G.D. entry dated 20.12.2013 (exhibit-11). Tshering Topgay Bhutia whose name is reflected as the one who made the G.D. entry dated 20.12.2013 (exhibit-11) was not examined. It must be noticed that the two G.D. entries (exhibit-10 and exhibit-11) are in the same handwriting although G.D. entry dated 20.12.2013 (exhibit-11) mentions the name of Tshering Topgay Bhutia as the signatory to the said entry. Keshar Bahadur Basnett (P.W.16) did not clarify anything about G.D. entry dated 20.12.2013 (exhibit-11) and about Tshering Topgay Bhutia. The purported written missing report made by the Appellant made to Tshering Topgay Bhutia on 20.12.2013 pursuant to which Tshering Topgay Bhutia is said to have made the General Diary entry is not placed before the Court. The failure of the prosecution to produce and prove the purported written missing report purportedly made by the Appellant would leave only the two G.D. extract of the entries (exhibit-10 and exhibit-11) for considering the correctness of the said extracts made by Police Officers in the General Diary which diary was also not produced. The person who is said to have made the entry (exhibit-11) was also not examined. The prosecution has thus failed to cogently prove that the Appellant had lodged a false missing report intentionally to screen himself from legal punishment after commission of the alleged offence of murder. The prosecution has also failed to cogently prove that the Appellant had made inconsistent and contradictory statements.

105. Deepak Sharma (P.W.1) the brother of the deceased would depose that on 20.12.2013 he had visited the house of the Appellant after being informed that on 19.12.2013 the deceased had not returned home. He

would also depose that when he inquired the Appellant had stated that the deceased had no misunderstanding with him. He would state that he went with his uncle Kedarnath to the Ranipool Police Station and when they returned they looked for photographs of the deceased for printing it in the newspaper to publish a missing report and had found 13-14 photographs of the deceased with her face torn off. As per his deposition they would ask the Appellant as to why the face was torn off from the photographs. The Appellant would feign ignorance. He would further depose that on the next day i.e. 21.12.2013 Deepak Sharma (P.W.1) along with Kedarnath Sharma (P.W.15) and his son Mahendra Sharma had first gone to the Ranipool Police Station after which they went to the Appellant's house and demanded the torn photographs from the Appellant. Deepak Sharma (P.W.1) would depose that the Appellant had already concealed the same and refused to give it to them and even denied having seen the said photographs.

106. Kedarnath Sharma (P.W.15) would depose nothing about the torn photographs.

107. Mahendra Poudyal (P.W.12) would depose that on 20.12.2013 after receiving a call from Deepak Sharma (P.W.1) he had gone to the Appellant's house at Ranipool and while searching the house they found 7-8 numbers of single photographs of the deceased which were all torn in two pieces inside the photograph album. He would also depose that on the following day after returning from the Ranipool Police Station they had gone back to the room of the Appellant and had found to their utter surprise that the photographs of the deceased including the torn photographs were missing from the album. This fact was objected to by the defence as the said fact was not stated in the statement recorder under Section 161 Cr.P.C.

108. Whereas Deepak Sharma (P.W.1) would state that they had seen 13-14 photographs of the deceased with her face torn off Mahendra Poudyal (P.W.12) would state that they found 7-8 numbers of single photographs of the deceased which were all torn in two pieces. The investigation however, did not go beyond this and no attempt seems to have been made to recover the said photographs or to find the truth regarding the same. In such circumstances the story of the photographs of the deceased with the face torn off would fail to be established by the prosecution.

109. Deepak Sharma (P.W.1) would also state that when they returned from Turung to the house of the Appellant he told them that he had broken open the box of the deceased on the night of 20.12.2013 and he had found that money was missing from there along with some clothes and a pair of sandals belonging to the deceased. Deepak Sharma (P.W.1) would further depose that when he asked the Appellant as to who kept the keys of the box the Appellant stated that both of them did but however, he had lost the wallet where he had kept the key. The prosecution has led no evidence to establish the falsity of the alleged statements said to have been made by the Appellant to the relative of the deceased. These statements if proved may have helped the prosecution to corroborate the other circumstances. However, the other circumstances not being proved as detailed above on its own, we are afraid, these oral evidences would not help the prosecution in establishing the guilt of the Appellant. More so when admittedly they are oral evidences from the mouth of the relatives of the deceased who attribute these admissions on the Appellant when the Court is kept in the dark about the truth and veracity of these statements of the Appellant. There is no evidence that the purported statements made by the Appellant to the prosecution witnesses were contradictory and inconsistent.

110. Deepak Sharma (P.W.1) would depose that the Appellant had told him that he had left the house at around 10.00 a.m. and therefore he did not know what time thereafter the deceased had left.

111. Hema Sharma (P.W.4) is the mother of the Appellant. According to her on 19.12.2013 at around 7.30 p.m. the Appellant phoned her and inquired about his wife (the deceased) as to whether she had come to the house or not to which she replied that she had not. The Appellant also told her that after going for her computer class at Ranipool she had not returned home.

112. Indralall Sharma (P.W.5) is the father of the Appellant. According to him on 19.12.2013 at around 7.30 p.m. while they were having dinner the Appellant phoned his wife Hema Sharma (P.W.4). Hema Sharma (P.W.4) told him that the Appellant was inquiring about whether his wife (the deceased) had come to the house. Hema Sharma (P.W.4) also told him that the Appellant had informed her that the deceased had not returned after her computer class at Ranipool.

113. Puspa Lal Kafley (P.W.11) would depose that in the evening of 19.12.2013 at around 8.30 or 9.30 p.m. he received a call from the

Appellant asking whether the deceased had come to his house or not and he had replied that she had not. Puspa Lal Kafley (P.W.11) asked the Appellant as to where she had gone and in reply he told him that he had gone to attend a computer class at Ranipool.

114. The aforesaid oral evidences would reflect that the Appellant had made inquiries about the whereabouts of the deceased from the said prosecution witnesses.

115. Mahendra Poudyal (P.W.12) would depose that on 20.12.2013 at around 7.30 a.m. or 8.00 a.m. he received a call from Deepak Sharma (P.W.1) stating that the deceased had been missing since 19.12.2013. Hearing about it he went to the rented room of the Appellant and inquired about the deceased. The Appellant told them that the deceased had gone to attend a computer class on 19.12.2014 and thereafter she had not returned home.

116. Rajesh Prasad Gupta (P.W.14) is the sole witness examined by the prosecution regarding the computer class. He would depose that on 19.12.2013 at around 6.30 or 7.00 p.m. one person had come to the computer institute at Ranipool to inquire whether the deceased had come to attend her computer class or not and in reply to the same he had told that person that the computer class remains closed on Thursday and nobody had come to the institute. Rajesh Prasad Gupta (P.W.14) did not disclose who had come to inquire about the deceased. The evidence of Rajesh Prasad Gupta (P.W.14) would not assist the prosecution to establish the allegation that the Appellant and Chandra Kala Sharma had gone to the MIT Computer Centre inquiring about the deceased knowing fully well that the Appellant had already pushed the deceased into the river Teesta and murdered her.

117. In re: ***Sharad Birdhichand Sarda (supra)*** the Supreme Court would expound on how false defence may be called into aid in a case based on circumstantial evidence and hold:

> ***"150.*** *The High Court has referred to some decisions of this Court and tried to apply the ratio of those cases to the present case which, as we shall show, are clearly distinguishable. The High Court was greatly impressed by the view*

taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said. We shall elaborate this aspect of the matter a little later.

151. *It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.***"**

118. In re: ***State of Karnataka* v. *Suvarnamma***[19] the Supreme Court would hold:

"10. *The court dealing with a criminal trial is to perform the task of ascertaining the truth from the material before it. It has to punish the guilty and protect the innocent. Burden of proof is on the prosecution and the prosecution has to establish its case beyond reasonable doubt. Much weight cannot be given to minor discrepancies which are bound to occur on account of difference*

[19] (2015) 1 SCC 323

*in perception, loss of memory and other invariable factors. In the absence of direct evidence, the circumstantial evidence can be the basis of conviction if the circumstances are of conclusive nature and rule out all reasonable possibilities of the accused being innocent. Once the prosecution probabilises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused.***"***

119. The learned Sessions Judge would hold that there was sufficient corroborative and clinching evidence against the Appellant and that while examining the Appellant under Section 313 Cr.P.C. he failed to explain the circumstances satisfactorily. He would further hold that simply answering *"I do not know"* was not sufficient to prove his innocence unless he properly explained the facts and circumstances as to how and under what circumstances the death of the deceased wife occurred or had been killed by someone else or committed suicide. The learned Sessions Judge would hold that the relevance and significance of sub-section (4) of Section 313 Cr.P.C. cannot be lost sight of and admissions and confessions made by an accused in the said statement can be given due weight age and considered along with other admissible evidence. The learned Sessions has however, not pointed out any such question or such answers for us to examine its relevance. It may therefore, be significant to draw attention and appreciate the scope of Section 313 Cr.P.C.

120. In re: ***Raj Kumar Singh* v. *State of Rajasthan***[20] the Supreme Court would summarise the purpose of recording a statement of an accused under Section 313 Cr.P.C. as under:

[20] (2013) 5 SCC 722

> ***"41.*** *In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 CrPC is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 CrPC cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 CrPC is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CrPC. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself.****"***

121. There is no evidence produced by the prosecution to establish that the filing of the missing report, even if it was true and the various calls made to various relatives by the Appellant inquiring about the deceased and her

whereabouts or that his statement that the deceased had gone to attend her computer class was to screen himself from the offence committed by him.

(xii) The time of death being closely connected to the date of incident.

122. The evidence of Dr. O. T. Lepcha (P.W.23) the Medico Legal Specialist at the STNM Hospital who conducted the autopsy over the dead body of the deceased is an opinion. He approximates the time since death as more than 48 hours in his medical autopsy report (exhibit-20) in which he also opined that the cause of death, to the best of his knowledge and belief was due to fractured skull with intracranial haemorrhage as a result of blunt force injury. There is no approximation of any time beyond 48 hours. Although the learned Sessions Judge would reason that the evidence of the said Dr. O. T. Lepcha (P.W.23) would connect the time of death and the time of incident we are afraid the medical opinion alone cannot help the prosecution in establishing the fact beyond reasonable doubt.

123. The chain of circumstances required to be proved in a criminal prosecution establishing the guilt of the accused has not been cogently proved. In fact none of the circumstances stands proved save the fact that the Appellant had eaten vegetable *"momos"* with an unknown girl on the date of the alleged incident i.e.19.12.2013 at Melli. This may create a serious doubt upon the Appellant. However, it is shockingly obvious that the prosecution did not deem it important to conduct the investigation in such a manner that would eliminate all possibility about the innocence of the Appellant. The prosecution seem to have rested its case on procuring statements of the Appellant and Chandra Kala Sharma under Section 164 Cr.P.C. without even realising that both had not confessed to their alleged crimes, a statement of the Appellant under Section 27 of the Indian Evidence Act, 1872 and evidence regarding some investigation done by the relatives of the deceased themselves. No effort has been made to prove vital documentary evidences. Material witnesses to the making of the said documents have been left out. Sajan Tamang the first informant about the recovery of the dead body has also been left out by the Investigating Officer-Mahendra Subba (P.W.28) without even an explanation. The offence of murder having not been proved the bare fact that the Appellant went and lodged a missing report after the deceased went missing or that he gave some statement under Section 313 Cr.P.C would not *ipso facto* lead to the

conclusion that the said report was false. In the present case the alleged links, save one, in the chain are in themselves not proved and therefore incomplete. Even if the prosecution allegation of a false plea or a false defence is accepted it cannot be called into aid to saddle the Appellant with culpability. The charges have not been proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence. In such circumstances the question of indicting or punishing an accused does not arise, merely being carried away by the presumed heinous nature of the crime or the gruesome manner in which it was presumed to have been committed. Mere suspicion, however strong or probable it may be cannot substitute legal proof required substantiating the charge of commission of a crime and graver the charge greater ought to be the standard of proof required. The criminal Courts should etch the words of the Supreme Court, so often reiterated, in their memory that there is a long mental distance between *"may be true"* and *"must be true"* and this basic and golden rule only helps to maintain the vital distinction between *"conjectures"* and *"sure conclusions"* to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

124. Before parting, as a reminder, it may be useful to quote the words of the Supreme Court in re: ***Jose alias Pappachan* v. *Sub-Inspector of Police, Koyilandy & Anr.***[21] ***:***

> ***"58.*** *The inalienable interface of presumption of innocence and the burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 445:*
>
> *"The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense this simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant's guilt. As explained above, the burden of proof rule has a number of functions, one of*

[21] (2016) 10 SCC 519

which is to provide a rule of decision for the factfinder in a situation of uncertainty. Another function is to allocate the risk of misdecision in criminal trials. Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful acquittal the rule is constructed so as to minimise the risk of the former. The burden of overcoming a presumption that the defendant is innocent therefore requires the state to prove the defendant's guilt."

(emphasis supplied)

59. *The above quote thus seemingly concedes a preference to wrongful acquittal compared to the risk of wrongful conviction. Such is the abiding jurisprudential concern to eschew even the remotest possibility of unmerited conviction.*

60. *This applies with full force particularly in fact situations where the charge is sought to be established by circumstantial evidence. These enunciations are so well entrenched that we do not wish to burden the present narration by referring to the decisions of this Court in this regard.*

61. *Addressing this aspect, however, is the following extract also from the same treatise The Law of Evidence, 5th Edn. by Ian Dennis at p. 483:*

"Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, fact finders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial

evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the factfinder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgements of probability necessarily admit that the factfinder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."

(emphasis supplied)

125. The investigation of the present case is unfortunately lethargic and the prosecution half hearted. The learned Sessions Judge in such circumstances has ventured to ignore settled principles of criminal jurisprudence and fastened the burden of proving his innocence upon the Appellant. Fanciful exposition of law to give an impression of studied scrutiny has been devised to convict the Appellant in a case where no cogent evidence had been brought forth by the investigation to prove a grave accusation of murder. We have no hesitation to express our displeasure on the quality of investigation and prosecution in the present case. In the circumstances we deem it proper to give the benefit of doubt to the Appellant.

126. The appeal is allowed. Resultantly, the impugned judgment as well as the order on sentence both dated 29.02.2016 rendered by the learned Sessions Judge in Sessions Trial Case No. 14 of 2014 are set aside and the Appellant is acquitted of the charges under Section 302 and 201 IPC. The fines of Rs.10,000/- (Rupees ten thousand) only under Section 302 IPC and Rs.5000/- (Rupees five thousand) only under Section 201 IPC imposed by the learned Sessions Judge, if paid by the Appellant shall be consequently returned. The Appellant be set at liberty forthwith.

SLR (2018) SIKKIM 1373

(Before Hon'ble the Acting Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 36 of 2017

Mangala Mishra @ Dawa Tamang @ Jack ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Puja Lamichaney, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor,
Mr. S.K. Chettri and Ms. Pollin Rai,
Assistant Public Prosecutors.

Date of decision: 13th October 2018

A. Code of Criminal Procedure, 1973 – S. 154 – First Information Report – The term "First Information" has not been defined in the Code nor is there any mention of such a term however it is now a settled position that information given to a police officer concerning an offence means something in the nature of a complaint or accusation. It may well be information of a crime which sets the criminal law justice system in motion. The provisions of S. 154 of the Cr.P.C. are mandatory and the concerned Police Officer is duty bound to register the case on the basis of information disclosing cognizable offence – The condition which is *sine qua non* for recording a First Information Report is that, there must be information, which must disclose a cognizable offence before the Officer-in-Charge of the Police Station. Upon receipt of such information, the law requires the police officer to reduce the information in writing if given orally which shall be read over to the informant. Where such information is a written complaint or one which has been reduced to writing it shall be signed by the person giving the information. The substance of the information is to be entered in a book to be kept by such Officer in terms of the rules prescribed by the

Government. The Section also requires that a copy of the information so recorded under Sub-Section (1) shall be given free of cost to the informant – Incumbent upon the Officer at the Police Station to record a complaint when a cognizable offence is reported and treat it as an FIR.

(Para 10)

B. Code of Criminal Procedure, 1973 – S. 154 – Second F.I.R Permissibility – Although two F.I.Rs have not been exhibited herein the evidence on record indeed leads one to such conclusion. The missing report is actually the F.I.R being prior in time to Exhibit 8 which in sum and substance is a report of steps taken by P.W.9 pursuant to the missing report. Exhibit 8 surely does not classify as an F.I.R. The matter being riddled with anomalies, lacking clarity about the lodging of an F.I.R is therefore untenable in the eyes of law – There cannot be two F.I.Rs for the same offence.

(Para 14)

C. Indian Evidence Act, 1872 – S. 35 – Relevancy of Entry in Public Record or an Electronic Record made in Performance of Duty – Such entries must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.

(Para 16)

D. Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 94 – Presumption and Determination of Age – Although the said provision for is to gauge the age of a child in need of care and protection or a child in conflict with law and consequently for the use of the Child Welfare Committee or the Juvenile Justice Board, nevertheless this does not debar any Court from taking assistance of the provisions of this Section to assess the age of the victim by the methods prescribed therein – If in the first instance, the date of birth from the school or matriculation certificate of the child is unavailable then resort can be taken to a birth certificate issued by a Corporation or a Municipal Authority. It is only thereafter that the prosecution can rely on the ossification test.

(Paras 21 and 22)

E. Indian Evidence Act, 1872 – S. 45 – Opinions of Experts – Medical evidence as is well settled is an opinion given by an expert and deserves respect by the Court, however, this does not necessarily conclude as always being binding upon the Court. The expert's evidence may be an opinion on facts such as a Doctor giving his opinion as to the cause of a person's death or injury but when calling an expert's evidence, the prosecution must first establish the expertise of the witness by furnishing evidence to convince the Court that the witness is a competent witness.

(Para 26)

Appeal allowed.

Chronological list of cases cited:

1. Mahadeo s/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
2. Ramesh Kumari v. State (N.C.T. of Delhi) and Others, AIR 2006 SC 1322.
3. Amitbhari Anilchandra Shah v. Central Bureau of Investigation and Another, (2013) 6 SCC 348.
4. Anju Chaudhary v. State of Uttar Pradesh and Another, (2013) 6 SCC 384.
5. State of Bihar v. Radha Krishna Singh and Others, (1983) 3 SCC 118.
6. Madan Mohan Singh and Others v. Rajni Kant and Another, (2010) 9 SCC 209.
7. State of Haryana v. Bhagirath and Others, (1999) 5 SCC 96.
8. Arnit Das v. State of Bihar, (2000) 5 SCC 488.
9. Santenu Mitra v. State of W.B., (1998) 5 SCC 697.
10. Bhola Bhagat v. State of Bihar, (1997) 8 SCC 720.
11. Gopinath Ghosh v. State of W.B., 1984 Supp SCC 228.
12. Rajinder Chandra v. State of Chhattisgarh and Another, (2002) 2 SCC 287.

JUDGMENT

Judgment of the Court was delivered by ***Meenakshi Madan Rai, ACJ***

1. The Learned Special Judge, Protection of Children from Sexual Offences (POCSO) Act, 2012, East Sikkim, at Gangtok, convicted the Appellant under Section 5(l) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short the POCSO Act), vide its impugned Judgment dated 19-09-2017. The impugned Order on Sentence dated 20-09-2017 sentenced the Appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/- (Rupees two thousand) only, for the offence aforestated, with a default clause of imprisonment.

2. Aggrieved, the Appellant is before this Court, *inter alia*, on grounds that the seizure of Exhibit 7 the Birth Certificate of the Victim, remained unproved, the date of birth of the Victim has not been established as the contents of Exhibit 7 were not proved by any witness of the Prosecution. That, it is now settled law as to how the age of a Victim is to be assessed and none of the parameters as laid down in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[1] have been complied with although witnesses being P.W.7, P.W.8 and P.W.9 were examined with regard to the Birth Certificate. P.W.2, the mother of the Victim, from whose possession the Birth Certificate was allegedly seized has made no mention of such seizure neither has she testified about the age of the Victim to establish that she was a minor. The Register containing the entry, if at all, of the date of birth of the Victim was not furnished before the Learned Trial Court. That apart, it is also evident from Exhibit 8 the FIR, that the father of the Victim had in fact lodged a Complaint on 25-05-2016 (May 2016) informing the Police that his daughter, the Victim, aged 15, was missing since 24-04-2016 (April 2016) at 2.30 p.m. which, however, was not reduced in writing but merely entered as a Diary Report and the case taken up as one under Missing Children being Case No.17/2016 dated 25-05-2016. The Learned Trial Court failed to appreciate that the evidence furnished before it did not prove that the Victim was a child as defined under Section 2(d) of the POCSO Act. That, material discrepancies have occurred in the evidence of the Prosecution, as P.W.9 ASI Tek Bahadur Chettri and P.W.15 PI Ajay Rai were not able to prove the date of lodging of the FIR and the date

[1] (2013) 14 SCC 637

when the Victim was alleged to have gone missing. The Section 164 Code of Criminal Procedure, 1973 (for short Cr.P.C.) statement of the Victim was incorrectly considered as substantive evidence by the Learned Trial Court, while the Victim was unable to prove that her statement was recorded under the said provision. Exhibit 12 the Medical Report of the Victim and Exhibit 15 the Report of the Regional Forensic Science Laboratory (RFSL), Sikkim, have not supported the Prosecution case of penetrative sexual assault. This evidence nevertheless was relied on by the Prosecution and the embellished and uncorroborated testimony of the Victim was duly considered by the Learned Trial Court. That, reliance has been placed on the statements of P.W.9 and P.W.16 who are both Investigating Officers (I.O.) which is impermissible. That, the Learned Trial Court failed to consider the claim of juvenility raised by the Appellant before the Court and erred in ignoring the principles laid down by Section 114(g) of the Indian Evidence Act, 1872 (for short the Evidence Act), when material witnesses and evidence were not produced by the Prosecution such as the father of the Victim and the FIR lodged by him. Hence, in view of the aforesaid circumstances the impugned Judgment and Order on Sentence deserves to be set aside and the Appellant acquitted of the Charges.

3. Resisting the stand of learned Counsel for the Appellant, learned Assistant Public Prosecutor would contend that the Prosecution has without doubt proved the age of the Victim as Exhibit 7, the Birth Certificate of the Victim, being an official document is admissible in evidence. The date of birth of the Victim on the Exhibit is reflected as 14-09-2001 thereby making her 15 years at the time of the incident, i.e., 25-05-2016. That, the claim of juvenility by the Appellant deserves no consideration as Exhibit 5 his Ossification Test would clearly indicate that his approximate bone age as per the Radiologist is above 20 years of age. That, the Learned Trial Court has correctly considered the statement of the Victim recorded under Section 164 of the Cr.P.C. which corroborated the evidence given by her in the Court. Exhibit 12, the Medical Report of the Victim, is testimony to the fact that the hymen of the Victim was ruptured establishing the offence of rape and of penetrative sexual assault. That, there are no anomalies with regard to the facts emerging in Exhibit 8 the FIR lodged by P.W.9 hence, no error emanates in the Prosecution case as well as the impugned Judgment and Order on Sentence of the Learned Trial Court. The Appeal thereby warrants dismissal.

4. The rival submissions put forth by learned Counsel for the parties were heard *in extenso*. The evidence and documents on records have also been meticulously perused by us.

5. We may briefly traverse the facts of the case as per the Prosecution for clarity in the matter. P.W.9, Assistant Sub-Inspector (ASI) Tek Bahadur Chettri of Singtam Police Station, received a Complaint from the father of the Victim on 25-05-2016, to the effect that his daughter, aged 15 years, was missing since 24-04-2016 from 2.30 p.m. This information was recorded as a Diary Report at the Singtam Police Station the same day, as can be drawn from the details at Exhibit 8 FIR lodged by P.W.9, ASI Tek Bahadur Chettri. The Complaint of the father was registered as MC (Missing Children) Case No.17/2016 dated 25-05-2016 at the Singtam Police Station and endorsed to P.W.9 for investigation. P.W.9 (I.O.) suspecting that the missing child could be with the Appellant, kept the mobile number of the Appellant on surveillance which traced him to a village Kawli', District Baksa, Assam. P.W.9 contacted the NGO (Impulse) at the said place, who traced the alleged Victim to the home of the Appellant. She was handed over to the Tamalpur Police Station. P.W.9 recorded the facts and submitted it before the Station House Officer, Singtam Police Station on 06-05-2016 which was registered as FIR, Exhibit 8, bearing No.21/2016 dated 06-05-2016. The missing case was converted into one under Sections 363/365 of the Indian Penal Code, 1860 (for short IPC) and registered against the Appellant and endorsed to Sub-Inspector Sonam Thendup Bhutia, P.W.16 for investigation. The Appellant was arrested in Assam on 08-05-2016 on a Non-Bailable Warrant of Arrest issued by the Learned Chief Judicial Magistrate, East at Gangtok, and produced under transit warrant issued by the Learned Judicial Magistrate, Nalbari. The Victim was also brought from the same place and forwarded for medical examination to the Singtam District Hospital, while the Appellant was forwarded to the Juvenile Observation Home by the Principal Magistrate, Juvenile Justice Board, North at Mangan, due to lack of proof of age. An Ossification Test of the Appellant was conducted which determined his age as twenty years following which he was remanded to judicial custody. Case Exhibits were forwarded to RFSL, Saramsa, for chemical analysis.

6. Investigation unravelled that the Appellant who was working as a plumber in Singtam met the Victim at her school there in February 2016 where they got acquainted with each other and fell in love. The Appellant

thereafter sexually assaulted the minor Victim several times below the school jungle. The brother of the Victim, P.W.4 had seen her talking to the Appellant on one occasion and reprimanded her, two days later the Appellant and the Victim met again and the Appellant suggested that the Victim elope with him. The same night they eloped, left for Siliguri and reached Jaigaon, where they met the Appellant's mother. She expressed her displeasure at the Appellant bringing home a school going child fearing legal consequences. Consequently, the Appellant took the minor Victim to his brother's house in Baksa, Assam, where they stayed and allegedly had sexual intercourse twice. On completion of investigation, finding a *prima facie* case Charge-Sheet was submitted against the Appellant under Sections 363/365/376 of the IPC read with Section 4 of the POCSO Act.

7. The Learned Trial Court on consideration of the *prima facie* materials framed Charges against the Appellant under Sections 363, 366 and 376(2)(n) of the IPC read with Section 5(l) of the POCSO Act, punishable under Section 6 and directed trial on the plea of not guilty by the Appellant. The Prosecution furnished sixteen witnesses including the I.O. of the case. On completion of evidence the Appellant was examined under Section 313 of the Cr.P.C., the final arguments heard and the impugned Judgment and the Order on Sentence pronounced.

8. The questions that now plague this Court and require determination are;

(i) Whether two First Information Reports can exist in one case?

(ii) Whether the Prosecution was able to establish that the Victim was a child, as defined under Section 2(d) of the POCSO Act?

(iii) Whether the Appellant was a child in conflict with law and had not completed eighteen years of age on the date of commission of the offence?

9. While answering the first question the provision of Section 154 of the Cr.P.C. is extracted hereinbelow for easy reference which we may briefly examine to assess what the provision entails. Section 154 of the Cr.P.C. pertains to information in cognizable cases and provides that;

> **"154. Information in cognizable cases.**–(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and can be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> ……
>
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> ……."

10. The term First Information has not been defined in the Code nor is there any mention of such a term however it is now a settled position that information given to a police officer concerning an offence means something in the nature of a complaint or accusation. It may well be information of a crime which sets the criminal law justice system in motion. The provisions of Section 154 of the Cr.P.C. are mandatory and the concerned Police Officer is duty bound to register the case on the basis of information disclosing cognizable offence, this was held in ***Ramesh Kumari*** vs. ***State (N.C.T. of Delhi) and Others***[2]. Thus, the condition which is *sine qua non* for recording a First Information Report is that, there must be information, which must disclose a cognizable offence before the Officer-in-Charge of the Police Station. Upon receipt of such information, the law requires the police officer to reduce the information in writing if given orally which shall be read over to the informant. Where such information is a written complaint or one which has been reduced to writing it shall be signed by the person giving the information. The substance of the information is to be entered in a book to be kept by such Officer in terms of the rules prescribed by the Government. The Section also requires that a copy of the information so recorded under Sub-Section (1) shall be given free of cost to the informant. It is thus incumbent upon the Officer at the Police Station to record a

[2] AIR 2006 SC 1322

Complaint when a cognizable offence is reported and treat it as an FIR. This discussion puts into place the requirements of Section 154 of the Cr.P.C.

11. According to P.W.9, on 25-05-2016, the father of the Victim filed a Missing Child Report at the Singtam Police Station regarding his minor daughter who went missing from the afternoon of 24-05-2016. The Missing Child Report was registered at Singtam Police Station as MC Case No.17 of 2016, dated 25-05-2016. It is pertinent to point out that the records of the case are bereft of this Report. The father of the Victim who allegedly lodged the report is notably not a Prosecution witness for reasons best known to the Prosecution which leads this Court to draw an adverse inference under Section 114(g) of the Indian Evidence Act. On this aspect of the report filed by the Victim's father, we may also consider the evidence of P.W.2 the Victim's mother. Her evidence to the contrary is that the Victim child went missing since 24-04-2016, thereafter, she tried to locate her and informed the Singtam Police Station that her daughter was missing. Her cross-examination would reveal that she had lodged a written missing report at the Singtam Police Station. This written report also finds no place in the records of the Prosecution case. P.W.2 has further specified in her evidence that on 05-05-2016 that her son received a telephone call on his mobile from the Appellant who informed him that his name was Jack Tamang and that the Victim was with him in Gangtok. When the Police recorded her statement she informed the Police about the information received by her son on his cell phone from the said Jack. Now, when we revisit Exhibit 8 the report of P.W.9 *inter alia* reads as follows;

> **"**…….
>
> *B. B. ……. East Sikkim had lodged a diary report on* ***25/05/2016****, to the effect that his daughter H……. aged 15 was missing since* ***24.04.2016*** *at 2.30 p.m. ……****"***.

This is contrary to his evidence where he states that the Victim's father had told him that the child was missing from the afternoon of **24-05-2016**. At the same time it is relevant to notice that Exhibit 8 corroborates the evidence of P.W.2 who has stated that the Victim was missing from the afternoon of 24-04-2016.

12. Exhibit 8 is said to be recorded on 06-05-2016 but if the Victim's father lodged a Diary Report only on 25-05-2016 as reflected in Exhibit 8 then how was it possible for P.W.9 to make a GD Entry on 06-05-2016, viz.; prior in time. This is indeed baffling and mind boggling. What can thus be culled out from the records is that the child went missing on 24-04-2016, P.W.2 as per her lodged a report at the Singtam Police Station. This was not recorded. P.W.16 the I.O. of the instant case would admit that the Victim's mother filed a missing report in connection with the Victim going missing. He also admitted that he has not filed the records of the enquiry into the missing report along with the Charge-Sheet or the missing report filed by the Victim's mother. Apparently the Police lost track of who was the Complainant or the date when the Victim went missing. P.W.15, the SHO Singtam P.S. also in tandem with the evidence of P.W.9 states that the Victim's father lodged a missing report on 25-05-2016 to the effect that his daughter was missing from 24-05-2016 but strangely enough goes on to state that based on such missing report an enquiry was made by P.W.9 on 06-05-2016. The Prosecution would indeed have us believe in the limerick of the young lady named Bright, whose speed was faster than light, she set out one day in a relative way and returned on the previous night. In view of the anomalies arising in the Prosecution case it is evident that efforts are being made by P.W.9, P.W.15 and P.W.16 to suppress their follies in the instant matter resulting in a preposterous situation.

13. The Hon'ble Supreme Court in ***Amitbhari Anilchandra Shah*** vs. ***Central Bureau of Investigation and Another***[3] was dealing with the question of two FIRs lodged in the matter and would hold as follows;

> **"58.5.** The first information report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR. **58.6.** In the case on hand, as explained in the earlier paragraphs, in our opinion, the second FIR was nothing but a consequence of the event which had taken place on 25-11-2005/26-11-2005. We have already concluded that this Court having reposed faith in CBI accepted their contention that Tulsiram Prajapati

[3] (2013) 6 SCC 348

> encounter is a part of the same chain of events in which Sohrabuddin and Kausarbi were killed and directed CBI to take up the investigation.
>
> ……..
>
> **60.** In view of the above discussion and conclusion, the second FIR dated 29-4-2011 being RC No. 3(S)/2011/Mumbai filed by CBI is contrary to the directions issued in judgment and order dated 8-4-2011 by this Court in *Narmada Bai* v. *State of Gujarat* [(2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] and accordingly the same is quashed. As a consequence, the charge-sheet filed on 4-9-2012, in pursuance of the second FIR, be treated as a supplementary charge-sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial court to decide the same in accordance with law. Consequently, Writ Petition (Crl.) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Crl.) No. 5 of 2013.**"**

14. In ***Anju Chaudhary*** vs. ***State of Uttar Pradesh and Another***[4] the Supreme Court would again consider the question of a second FIR in respect of the same offence or incident forming part of the same transaction as contained in the first FIR and discuss its permissibility.

> **"14.** On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced into writing by the officer-in-charge of a police station. This implies that there has to be the first information report about an incident which constitutes

[4] (2013) 6 SCC 384

a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the investigating agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so,

> in the backdrop of the settled canons of criminal jurisprudence, reinvestigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Section 167(2) of the Code. (Ref. *Reeta Nag* v. *State of W.B.* [(2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] and *Vinay Tyagi* v. *Irshad Ali* [(2013) 5 SCC 762] of the same date.)**"**

The above ratio make it crystal clear that there cannot be two FIRs for the same offence. Although two FIRs have not been exhibited herein the evidence on record indeed leads one to such conclusion. The Missing Report is actually the FIR being prior in time to Exhibit 8 which in sum and substance is a report of steps taken by P.W.9 pursuant to the Missing Report. Exhibit 8 surely does not classify as an FIR. The matter being riddled with anomalies, lacking clarity about the lodging of an FIR is therefore untenable in the eyes of law.

15. The next question which is indeed the core issue at hand is taken up for consideration. Exhibit 7 the Birth Certificate of the Victim is said to have been issued from the District Hospital, Singtam, recorded as the place of birth of the Victim. Has this document been established in terms of the required legal parameters? In our considered opinion, the answer would be in the negative. Learned Counsel for the State-Respondent would contend that the document is a public document requiring no proof. In this context, we may refer to Section 35 of the Evidence Act, which reads as follows;

> **"35. Relevancy of entry in public record or an electronic record made in performance of duty.**—An entry in any public or other official book, register or record or any electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.**"**

16. Section 35 requires the following conditions to be fulfilled before a document can be held to be admissible under this Section;

(i) The document must be in the nature of an entry in any public or other official book, register or record;

(ii) It must state a fact in issue or a relevant fact; and

(iii) The entry must be made by a public servant in the discharge of his official duties, or in performance of his duties.

[***State of Bihar*** vs. ***Radha Krishna Singh and Others***[5]]

Such entries however must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.

17. Section 74 of the Evidence Act defines what public documents are and reads as follows;

> **"74. Public documents**.—The following documents are public documents:-
>
> (1) Documents forming the acts, or records of the acts—
>
> (i) of the sovereign authority,
>
> (ii) of official bodies and tribunals, and
>
> (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
>
> (2) Public records kept in any State of private documents.**"**

18. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[6] distinguishing between the admissibility of a document and its probative value, the Hon'ble Supreme Court would explain as follows;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained

[5] (1983) 3 SCC 118
[6] (2010) 9 SCC 209

therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat* Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].

20. So far as the entries made in the official record by an official or person authorised in

performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value.** The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi* v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500] .)

22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868] .)**"**

[emphasis supplied]

19. In the case at hand, the Prosecution furnished Exhibit 7 as the Birth Certificate of the Victim. P.W.7 and P.W.8 were produced by the Prosecution as witnesses to the seizure of the document. P.W.7 testified that the Police prepared a Property Seizure Memo and seized the Birth Certificate from the Victim's mother, who had produced it at the Singtam Police Station. P.W.8 the second witness for the Seizure of Exhibit 7 would however state that he was called by the Victim's mother, P.W.2 to the Police Station in connection with the case relating to the Victim. According to him, the Police prepared Seizure Memo, Exhibit 6 and requested him to sign on the said document which he complied with. His specific testimony is that he did not see the Birth Certificate, Exhibit 7, which was shown to him in the Court on the day his evidence was recorded, although he identified Exhibit 6 and his signature thereon as Exhibit 6(b). He however deposed that the contents of Exhibit 6 were not read over and explained to him. The evidence of P.W.9 ASI Tek Bahadur Chettri reveals that he had seized the Birth Certificate from the legal guardian of the Victim at the Singtam Police Station. The witness reveals the said legal guardian to be the father of the Victim. The anomaly that arises in the evidence of P.W.7 and P.W.9 is that, according to P.W.9, Exhibit 6(d) and 6(e) are the signatures of the father of the Victim from whom he had seized the Birth Certificate, Exhibit 7. This is in contradiction to the evidence of P.W.7 according to whom it was seized from the mother of the Victim. In this context when we examine the evidence of P.W.2, the Victim's mother she has made no claim that Exhibit 7 was seized from her or that she had furnished Exhibit 7 at the Police Station. Infact her evidence is silent with regard to Exhibit 7 or on the aspect of the Victim's age. Although P.W.9 has identified Exhibit 6(c) as his signature on Exhibit 6 and the signatures purportedly of the Victim's father, but no explanation was furnished as to why the father was not produced as a witness when besides being a seizure witness he was also the original Complainant as per P.W.9. Exhibit 7 no doubt records the date of birth of the Victim as 14-09-2001 but the origin of this document has remained an enigma. No Register of the Chief Registrar of Births and Deaths, Health & Family Welfare Department, Government of Sikkim, was furnished to substantiate that the entries made in Exhibit 7 drew strength from the entries in the Register. No witness was forthcoming as the person who made the entries in either any Register or Exhibit 7. Confounding the above confusion is Exhibit 6 the Property Seizure Memo which at Sl. No.4 recorded that property (Exhibit 7) was seized on 25-04-2016 at 11.50 hours. The dates which appear below the signatures of the witnesses and P.W.9 all are

reflected the date as 25-04-2016. The perpetual anomalies in the dates of the Prosecution case leads to doubts regarding its veracity and strikes at the root of the Prosecution case. Merely because Exhibit 7 is a document furnished by the Prosecution in support of their case it cannot be accepted as gospel truth without fortification by way of supporting evidence, sans examination of its probative value.

20. It is also to be mentioned here that the matter at hand was registered on 06-05-2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short Juvenile Justice Act), came into force on 15-01-2016, before the registration of the instant case. Section 94 of the Juvenile Justice Act provides for presumption and determination of age and reads as follows;

> **"94. Presumption and determination of age**.%(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
>
> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.**"**

21. Although the said provision for is to gauge the age of a child in need of care and protection or a child in conflict with law and consequently for the use of the Child Welfare Committee constituted under Section 27 of the Juvenile Justice Act or the Juvenile Justice Board constituted under Section 4 of the Juvenile Justice Act, nevertheless this does not debar any Court from taking assistance of the provisions of this Section to assess the age of the Victim by the methods prescribed therein. In ***Mahadeo*** *(supra)*, the Hon'ble Supreme Court has held that;

"12. ..... Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical option can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"**

[emphasis supplied]

22. Hence, if in the first instance the date of birth from the school or Matriculation Certificate of the child is unavailable then resort can be taken to a Birth Certificate given by a Corporation or a Municipal authority. It is only thereafter that the Prosecution can rely on the Ossification Test. As

Exhibit 7 the Birth Certificate is of no assistance to the Prosecution and the Victim being a student of Class 7 did not possess a Matriculation Certificate the Ossification Test of the child could have been conducted. The provisions of the Section have not been complied with hence the Prosecution has failed to establish the first requirement of the case under POCSO Act, viz.; to establish that the Victim was below the age of 18 years as is the requisite provided under Section 2(d) of the POCSO Act. Thus, it is but apposite for this Court to reject Exhibit 7 as proof of age of the Victim which thereby remains unproved.

23. That having been said, we may next address the question which pertains to the age of the Appellant and is of equal importance. P.W.16, the I.O. of the instant case revealed that in the course of his investigation, he filed a requisition Exhibit 24 before the Principal Magistrate, Juvenile Justice Board, North Sikkim at Mangan seeking permission to conduct Ossification Test in respect of the Appellant for determination of his age. The I.O. identified Exhibit 4 as the requisition of Dr. O. T. Lepcha for the Ossification Test and Exhibit 5 as the Ossification Test Report. Dr. O. T. Lepcha is not a witness herein. Pending the enquiry regarding the age of the Appellant, he was forwarded to the Juvenile Observation Home. Upon receipt of the Report he was remanded to Judicial Custody in connection with the Case vide Exhibit 26, his age having been indicated as above 20 years.

24. P.W.6 Dr. K. Giri, the Principal Chief Consultant, Radiology, STNM Hospital, on receiving the requisition Exhibit 4 from Dr. O. T. Lepcha, the Medicolegal Specialist at STNM Hospital conducted Ossification Test of the Appellant. P.W.6 would give the following opinion after examining the Appellant;

> **"**The following X-rays of Mangala Mishra were taken:
>
> 1. Right wrist AP
> 2. Right elbow AP
> 3. Right knee AP
> 4. Right shoulder AP
> 5. Right hip with crest AP

> The above x-rays were studied by me and I came to the conclusion that the approximate bone age of Mangala Mishra was above 20 years.
>
> Accordingly, I prepared the Bone Age Estimation Report, Exbt. 5, shown to me in the Court today under my signature Exbt.5(a)."

25. Exhibit 5 referred to by the Expert reads as follows;

> "Bone age estimation
>
> Rt wrist AP – lower ends of radius & ulna fused.
>
> Rt elbow AP – all centres fused.
>
> Rt knee AP – lower end of jemur fused.
>
> Rt shoulder AP – acromion & coracoids fused.
>
> Rt hip and crest AP – iliac crest fused. Impr. Approx bone age above 20 years"

26. Pausing here for a minute, when we embark upon an examination of the evidence of this witness, it is clear in the first instance that his evidence would be covered by the provisions of Section 45 of the Evidence Act which deals with opinions of Experts. Medical evidence as is well settled is an opinion given by an Expert and deserves respect by the Court, however, this does not necessarily conclude as always being binding upon the Court. The Expert's evidence may be an opinion on facts such as a doctor giving his opinion as to the cause of a person's death or injury. But when calling an Expert's evidence the Prosecution must first establish the expertise of the witness by furnishing evidence to convince the Court that the witness is a competent witness. In ***State of Haryana*** vs. ***Bhagirath and others***[7] the Supreme Court would hold as follows;

> **"15.** The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact

[7] (1999) 5 SCC 96

> situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.**"**

27. On the bedrock of the principle so enunciated, the evidence of P.W.6 reveals that his expertise has not been established, the number of years he has put in as a Radiologist has not been alluded to raising a doubt about the competence of the witness. Added to that is the fact that the X-rays of the Appellant do not explain any circumstance pertaining to his age inasmuch as P.W.6 has failed to reveal what **"***Right wrist AP, Right elbow AP, Right knee AP, Right shoulder AP and Right hip with Crest AP***"** mean. It may be accepted medical terms but the Expert is without a doubt expected to clarify and elucidate the same to the understanding of the parties and the Court. This patently has been overlooked. Therefore, there is no basis for the Court to reach a finding as to the ground on which the Expert has reached his finding about the age of the Appellant and the satisfaction of the Court on this count is but nil. This evidence consequently cannot be taken into consideration. Undoubtedly the appearance of the Appellant was that of a minor prompting, the I.O. to file Exhibit 24 before the concerned Magistrate of the Juvenile Justice Board for age verification. The I.O. has failed to comply with the provisions of Section 94 of the Juvenile Justice Act. In such a circumstance, it is not possible to reach a final conclusion that the Appellant was indeed 20 years or above. In this aspect of the matter, useful reference may be made to the ratiocination of the Hon'ble Supreme Court in ***Arnit Das*** vs. ***State of Bihar***[8] in which while discussing authorities being ***Santenu Mitra*** vs. ***State of W.B.***[9], ***Bhola Bhagat*** vs. ***State of Bihar***[10] and ***Gopinath Ghosh*** vs. ***State of W.B.***[11] and to a number of other decisions which we do not propose to catalogue separately would *inter alia* hold that generally speaking these cases are authorities for the propositions that;

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[8] (2000) 5 SCC 488
[9] (1998) 5 SCC 697
[10] (1997) 8 SCC 720
[11] 1984 Supp SCC 228

> **"19.** …….....
>
> (*i*) the technicality of the accused having not claimed the benefit of the provisions of the Juvenile Justice Act at the earliest opportunity or before any of the courts below should not, keeping in view the intendment of the legislation, come in the way of the benefit being extended to the accused-appellant even if the plea was raised for the first time before this Court;
>
> (*ii*) a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases; and
>
> (*iii*) the provisions of the Act are mandatory and while implementing the provisions of the Act, those charged with responsibilities of implementation should show sensitivity and concern for a juvenile.
> ……."

It may be added here that this pertains to the Juvenile Justice Act, 1986, but the same principles apply to the matter at hand.

28. In ***Rajinder Chandra*** vs. ***State of Chhattisgarh and Another***[12] the Supreme Court would reiterate the principle laid down in ***Arnit Das*** (*supra*) and hold that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile. That if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases.

29. In the case of the Appellant there is no evidence whatsoever at hand to gauge his age. Once a claim of juvenility or a doubt arose that

[12] (2002) 2 SCC 287

the Appellant was a juvenile, the correct procedure to be adopted was the one detailed in Section 94 of the Juvenile Justice Act. P.W.7 under cross-examination has revealed that the Police seized the Voter I.D. Card of the Appellant, Exhibit 24 substantiates this evidence. No reason obtains as to why it was eschewed as evidence. In the absence of conclusion proof of the age of the Appellant we lean in favour of the accused being a juvenile.

30. No proof of the age of the Victim or the Appellant exists the Victim has admitted that she eloped with the Appellant of her own free will and consented to sexual intercourse. P.W.3 has stated that he saw the alleged Victim at the work site of the Appellant proving that she was there voluntarily. P.W.4 the Victim's brother had also seen the Victim talking to the Appellant behind a Masjid on account of which he gave her a beating at home. The Appellant in such circumstances cannot be saddled with the offence of penetrative sexual assault on the alleged Victim.

31. In conclusion, we find that the Prosecution has failed to prove its case beyond a reasonable doubt.

32. The Appellant is acquitted of the offence under Section 5(l) punishable under Section 6 of the POCSO Act. He be set at liberty forthwith, if not required in any other matter.

33. Consequently, the impugned Judgment and Order on Sentence of the Learned Trial Court is set aside.

34. Appeal is allowed.

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

36. No order as to costs.

37. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

SLR (2018) SIKKIM 1397

(Before Hon'ble the Acting Chief Justice)

CRP No. 8 of 2017

Goshir Gyaltsab Rinpoche ….. PETITIONER

Versus

Karmapa Charitable Trust ….. RESPONDENTS

For the Petitioner: Mr. Anmole Prasad and Mr. N. Rai, Senior Advocates with Mr. Jorgay Namka, Ms. Yangchen D. Gyatso, Ms. Tamanna Chhetri, Ms. Malati Sharma, Ms. Sudha Sewa and Mr. Sagar Chettri, Advocates.

For Respondents 1-3: Mr. K.K. Rai and Mr. B. Sharma, Senior Advocates with Mr. Ansul Rai, Mr. Norden Tshering Bhutia, Mr. Shiv Kumar Pandey and Mr. Sajal Sharma, Advocates.

For Respondents 4-5: Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee, Government Advocate, Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates and Ms. Sedenla Bhutia, Advocate.

Date of decision: 29th October 2018

A. Code of Civil Procedure, 1908 – S. 151 – Issue No. 3 *supra* of 27.02.2002 is to be decided on merits and not by mere statement. Even if it is admitted that the Karmapa is 21 years and hence the sole Trustee, the matter is not as simplistic as the Petitioner would have us believe as the prayers in the plaint are manifold as also the issues settled for determination which require specific decision on merits – As rightly pointed out by the learned Trial Court, it is not clear as to why the Petitioner has suddenly raised the issue of the 17th Gyalwa Karmapa having already attained the age

of 21 years at this stage when, going by his own claims, the 17th Karmapa had attained the age of 21 years in the year 2006. It is no one's case that they were unaware of the date of birth of the reincarnation. Contrarily, it may be stated that no proof has been furnished before the learned Trial Court to establish that the Karmapa has attained the age of 21 years and the rules of evidence cannot be wished away and the matter decided in slipshod manner on the persuasion of the Petitioner – The coming of age of the Karmapa as the sole Trustee has to be established by evidence – In the matter at hand, learned Counsel for the Petitioner would contend that as the Karmapas on either side have attained the age of 21 years, the Trustees are *functus officio* and in such event the suit does not survive as it cannot be continued in the sole name of the Trust which is not a juristic person. It is to be reiterated here that proof of age of the Karmapas is yet to be adduced and the proceeding cannot be said to have become infructuous in view of the issues involved.

(Paras 17, 18 and 21)

Petition dismissed.

Chronological list of cases cited:

1. Pasupuleti Venkateswarlu v. The Motor & General Traders, (1975) 1 SCC 770.
2. J.M. Biswas v. N.K. Bhattacharjee and Others, (2002) 4 SCC 68.
3. Alka Gupta v. Narender Kumar Gupta, 2010 (10) SCC 141.
4. M/S Abraham Memorial Educational Trust and Others v. C. Suresh Babu, (2012) 175 Comp Cas 361.
5. Shiromani Gurdwara Prabandhak Committee v. Shri Som Nath Dass and Others, (2000) 4 SCC 146.
6. Vimal Vitthal Chavan v. L. Nava Maharashtra Education Society and Others, 2005 SCC OnLine Bom 916.
7. Amar Singh v. Union of India and others, (2011) 7 SCC 69.
8. Jaspal Kaur Cheema and Another v. Industrial Trade Links and Others, 2017 (8) SCC 592.
9. Shipping Corporation of India Ltd. v. Machado Brothers and Others, 2004 (11) SCC 168

ORDER

Meenakshi Madan Rai, ACJ

1. By filing this petition under Section 115 read with Section 151 of the Code of Civil Procedure, 1908, the Petitioner herein *(Defendant No. 3 in Title Suit No. 1 of 2017)* seeks to assail the order of the learned District Judge, Special Division I, Sikkim at Gangtok dated 09.11.2017. Vide the said Order, the learned Court rejected the petition filed by the Petitioner under Section 151 of the Code of Civil Procedure, 1908 praying for dismissal of the suit on grounds stated therein.

2. Before proceeding further, for clarity, it may be stated that the original Plaintiffs in Civil Suit No. 40 of 1998 filed on 31.07.1998 were *(1)* Karmapa Charitable Trust (Respondent No. 1 herein), *(2)* T.S. Gyaltsen, *(3)* Kunzing Shamar Rinpoche and *(4)* Gyan Jyoti Kansakar. The original Plaintiffs No. 2, 3 and 4 are since deceased. The Plaintiff No. 2 is substituted by his son as also Respondent No. 4, Respondent No. 3 was a celibate monk hence none substitutes him. The Respondents No. 1, 2 and 3 herein are the Plaintiffs No. 1, 2 and 4 in the Title Suit now renumbered as Title Suit No. 1 of 2017. The Defendant No. 1 (State of Sikkim) and Defendant No. 2 (Secretary, Ecclesiastical Affairs, Government of Sikkim), in the Title Suit No. 1 of 2017, are the Respondents No. 4 and 5 herein. The Petitioner herein is the Defendant No. 3 in the said Title Suit. The parties shall be referred to in their order of appearance in the instant Revision Petition.

3. The arguments of Learned Senior Counsel Mr. Anmole Prasad for the Petitioner, before this Court, pivoted around the contention that due to the occurrence of certain events that transpired subsequent to the filing of the suit, the Respondents No. 2 and 3 have lost the *locus standi* to continue with the suit on their own admission as would be evident from the averments made in their plaint. The Respondents have clearly conceded that the Trust would automatically become *functus officio* upon the reincarnated Karmapa *viz.* the 17th Gyalwa Karmapa, attaining the age of 21 years at which point he would become the sole Trustee. That the rival contentions reveal the admission of the adverse parties that the sole Trustee has re-incarnated, been identified and attained the age of 21 after the institution of the suit. This occurrence has been brought to the notice of the Court and

has a fundamental impact on the right to relief or the manner of moulding it, hence the Court cannot turn a blind eye to such an event. To buttress this submission, reliance was placed on ***Pasupuleti Venkateswarlu* vs. *The Motor & General Traders***[1]. That in this circumstance, continuing with the suit would be like flogging a dead horse. On this count, strength was drawn from ***J.M. Biswas* vs. *N.K. Bhattacharjee and Others***[2]. That in such event, this suit would not survive in the name of the Respondent No. 1 for the reason that no suit can be instituted or continued in the sole name of a Trust as a Trust is not a juristic person. While assailing the impugned order, it was averred that the learned Trial Court failed to consider that the future Trustees were entitled to act as such only till the 17th Gyalwa Karmapa attained the age of 21 years and the admission of the Respondents No. 1 to 3 that the reincarnation of the 17th Karmapa had attained the age of 21. Besides, the petition was misconstrued as being an invitation to embark upon the controversy regarding the recognition of the 17th Karmapa. That, the cross-examination of the witnesses has established that the sole Trustee had not only reincarnated but attained the age of 21 which fact could not be brought on record in 2006 without recording evidence. Hence, the Trustees being *functus officio* the suit would not survive in the name of the Respondent No. 1, a Trust which is not a juristic person. Thus, the impugned order be set aside and quashed and the reliefs prayed for in the petition under Section 151 of the Code of Civil Procedure, 1908, be allowed.

4. Learned Senior Counsel Mr. K.K. Rai, resisting the contentions of learned Senior Counsel for the Petitioner, canvassed that the object of filing the petition under Section 151 of the Code of Civil Procedure, 1908 was an effort to cut short the matter which would decide the entire suit. In fact, the Petitioner ought to have invoked the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 but has erroneously opted to invoke only the provisions of Section 151 of the Code of Civil Procedure, 1908. That, this petition has been brought before this Court *malafide* with the purpose of delaying the trial as the issues raised by the Petitioner have already been settled by the learned Trial Court and confirmed by the higher Courts. Relying on the ratio in ***Alka Gupta* vs. *Narender Kumar Gupta***[3], learned Senior Counsel would contend that a civil proceeding governed by the Code will have to be proceeded with and decided in accordance with

[1] (1975) 1 SCC 770
[2] (2002) 4 SCC 68
[3] 2010 (10) SCC 141

law and there can be no shortcuts in the trial unless provided by law. That the question of the Respondent No. 1 not being a juristic person does not arise as with the changing needs of society, fresh juristic persons have been created. Reliance was placed on the decision of the Hon'ble High Court of Madras in ***M/S Abraham Memorial Educational Trust and Others*** **vs.** ***C. Suresh Babu***[4]**,** which, while discussing the law laid down by the Hon'ble Supreme Court and other High Courts would hold that a Trust, either private or public/charitable or otherwise, is a juristic person who is liable for punishment for the offence under Section 138 of the Negotiable Instruments Act. That since issues pertaining to non-joinder of necessary parties and the *locus standi* of the Respondents No. 1, 2 and 3 have been framed for adjudication, these issues are necessarily to be decided after all parties adduce their evidence and not by way of a petition under Section 151 of the Code of Civil Procedure, 1908. That the Respondents No. 1, 2 and 3, even today, have *locus standi* and the cause of action still subsists in view of the fact that the Trust property is in illegal possession of the Petitioner and which has not yet been returned to its original owner i.e. the Respondent No. 1. Mr. K.K. Rai would further contend that the Trust is a juristic person while referring to the decision of the Hon'ble Supreme Court in ***Shiromani Gurdwara Prabandhak Committee*** **vs.** ***Shri Som Nath Dass and Others***[5]. Learned Senior Counsel buttressed his submissions with the ratio of ***Vimal Vitthal Chavan*** **vs.** ***L. Nava Maharashtra Education Society and others***[6], while contending that the Petitioner has to come to Court with clean hands. That the application of the Petitioner ought to be dismissed at the threshold for suppression of material facts, on which count, strength was garnered from the decision in ***Amar Singh*** **vs.** ***Union of India and others***[7]. That, the question that arises in view of the instant petition is whether the 17th Karmapa ought to take over the Trust. It was his specific argument that it is not as easy as envisaged by the Petitioner since the rules of evidence have also to be complied with. The Petitioner is required to prove, by satisfactory evidence, the age of the Karmapa and not by merely stating that the Karmapa has come of age.

5. The arguments of both parties were heard *in extenso* and all records perused carefully.

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[4] (2012) 175 Comp Cas 361
[5] (2000) 4 SCC 146
[6] 2005 SCC OnLine Bom 916
[7] (2011) 7 SCC 69

6. In order to examine the matter, the brief facts of the suit as stated by the Petitioner herein, may be referred to. The original Plaintiffs filed Civil Suit No. 40 of 1998 in that year now numbered as Title Suit No. 1 of 2017 claiming to be the Trustees of a public, religious and charitable Trust created in 1961 by the Late 16th Gyalwa Karmapa, who, until his demise on 06.11.1981, was the sole Trustee of the said Trust. On his passing away, the Trustees stepped into his shoes, as asserted by them, assuming complete authority over the trust properties enumerated in Schedule A and Schedule B of the Plaint. The principle grievance of the original Plaintiffs No. 2 to 4 was that on 02.08.1993, the agents of the Defendants No. 1 and 2 i.e. the State of Sikkim through its Chief Secretary and the Secretary for Ecclesiastical Affairs, Government of Sikkim *(Respondents No. 4 and 5)*, acting in collusion with the Petitioner herein, had forcibly ousted the monks and beneficiaries of the Respondent No. 1, the Karmapa Charitable Trust and put the Petitioner in illegal and wrongful possession of the suit property. Hence, reliefs were sought for as mentioned in the plaint.

7. On the Petitioner and the Respondents No. 4 and 5, filing their respective Written Statements, issues were framed by the learned Trial Court on 27.02.2002 and 28.12.2002.

8. Evidence of the parties were recorded. That now after the evidence of the Respondents No. 1, 2 and 3 concluded on 16.08.2017, the Respondents No. 4 and 5 have led their evidence and closed their case. On 16.08.2017, in view of the materials emerging from the pleadings and evidence of the witnesses of Respondents No. 1 to 3, the Petitioner filed an application under Section 151 of the Code of Civil Procedure, 1908 before the learned Trial Court.

9. That, Orgyen Drodul Thinlay Dorjee, recognized as the 17th Karmapa by the Dalai Lama in 1992 (and consequently by the Petitioner), has attained the age of 21 years having been born on 26.06.1985 and as of date, he is 32 years. That, Thaye Thinlay Dorjee, who was claimed to be the 17th Karmapa by the original Plaintiff No. 3, Kunzing Shamar Rinpoche (and hence by the Respondents No. 1 to 3 herein), has attained the age of 34 years having been born on 06.05.1983. That regardless of the imbroglio concerning the identity of the reincarnation, both Orgyen Drodul Thinlay Dorjee and Thaye Thinlay Dorjee have crossed the age of 21, therefore, the Trustees have now no role to play as the Karmapa is the sole Trustee and

the role of the Trustees was limited to the interregnum from the date of the demise of the 16th Karmapa till the attaining of the age of 21 years by the 17th Karmapa. Hence, the petition under Section 151 of the Code of Civil Procedure, 1908.

10. Before embarking on the point raised by the Petitioner in his petition, it would be interesting to note that as far back as in the year 2001, the Court of the learned District Judge, East and North Sikkim at Gangtok in Civil Suit No. 40 of 1998 had considered whether the suit filed by the Plaintiffs was maintainable or not, the prayer in the suit being *inter alia* for a declaration that they were entitled as Trustees of the Karmapa Charitable Trust to administer, protect and preserve the suit properties i.e. both movable and immovable, as per Schedule A and Schedule B of the plaint. The learned Trial Court observed as follows;

> *"...15. Besides the above facts and circumstances, statements on oath filed by the parties prima facie go to show that out of seven Trustees only 3 are capable of participating in the present proceeding. Parties are yet to lead evidence in support of their respective contentions. Thus it is found that the plaintiffs in the capacity of trustees have locus standi to file the present suit and such suit is maintainable. ..."*
>
> **(Emphasis supplied)**

11. The Petitioner herein was consequently before this Court in FAO No. 1 of 2002 challenging the said order. Vide judgment dated 18.11.2002, this Court would hold as follows;

> *"…The use of the word 'prima facie' and the expression that the parties "are yet to lead evidence in support of their respective contentions" shows that the finding recorded by the trial Court that the preliminary objections had no merit was only prima facie for the purpose of the order that was passed and not final. The controversy as regards the issue of commission has already been settled by this Court with the*

consent of the parties. As such, no further question remains to be decided in this appeal. ..."

12. Later in time, this Court would note, in its judgment dated 26.08.2003 in Writ Petition (C) No. 5 of 2003;

"…At this stage, we may note that the learned trial Judge was called upon by the contesting defendants to decide as to the maintainability of the suit and in his order dated 17th October, 2001, he has come to hold that the suit is maintainable. In paragraph 14 of the said order, he has held that "defendants 1, 2 and 3 do not dispute that possession of the suit property was with the plaintiffs till 2.8.1993. Defendants 1 and 2 have admitted this fact in para 7 of their written statement. Defendant 3 also concedes this fact at paragraph 14 in his written statement." This order was subject matter of challenge in this Court in FAO No. 1 of 2002 and this court did not interfere with the above finding.

.....

The learned trial Judge in another order on 7th August, 2002 has held that "the present suit does not relate to the question as to who is the 17th Karmapa. The main dispute between the parties is that whether the plaintiffs being the trustees are obliged to possess and administer the suit property or that whether the defendants 1 to 3 have dispossessed them from the possession of suit property. Such being the position whether a particular person is the 17th reincarnation of the Karmapa or not is not the bone of contention." This order of the learned trial Judge was upheld by this Court in Civil Revision No. 5 of 2002. The findings recorded in the two orders have touched finality and are not available to be disturbed.

.....

> *The learned trial Judge rejected the application for impleadment on two grounds (1) the suit filed by the majority of the trustees is basically for eviction, restoration of possession and maintenance of property and the petitioner has failed to show as to how its interest is involved in it (2) the suit has been filed wherein majority of the trustees are parties who sufficiently represented the case of the petitioner. ...”*
>
> **(Emphasis supplied)**

The observations *supra* were made in relation to a prayer for impleading “Tsurphu Labrang” as a party, the learned Trial Court had rejected the petition and the order was upheld by this Court.

13. Later on 07.07.2005, the Petitioner went on to file an application under Order I Rule 10 read with Section 151 of the Code of Civil Procedure, 1908 seeking to strike out the name of the Karmapa Charitable Trust from the array of parties who according to the Petitioner was improperly joined as Plaintiff No. 1. It was contended that a Trust is not a legal entity and the suit cannot be maintained in the name of a Trust i.e. the Karmapa Charitable Trust and, in fact, a Trust cannot sue or be sued in its own name, as a member of a firm that in the case of a Trust, the Plaintiff has to be a Trustee.

14. The Respondents No. 1, 2 and 3 objecting to the petition, had stated that this issue had already been decided by the Court of the learned District Judge, East and North when the preliminary objection regarding misjoinder of parties was taken up during the hearing of the injunction application. The preliminary objection including the misjoinder of parties was dismissed by the learned District Judge, East and North Sikkim which came to be assailed before the Hon’ble High Court in FAO No. 1 of 2002 which also disposed of the matter with the observations as already extracted hereinabove. They further contended that the issue of misjoinder of parties is sought to be raised by the Respondent No. 4 for the second time in the garb of a petition under Order I Rule 10 of the Code of Civil Procedure, 1908 in an attempt to once again raise the issue of maintainability of the suit. The Trial Court i.e. the District Judge, Special Division I referred to the decision of the learned District Judge, East and North and the judgment of

the Hon'ble High Court *supra* and held that the application under Order I Rule 10 of the Code of Civil Procedure, 1908 filed by the Defendant No. 3 raised the same question already decided and thus rejected the petition. However, Mr. Anmole Prasad, learned Senior Counsel, whose attention was drawn to the above orders and Judgment would contend that these decisions were prior in time to the Karmapa attaining 21 years of age. Now the circumstances differ from the circumstances at that particular time as the Deed of Trust, already referred to, specifies that on the reincarnation of Karmapa attaining the age of 21 years, he shall be the sole Trustee and none else.

15. What emerges from the entire gamut of facts and circumstances placed hereinabove is that the learned Trial Courts found that the Respondents No. 1, 2 and 3, in the capacity of Trustees, had *locus standi* to file the suit and that the suit was maintainable. This Order was not overturned or upset by this Court in FAO No. 01 of 2002 already extracted hereinabove. Further, this Court, in its Judgment in Writ Petition (C) No. 5 of 2003, has also observed that the findings recorded in the two orders have reached finality and are not to be disturbed. The Petitioner went on to file the petition under Order I Rule 10 of the Code of Civil Procedure, 1908, whose fate has been detailed *supra.* We may beneficially consider the issues framed by the learned Trial Court on 27.02.2002 and 28.12.2002. The issues framed on 27.02.2002 were as follows;

> *"(1) Whether the representatives of the plaintiffs on 2.8.1993 handed over the main key of the Sanctum Santo-rum* (sic) *of the Monastery at D.C.C, Rumtek to the Home Secretary Voluntarily or under duress and coercion which was then handed over to defendant No.3 and Tai Setu Rimpoche by the said Home Secretary?*
>
> *(2) Whether on 2nd August, 1993 the defendants 1, 2 and 3 deprived the plaintiffs, their rights to administer, manage and take care and keep the custody of the Schedule 'A' and 'B' properties and they also deprived the plaintiffs to conduct Puja and other religious ceremonies?*

(3) Whether the plaintiffs 2, 3 and 4 are under an obligation to possess, manage and administer the Schedule 'A' and 'B' properties in accordance with the instrument of Trust dated 23.8.1961 till the 17th Karmapa attains the age of 21 years?

(4) Whether the defendant No.3 and his inductees are liable to be removed from the suit premises?

(5) Whether the plaintiffs are entitled for status quo ante over D.C.C, Rumtek as it was on 2.8.1993?

(6) Whether any such Trust known as Karmapa Charitable Trust was established on 23.8.1961 by H.H.XVI Gyalwa Karmapa?

(7) Whether the properties mentioned in Schedules 'A' and 'B' to the plaint which are alleged to be the subject matter of the dispute vested in the Trust as its corpus and whether the plaintiffs are vested with the said properties?

(8) Whether the quorum for the Trust (plaintiff No.1) exists and whether the Trust was functional after its establishment?

(9) Whether the plaintiff No. 1 was vested only with an amount of Rs.2,51,473.64 and no other movable and immovable property including Schedule 'A' and 'B' properties?

(10) On 2nd August, 1993 the day of Yarney Ceremony was the situations at Rumtek Monastery tense due to the closer (sic) *of the main door of the Shrine Hall?*

(11) Who has been in possession of the key to the main door of the Shrine Hall since August 2nd, 1993?"

(Emphasis supplied)

16. The issues framed on 28.12.2002 were as follows;

"1. Whether the Suit as filed is maintainable in law?

2. Whether the suit is barred in view of the provision of Section 34 of the Specific Relief Act, 1963?

3. Whether the suit is barred for the non joinder of necessary parties?

4. Whether the suit has been properly signed, verified and instituted?

5. Whether the appointment of plaintiff No.2, 3 and 4 as Trustees of the plaintiff Trust valied (sic) *and binding in law?*

6. Whether the conduct of the plaintiffs disentitles them to any relief?

7. Whether the plaintiffs have any locus standi to file this suit?

8. Whether the suit is barred by the law of limitation?"

17. The issues thus are indicative of the irrepressible fact that other controversies raised in the suit need to be given a quietus. Issue No. 3 *supra* of 27.02.2002 is to be decided on merits and not by mere statement. Even if it is admitted that the Karmapa is 21 years and hence the sole Trustee, the matter is not as simplistic as the Petitioner would have us believe as the prayers in the plaint are manifold as also the issues settled for determination which require specific decision on merits.

18. As rightly pointed out by the learned Trial Court, it is not clear as to why the Petitioner has suddenly raised the issue of the 17th Gyalwa Karmapa having already attained the age of 21 years at this stage when, going by his own claims, the 17th Karmapa had attained the age of 21 years in the year 2006. It is no one's case that they were unaware of the date of birth of the reincarnation. Contrarily, it may be stated that no proof has been furnished before the learned Trial Court to establish that the Karmapa has attained the age of 21 years and the rules of evidence cannot be wished away and the matter decided in a slipshod manner on the persuasion of the Petitioner. In my considered opinion, the coming of age of the Karmapa as the sole Trustee has to be established by evidence. That having been said the contention of the Petitioner that the learned Trial Court misconstrued the petition under Section 151 of the Code of Civil Procedure, 1908 as an invitation to embark on the question of who the Karmapa was, is in my considered opinion, erroneously interpreted by the Petitioner. The learned Trial Court, in fact, has specifically stated as follows;

> *"...15. Further, it seems there is some controversy regarding the recognition of the 17th Gyalwa Karmapa. However, for the purpose of the present suit, this Court need not enter into the said controversy. ..."*

19. The reliance on the decision of ***J.M. Biswas*** *(supra)* by the Petitioner is misplaced as it is clear from the said facts and circumstances narrated therein that the dispute raised in the case lost its relevance due to the passage of time and subsequent events which had taken place during the pendency of the litigation. The dispute therein related to the election of office bearers of the South Eastern Railway Mens' Union. It was at a point of time when both the Appellant and the Respondent 1 were members of the said Union. Both had since ceased to be members of the Union. Further, successful subsequent elections had been held to elect office bearers and the office bearers so elected had been recognized by the management. In the said circumstances, the Hon'ble Supreme Court would observe that continuing the litigation would be like flogging a dead horse as such litigation irrespective of the result would neither benefit the parties in the litigation nor would it serve the interest of the Union. The facts in the instant matter are clearly distinguishable from the aforestated citation.

20. Reliance had also been placed on ***Jaspal Kaur Cheema and Another* vs. *Industrial Trade Links and Ors***.[8] which dealt with Section 116 of the Indian Evidence Act, 1872 i.e. estoppel of tenant wherein it is specified that a tenant cannot be allowed to approbate or reprobate at the same time. In my considered opinion, there has been no reprobation of what was stated by the Respondents concerning the age of the 17th Gyalwa Karmapa or that he was the sole Trustee on his coming of age. The contention of the Respondents No. 1, 2 and 3 is that a deeper look is required into the matter in view of the issues involved and the rules of Evidence.

21. In ***Shipping Corporation of India Ltd.* vs. *Machado Brothers & Ors***.[9] also relied on by the Petitioner, it was specifically held that if by the subsequent event if the original proceeding has become infructuous, *ex debito justitiae*, it will be the duty of the Court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. In the matter at hand, learned Counsel for the Petitioner would contend that as the Karmapas on either side have attained the age of 21 years, the Trustees are *functus officio* and in such event the suit does not survive as it cannot be continued in the sole name of the Trust which is not a juristic person. It is to be reiterated here that proof of age of the Karmapas is yet to be adduced and the proceeding cannot be said to have become infructuous in view of the issues involved.

22. In view of the above discussions, no error obtains in the order of the learned Trial Court.

23. Petition is dismissed.

24. No order as to costs.

25. Copy of this Order be sent to the learned Trial Court and its records be remitted forthwith.

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[8] 2017 (8) SCC 592
[9] 2004 (11) SCC 168

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