

IN THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Crl. A. No.14 of 2019

Deepak Rai
Son of late Bhim Bahadur Rai
Resident of Upper Vok
South Sikkim

... Appellant

Versus

State of Sikkim,
Represented by and through
Chief Secretary,
Government of Sikkim,
Tashiling, Gangtok.

... Respondent

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For Appellant : Mr. Zangpo Sherpa, Advocate
For Respondent : Mr. S.K Chettri, A.P.P
Date of hearing : 01.09.2020
Date of Judgment : 14.09.2020

JUDGMENT

(Arup Kumar Goswami, CJ)

This appeal is preferred under Section 374(2) Cr.P.C against the judgment dated 30.05.2019, whereby, while acquitting the appellant of the offence under Section 307 IPC, he was convicted under Section 326 IPC, and the Order of Sentence dated 30.05.2019, whereby he was sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs. 1000/-, in default of the payment of fine, to undergo further simple imprisonment of one month.

2. One Dhiren Rai had filed a First Information Report (FIR) before the Station House Officer, Namchi on 19.08.2017 stating that at around 01.00 AM, his friend Raja Mukhia had come to his place and had verbally informed him that one of their friends, namely, Pranay Rai, was assaulted by unknown person at Dambudara on 18.08.2017 at around 11.00 pm and as a result of the same he had sustained cut injuries on the right side of neck and that he had been referred to Central Referral Hospital (CRH), Manipal, Tadong, Gangtok. On receipt of the FIR, Namchi Police Station Case No.41/2017 was registered under Section 325 of the IPC and the case was endorsed to Sub-Inspector Sunil Rai for investigation. The investigation had commenced and the appellant was arrested on 21.08.2017. On conclusion of investigation, finding that a prima facie case under Section 325 IPC was made out against the appellant, charge-sheet was submitted on 27.11.2017.

3. During trial, the learned Chief Judicial Magistrate, South Sikkim, on being satisfied that, prima facie, there is material for the offence of attempt to murder under Section 307 IPC and accordingly, sent the records to the Court of learned Sessions Judge, South Sikkim, and accordingly, Sessions Trial Case No.03/2018 was registered.

4. After hearing the learned Counsel for the parties, finding, prima facie, materials against the appellant under Section 307 IPC, charge was framed accordingly. Charge being explained to the appellant, he pleaded not guilty and claimed to be tried. During trial, prosecution examined 12 witnesses while defence adduced no evidence. When examined under Section 313 Cr.P.C, the appellant claimed that he is innocent and that he had been falsely implicated.

5. PW-1 is the injured person. PW-2 is the brother of injured. PW-7 is Medical Officer of CRH, Manipal, Tadong, who had examined the injured on 19.08.2017. PW-8 and PW-9 are seizure witnesses of Exhibit-4. PW-9 was, however, declared hostile. PW-11 was the Station House Officer (SHO) of Namchi Police Station at the relevant time who had received the FIR. PW-12 is the Sub-Inspector of Namchi Police Station who is the Investigating Officer of the case.

6. PW-1, PW-2, PW-3, PW-4, PW-5 and PW-10 had attended a party organized in connection with opening ceremony of Third Eye Pub and Bar, Namchi. According to the prosecution, the incident occurred when PW-1 and PW-2 were returning home after attending the party. PW-6 is the Proprietor of Third Eye Pub and Bar.

7. The learned Sessions Judge recorded that evidence of PW-1, PW-2, PW-3 and PW-4 makes it clear that they had seen the appellant during the opening ceremony of Third Eye Pub and Bar and that evidence of PW-1 demonstrates that he was assaulted by the appellant with a broken beer bottle on his neck. It was also held that evidence of PW-1 with regard to injuries sustained by him is corroborated by the evidence of PW-2, PW-4 and PW-5. Reliance was also placed on the evidence of PW-7, who had proved one Wound Certificate (Exhibit-1), to conclude that injury sustained by injured was grievous in nature.

8. Having regard to the evidence of PW-1 and PW-2, the learned Sessions Judge, however, concluded that it cannot be said that the appellant had attempted to murder PW-1.

9. Mr. Zangpo Sherpa, learned Counsel for the appellant has submitted that prosecution has miserably failed to prove the guilt of the appellant. He has contended that there are material contradictions

in the evidence of prosecution witnesses going to the root of the matter. He submits that materials on record demonstrate that no Test Identification Parade (TIP) was conducted and that the appellant was identified for the first time in Court and therefore, conviction of the appellant on the basis of such identification is not permissible in law. He submits that benefit of doubt on account of faulty investigation ought to be given to the appellant and that having regard to the evidence on record, the appellant is entitled to acquittal. He has relied on the decisions of Hon'ble Supreme Court in the cases of *Sujit Biswas vs. State of Assam*, reported in (2013) 12 SCC 406; *P. Satyanarayana Murthy vs. District Inspector of Police, State of Andhra Pradesh and Another*, reported in (2015) 10 SCC 152; and *State of Uttar Pradesh vs. Wasif Haider and others*, reported in (2019) 2 SCC 303.

10. Mr. S.K. Chettri, learned Additional Public Prosecutor, Sikkim supports the impugned judgment and sentence and contends that guilt of the appellant was proved to the hilt and no case is made out for interference with the conviction and sentence of the appellant. He has relied on a decision of the Hon'ble Supreme Court in the case of *Thathanna vs. State of A.P*, reported in 1994 Crl.L.J 63.

11. I have considered the submissions of the learned Counsel for the parties and have examined the materials on record.

12. PW-1 had deposed that while he was returning from the party at around midnight along with his brother, PW-2, the accused suddenly hit him with a broken beer bottle on his neck, as a consequence of which he sustained deep cut injuries on his neck on the right side. There was profuse bleeding from the cut injuries and since flow of blood had not stopped, he went to District Hospital, Namchi along with PW-2 where his wound was treated but as flow of

blood did not stop, he was immediately evacuated to CRH, Manipal, Tadong. One injury was sutured at District Hospital but a bigger wound could not be managed there. He deposed that he could recognize the assailant (who was present in the Trial Court) as he had stabbed from a close range and as there was sufficient light from the street lamps and light coming from nearby houses. In his cross-examination, he had stated that he did not know the accused and his name and only after the incident he came to know about his name. He admitted that his statement under Section 161 Cr.P.C was recorded by the Investigating Officer after he was discharged from CRH, Manipal, Tadong. His categorical assertion was that the accused was alone during the relevant time. He had denied the suggestion that it was not the appellant who had assaulted him with a broken beer bottle.

13. PW-2, on the other hand, had stated that when he stepped out of the pub, he saw 7-8 boys near the stairs of the pub and they started picking up a quarrel with them without any rhyme or reason. 4/5 of them confronted him while remaining boys confronted his brother at a distance of about 5 to 10 meters and within 30-40 seconds of the confrontation, PW-1 came and told him that he had sustained cut injuries and saying that he proceeded towards Namchi Hospital. When PW-2 reached District Hospital after pacifying the boys, he found his brother lying in the Emergency ward. He also stated that on being asked, PW-1 had stated that the assailant was having long hair, a crap bandage over the head and he was wearing a sleeveless vest.

14. PW-3 is the informant and Raja Mukhia, based on whose information he came to lodge the FIR, had requested him to provide his vehicle to take the injured to CRH Manipal, Tadong. PW-3 stated

that he was not present at the time of incident and Raja Mukhia had told him that there was a fight between the injured and the accused in the pub. Raja Mukhia is not examined in this case. PW-3 stated that he had allowed Raja Mukhia to take his vehicle to take the injured to CRH Manipal, Tadong.

15. PW-4 stated that while he was in the second floor of the building he had seen the appellant having a heated discussion in the pub with one Bhaichung and that as a result of his intervention the matter subsided. PW-1 and PW-2 were then in the ground floor. He had heard some persons quarrelling in the floors below but he did not go there. He did not witness the fight between the accused and PW-1. On receiving a call from PW-2 he came to learn that that PW-1 was grievously hurt in a fight and then he had gone to Namchi Hospital.

16. PW-5 is a Painter by profession and he stated that he had heard a clamor and saw people in the pub running helter and skelter. He stated that some boys were quarrelling and in the process of separating the boys, he sustained injury on his nose, which started bleeding. After sometime somebody told him that PW-1 had sustained cut injuries in a fight. He further stated that he went to District Hospital, Namchi and had also accompanied PW-1 to CRH Manipal, Tadong.

17. PW-6, who is the proprietor of Third Eye Pub and Bar, stated that the function got over at 11.00 pm and at around 01.00 am on 19.08.2017 he heard that a quarrel had taken place between some boys of Wok village outside his building on the road.

18. PW-10 stated that he and PW-6 had some premonition that a quarrel might break out and therefore, they requested the persons present in the pub to vacate, so that they can close the pub.

After the people left, they had closed the pub and while he was on his way, he heard that a quarrel had taken place outside the pub.

19. PW-12 stated that when he examined PW-1, PW-1 had told him that he was assaulted by one Deepak Rai and accordingly, steps were taken to trace him and Deepak Rai was arrested on 21.08.2017. He stated that the accused had drunk beer and he had an argument with PW-1 inside the pub. PW-12 admitted that he did not conduct TIP and had also not seized the medical documents of Namchi District Hospital.

20. PW-7 had described the injuries on the person of PW-1. He stated that the injuries were grievous in nature and that PW-1, who was admitted on 19.08.2017, was discharged on 25.08.2017. PW-7, however, stated that when he had examined PW-1, he did not find stitches on PW-1.

21. The Hon'ble Supreme Court in a number of cases had observed that TIPs are meant for investigation purpose. The necessity for holding an identification parade can arise only when the accused persons are not previously known to the witnesses. The object of conducting the TIP is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime and to satisfy the Investigating Authority that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. The identification proceedings being in nature of test, TIP should be conducted, as soon as possible, after the arrest of the accused, so as to eliminate the possibilities of the accused being shown to the witnesses prior to the TIP. However, it must be borne in mind that identification tests do not constitute substantive evidence and

identification can only be used as corroboration of the statements made in Court.

22. In *Wasim Haider* (supra) Hon'ble Supreme Court had held that benefit of doubt arising out of faulty investigation accrues in favour of the accused.

23. In *Sujit Biswas* (supra) and in *P. Satyanarayana Murthy* (supra), the Hon'ble Supreme Court reiterated that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held that the court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused.

24. In *Thathanna* (supra), the Hon'ble Supreme Court upheld the conclusion reached by the High Court that the individual acts only should be taken into account when there was a free fight and some of the witnesses were injured as well as the conviction of accused nos. 3, 4 and 7 based on the above reasoning. The decision has no application to the facts of the present case.

25. When PW-1 had come to know the name of the accused and from who has not been disclosed by him. PW-2, on being confronted in cross-examination, had admitted that he had not given the description of the assailant in his statement under Section 161 Cr.P.C. PW-12 in his cross-examination also affirmed that PW-2 did not give the description of the accused who had attacked PW-1. The evidence of PW-2 indicates that he did not see the assailant. No other witness had stated that he had seen the appellant assaulting PW-1.

FIR was lodged at 07.00 am in the morning and apparently, identity of the accused was unknown till then. Wound Certificate (Exhibit-1) shows that PW-1 was admitted on 19.08.2017 and discharged on 25.08.2017. PW-1 categorically stated that his statement was recorded after his discharge from hospital. If PW-12 had come to know that the accused was Deepak Rai after the statement of PW-1 was recorded after 25.08.2017, how the appellant could have been arrested on 21.08.2017? There is a fundamental contradiction in the evidence of PW-1 and PW-2. While the stated version of PW-1 was that the accused was alone, PW-2 had stated that out of 7-8 boys while 4-5 boys confronted him, rest confronted his brother. The evidence of PW-1 that the accused was alone is contradicted by other witnesses, namely, PW-2, PW-3, PW-4, PW-5 and PW-6. PW-4 had only stated that the appellant had heated discussion with one Bhaichung. Assuming that the appellant was present in the pub that itself is not enough to hold that it was the appellant who had inflicted the injuries. PW-1 is conspicuously silent about the fight that other witnesses have deposed to.

26. There is contradiction between PW-1 and PW-2 as to how PW-1 had gone to District Hospital. Though PW-1 stated that one wound was sutured at District Hospital, PW-7 did not find any stitch on PW-1. He also did not say that PW-1 was referred by District Hospital. However, these aberrations will not have much bearing as the evidence on record establishes that PW-1 was assaulted on 18.08.2017 near the pub and it is not in dispute that PW-1 had suffered grievous injury.

27. However, there is no acceptable evidence on record to hold that the appellant was identified during the course of the investigation

and Mr. Sherpa is correct in submitting that he was identified in Court for the first time by PW-1. In *Mulla and Another vs. State of Uttar Pradesh*, reported in (2010) 3 SCC 508, the Hon'ble Supreme Court had held that when identification of the accused by witnesses is made for the first time in Court, it should not form the basis of conviction.

28. In view of the discussion above, I am constrained to hold that the prosecution, in the instant case, has failed to prove that it was the appellant who had caused grievous hurt to PW-1 and therefore, the conviction of the appellant under Section 326 IPC cannot be sustained. Accordingly, the impugned conviction and sentence of the appellant is set aside and the appellant is set at liberty. Bail Bond, if any, shall stand discharged.

29. Appeal is allowed.

30. Registry will send back the Lower Court Records.

Chief Justice

Avi/