# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 8th May, 2024

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**DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**
**THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

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Crl. A. No.18 of 2022

**Appellant** : Shaktiman Rai

***versus***

**Respondent** : State of Sikkim

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

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**Appearance**

Ms. Gita Bista, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the Respondent.

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# J U D G M E N T

Meenakshi Madan Rai, J.

***1.*** The victim, a man aged about forty-six years, a Government employee, was found lying on a cornfield, in Zeel, West Sikkim, at around 08.00 a.m., on 12-04-2021, in a critical condition with signs of brutal assault on his person. He held the Appellant responsible for the assault, which allegedly occurred on the night of 11-04-2021. On the morning of 13-04-2021, he succumbed to his injuries in the hospital. The First Information Report (FIR) Exhibit 2 was lodged on 12-04-2021, by PW-2 before the Kaluk PS, informing that his brother was assaulted near the Church, at Zeel, West Sikkim, at around 06.30 p.m. on 11-04-2021 by the Appellant. FIR No.05 of 2021, dated 12-04-2021 was registered against the Appellant, under Section 307 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), which was converted to Section 302 IPC, on the death of the victim. The Court of the

Learned Sessions Judge, West Sikkim, at Gyalshing, on examining the Prosecution witnesses and relying largely on the alleged dying declaration of the deceased, by the impugned Judgment, dated 29-06-2022, convicted the Appellant of the offence under Section 302 of the IPC and sentenced him to undergo imprisonment for life, with fine of ₹ 20,000/-(Rupees twenty thousand) only, and a default clause of imprisonment, in Sessions Trial Case No.05 of 2021 (*State of Sikkim* vs. *Shaktiman Rai*), on 29-06-2022.

***2.*** On investigation, it transpired that PW-6 the landlord of the house where the deceased was residing, informed his neighbor PW-5 Sumitra Rai, on the morning of 12-04-2021, that the victim had not returned home the previous night, therefore he intended to search for him. He requested her to tend to his cattle in the meanwhile. For that purpose, when PW-5 came walking towards the house of PW-6, she saw the deceased lying naked on the cornfield of PW-6. She called out to PW-6, who reached the place and saw the deceased. PW-6 carried the deceased who was smelling of alcohol, to his room and on his enquiry from the deceased about his absence from home the night before and the reason for his condition, the deceased told him that he had been physically assaulted by the Appellant. PW-6 then informed PW-7 Chandra Lall Limboo, the cousin of the deceased about the incident, who in turn informed his sons PW-3 Suresh Limboo and PW-4 Rikesh Limboo. PWs 3 and 6 also informed PW-2, the Complainant, the younger brother of the deceased. The deceased as per PW-2 was taken to the District Hospital, Namchi, South District, the same morning by him, accompanied by his sisters, PW-3 and one Indra Bahadur Subba, where, on the morning of 13-04-2021, he succumbed to his injuries. The deceased told PW-4

that the Appellant with whom he used to drink, had assaulted him.

***(i)*** On his plea of "not guilty" to the charge framed against the Appellant under Section 302 of the IPC, by the Learned Trial Court, he claimed trial, thus ten witnesses were examined by the Prosecution, on completion of which the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."). Consideration of all evidence on record by the Learned Trial Court culminated in the impugned Judgment and Order on Sentence. The Learned Trial Court while convicting the Appellant based its finding on the alleged statement of the deceased made to PWs 2, 3, 4 and 6, implicating the Appellant for the assault. Such a statement the Learned Trial Court opined, was a "dying declaration" and fell within the ambit of Section 32 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act"). The Learned Trial Court was also of the view that a mere lack of motive or enmity between the deceased and the Appellant or the failure of the investigating agency to recover and seize a (murder weapon) if any, would not suffice to reject the entire case of the Prosecution and discard the final words/statement of the deceased, who succumbed to his injuries in less than a day after he named the Appellant as the perpetrator.

***3.*** Before this Court, the arguments put forth by Learned Counsel for the Appellant was that the Prosecution was relying on the evidence of PWs 2, 3, 4 and 7 who are the family members of the deceased as well of PW-6 his landlord but the evidence of the Prosecution witnesses do not corroborate each other. As per PW-2, the deceased told him at the hospital that, he was assaulted by the Appellant, near the Church, when he was returning home and

that PWs 3, 4, 6 and another villager were present when such statement was made to PW-2. But as per PW-3 he spoke telephonically with the deceased on the morning of 12-04-2021 who merely told him that there was a fight. PW-3 requested PW-4 his brother to look up the deceased but PW-3 nowhere stated that PWs 2, 4, 6 and a villager were present when PW-3 was at the hospital. PW-4 also did not support the evidence of PW-2. As per PW-4, he met the injured deceased in his house, where the deceased told him that the Appellant had assaulted him. PW-4 did not mention his presence at the hospital. Contrary to the evidence of PW-2, PW-6 also made no mention of being present at the hospital with PWs 2, 3 and 4. PW-3 in fact in his Section 161 Cr.P.C. statement appears to be unaware of the Appellant being the assailant, and such statement was made by him for the first time in the Court. As per PW-4 the deceased pointed towards the direction of the house of the Appellant but no investigation regarding such direction was made, neither did the Investigating Officer (IO), PW-10 investigate the statement of PW-6 that the Appellant lived forty minutes away from his house. PW-5 was the first person to have seen the deceased on the cornfield but her deposition nowhere reveals that the deceased named the Appellant as the assailant. That, had the Appellant been the assailant there would undoubtedly have been injuries on his person, but the medical examination reveals no injuries on him neither has the Prosecution established the motive of the Appellant to commit the crime. That, the Learned Trial Court concluded that the statement of the deceased made to the PWs 2, 3, 4 and 6 was a dying declaration and convicted the Appellant without any evidence to link the offence to the Appellant, who

thereby deserves an acquittal. Hence, the impugned Judgment and Order on Sentence be set aside.

***4.*** *Per* contra, Learned Additional Public Prosecutor urged that there was no error in the Learned Trial Court considering the statement of the victim as one under Section 32 of the Evidence Act. That, in ***Rattan Singh*** vs. ***State of H.P.***[1], the Supreme Court has held that Section 32(1) of the Evidence Act renders a statement relevant when made by a person who dies, in cases in which the cause of his death comes into question. That, the deceased has categorically stated that the Appellant was the assailant and his statement was proximate to the offence committed. That, in ***Narain Singh and Another*** vs. ***State of Haryana***[2], the Supreme Court held that, the dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. Similarly, there was no reason for the deceased to have spoken an untruth, while pointing to the Appellant as the assailant, when he was on the verge of death himself. That, PWs 2, 3, 4, 6 and 7 have unequivocally fortified the Prosecution stand that the Appellant was the assailant and their statements were not decimated in cross-examination. Hence, the conviction and Order on Sentence suffers from no infirmity which thereby brooks no interference.

***5.*** We have considered the rival contentions canvassed *in extenso* and given due consideration to all the materials on record as well as the evidence and perused the impugned Judgment.

***6.*** The points that arise for determination herein are;

(i) The case being one of circumstantial evidence, was the

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[1] (1997) 4 SCC 166
[2] (2004) 13 SCC 264

Prosecution able to establish that the facts were consistent only with the hypothesis of the guilt of the Appellant.

(ii) Was the Learned Trial Court correct in basing its conviction solely on the alleged dying declaration of the deceased?

***7.*** Having examined the evidence on record it is indubitably established that there was no eye witness to the incident, the Prosecution case thus rests entirely on circumstantial evidence. It is no more *res integra* that in such a situation the evidence collated by the Prosecution must be consistent with the hypothesis of the guilt of the accused and the circumstances should be of a conclusive nature, establishing that the accused was the perpetrator of the offence and none else. While deliberating on this aspect, in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[3] the Supreme Court considered the parameters that are required to be proved in a case of circumstantial evidence to establish the Prosecution case and *inter alia* observed as follows;

> **"153.** ……..
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> ……in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the

[3] (1984) 4 SCC 116

> innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **154.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.**"**

***(i)*** It is trite that the Prosecution must stand on its own legs and cannot garner strength from the weaknesses of the defence. Besides, the cardinal principle of criminal jurisprudence is that a case can only be said to be proved beyond a reasonable doubt when there is explicit evidence against the accused and the conviction surely cannot be a moral one.

***8.*** In the backdrop of the above enunciated principles of law in the first instance, it is apposite to look at the evidence furnished by the Prosecution. Exhibit 7, proved by PW-9, Dr. O. T. Lepcha, is the autopsy report of the deceased. According to PW-9, he conducted autopsy on the body of the deceased on 14-04-2021 at 10.40 a.m which concluded at 11.55 p.m. The following are the observations of PW-9;

> **"**……The body was identified by the police. The face was swollen with bilateral black eye with conjuctival haemorrhage over the left side. There was bleeding from the nose, and left ear. Rigor mortis was present, post mortis staining was also present and fixed. There were no other injuries found over the body of the deceased.
>
> Internal Examination:-
>
> Head & Neck — The brain showed swelling with mild disfiguration of the brain matter. The brain showed presence of left temporal extradural haemorrhage (4x3.5x1 cm) with diffuse Sub Arachnoid haemorrhage of the brain.
>
> Chest — There was presence of fracture of the left-3, 4, 5, $6^{th}$ ribs with laceration of the lower lobe of lungs with around 700-800 ml of blood in the chest cavity.
>
> Heart — No abnormality detected.
>
> Abdomen — Presence of blood in the abdominal cavity around (800-1000ml).
>
> The spleen was lacerated (1x1.5cms), liver showed features of Cirrhosis with around 800 ml of fluid (red colored — Ascitic fluid mixed with blood) present in the abdomen.
>
> Genitals : No abnormality noted.
>
> Time since death :- 24 hours — 36 hours.
>
> Cause of Death: the cause of death to the best of my

> knowledge and belief is due to Intracranial hemorrhage (Left Subdural Hematoma) and hemmorrhagic shock due to laceration of spleen as a result of blunt trauma to the abdomen and skull. ……**"**

***(i)*** Thus, the evidence of PW-9 is revelatory of the fact that the deceased was subjected to severe assault, which affected him externally and damaged his internal organs as well. The cause of death as per PW-9 was a result of 'blunt trauma to the abdomen and skull'. It is not the Prosecution case that the perpetrator attacked the deceased from behind, in fact as per Exhibit 7, it is evidently a frontal attack as blunt trauma is seen in the abdomen and four of his ribs have been fractured. It stands to reason on the basis of Exhibit 7 that the person who inflicted the injuries would have used a weapon or his bare hands. The Prosecution has thrown no light on these aspects and admittedly there was no recovery of any weapon of offence. As a corollary to Exhibit 7, it thus becomes imperative to examine the medical report of the Appellant, Exhibit 5, proved by PW-8 the Doctor who examined him on 13-04-2021. PW-8 stated as follows;

> **"**…….. On 13.04.2021 I examined one Shaktiman Rai, **53 years**, son of Lt. Jit Bahadur Rai, resident of Lower Zeel, West Sikkim. He gave history of physical assault on 11.04.2021.
>
> On examination: His BP was 140/90 mmhg. PR 92 b/minute, SPO2-92-93% in the room air, temperature-afebrile. CVS-S1S2 heard, RS-bilateral air entry equal, GCS-E4V5 M6. PA-soft. Bowel sound heard.
>
> Impression- no apparent injury. No smell of alcohol in breath. He was fit for custody. ……**"**
>
> **[emphasis supplied]**

***(ii)*** On 14-04-2021, the Appellant was also examined by PW-1 Dr. Prabriti Rai, at 11.47 a.m. Her report *inter alia* is that on examination she found "……clothes neat, well behaved, smell of alcohol negative……." She also found him to be conscious and cooperative. She made no mention of any injuries on the body of the Appellant.

***(iii)*** Juxtaposing Exhibit 7 with Exhibit 5 and Exhibit 1, it appears that the Appellant who is aged about fifty-three years gave a "history of physical" assault to PW-8 but the Prosecution shed no further light on this statement and it is unclear whether he was assaulted or was the assailant and whether it involved the deceased. Any prudent person would reason that when a person assaults another, the assailant too is likely to sustain some injuries considering the extent and severity of the injuries on the victim. Assuming that the Appellant is the assailant, there are surprisingly no injuries on his person as vouched for by Exhibit 1 and Exhibit 5. The deceased may not necessarily have retaliated during the assault that was perpetrated on him but the force and strength employed by the assailant for injuring the other person would obviously have had physical repercussions on the assailant himself, which in the instant case as seen from Exhibits 1 and 5 are wholly lacking. Even if he used his bare hands for the assault, no injuries were detected by PW-1 and PW-8 on his hands to establish such signs. It is in fact the categorical statement of PW-8 that she did not find "any injury" on the body of the Appellant when she examined him. This circumstance in the first instance raises doubts about the veracity and the Prosecution case that the Appellant was the assailant.

***(iv)*** The matter being one of circumstantial evidence it would next be necessary to consider the evidence of the PW-10, the IO, to analyze whether his investigation linked the crime to the Appellant. PW-10 in his evidence *inter alia* stated as follows;

> "……..
>
> During the course of investigation, the following line of action were carried out:
>
> On 13.04.2021 the accused person was rounded up…… After his medical examination he was

> formally arrested in the instant case duly explaining his ground of arrest. Intimation regarding his arrest was given to his son Radeep Rai. ……
>
> ……..
>
> During through investigation it was learnt that the deceased was a habitual drunkard. He always used to wake up early and head straight towards nearby village in order to drink alcohol. The deceased being a teacher was later attached to BAC, Rinchenpong, West Sikkim under HRDD, Government of Sikkim due to his alcoholic behavior. As per the statement of Thendup Lepcha, it was learnt that the deceased used to even get stock of liquour in jars and bottled for consumption for himself.
>
> ……..
>
> Evaluating the facts and evidence collected, a *prima facie* offence defined under Section 302 IPC is made out against the accused for committing murder of the deceased Bhim Bahadur Subba.
>
> Hence I submitted the charge-sheet u/s 302 of IPC, 1860, against the aforesaid accused person for his trial.**"**

***(v)*** A bare reading of the evidence of the IO divulges no reason or clues whatsoever that prompted him to conclude that the Appellant was the assailant or what measures were employed by him during investigation to connect the offence to the Appellant.

***9.*** The undeniable basic tenet of criminal jurisprudence that holds steadfast is that, the onus lies on the Prosecution to prove its case beyond a reasonable doubt. While recapitulating the principles laid down in the case of ***Sharad Birdhichand Sarda*** (*supra*) and sifting through the evidence of the Prosecution to remove the chaff from the grain, we notice that the lone evidence that the Prosecution and the Learned Trial Court relied on was the alleged statement made by the deceased to the PWs 2, 3, 4 and 6 disclosing the name of the Appellant as the assailant. Such statement however is of no value to the Prosecution case until investigation reveals the context of the acquaintance of the Appellant and the deceased and thereby the reason that the Appellant would attack the deceased. More importantly the whereabouts of the Appellant on the night and time of the offence

have not been factored in at all by the IO, PW-10. None of the witnesses including the IO have lifted the veil on this aspect. Accordingly, in this circumstance the question of Section 106 of the Evidence Act kicking in also does not arise as the Prosecution is required to prove its case beyond a reasonable doubt and only thereafter the accused would have to establish his alibi if any. Apart for this fact, we also notice that the deceased allegedly disclosed the name of the Appellant as the assailant, to PWs 2, 3 and 4, who are his relatives but PW-5 made no statement regarding such disclosure although admittedly she saw him first. The other persons namely Binod Gurung, Mahakal Bahadur Gurung and Passang Lepcha who carried him along with PW-6 to his room as deposed by PW-6 find no mention in the Prosecution list of witnesses with no explanation furnished for such exclusion. The relationship between the assailant and PWs 2, 3, 4 and 6 or any reason or interest that could have propelled them to wrongly implicate the Appellant, has not been investigated into by PW-10. PW-6 stated that the next morning at 07.00 a.m. one Phu Tshering Lepcha, staff of the deceased, came to his house and showed him a picture of the deceased naked from his waist down on his mobile. No investigation has been made regarding this crucial aspect of who had taken the photograph, the place of such photograph and who circulated it to arrive at the crux of the case as the deceased was found in a state of undress on the cornfield. It is not the Prosecution case that the picture came to be shared by the Appellant. Thus, it is unfathomable as to how the Prosecution has concluded that the Appellant was the perpetrator *sans* tangible proof. The evidence points to the fact that the deceased was a known alcoholic raising the probability of him

having entered into a drunken brawl with a third person and not necessarily the Appellant. This angle too has been excluded from the parameters of the investigation. The deceased, it is claimed, was found by PW-5 at 08.00 a.m., in the cornfield and on her information, PW-6 carried the victim to his room. If that be so, then it is indeed surprising that PW-2, in the FIR, Exhibit 2 has specifically mentioned that the deceased was assaulted at "06.30 p.m. on 11-04-2021". How PW-2 came to be privy to such specific information ought to have concerned the IO, who unfortunately has turned a Nelson's eye to it and failed to delve into the source of such crucial information. PW-6 in his deposition also states that he had gone to look for the deceased the same evening i.e., 11-04-2021 but was not able to trace him, thus when he was not traceable that night it is incomprehensible as to how PW-2 learnt of the above circumstances of the time and place of the victim's assault. While sifting through the evidence further, we find that the place of occurrence is said to be near the Church, why and how the Appellant reached the cornfield of PW-6, the distance between the cornfield and said Church and the facts surrounding such circumstances have not been examined at all by PW-10. How PW-2 came to learn that the deceased was assaulted near Zeel Church, when the victim was lying on the cornfield is another mystery. The sisters of PW-2 and Indra Bahadur Subba were not cited as Prosecution witnesses although PW-2 mentions their presence at the hospital. In our considered view, the Prosecution while relying totally on the evidence of PWs 2, 3, 4 and 6, failed to establish the identity of the Appellant as the assailant or his involvement in the offence as apparent from the foregoing discussions.

***(i)*** While addressing the issue of motive, it is now settled law that the Prosecution need not establish motive in every case as motive is an unknown element or that the cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt (See *Shivaji Sahabrao Bobade and Another* vs. *State of Maharashtra,* (1973) 2 SCC 793). It is also held by the Supreme Court in ***Suresh Chandra Bahri*** vs. ***State of Bihar***[4] that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the Prosecution case. However, in ***Babu*** vs. ***State of Kerala***[5], the Supreme Court went on to observe that absence of motive, in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In our considered view, the Prosecution must put in context the involvement of the accused in the crime and his presence at the crime scene must be established by an unbroken chain of unimpeachable circumstantial evidence. The instant matter is bereft of such evidence.

***(ii)*** Now while addressing the issue of the Learned Trial Court having convicted the Appellant solely on the basis of the dying declaration of the deceased, it needs no reiteration that though the dying declaration must be approached with circumspection, for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law, that a dying declaration cannot be acted upon unless it is

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[4] (1995) Supp (1) SCC 80
[5] (2010) 9 SCC 189

corroborated (See *Munnu Raja and Another* vs. *The State of Madhya Pradesh* (1976) 3 SCC 104).

***(iii)*** In ***State of Madhya Pradesh*** vs. ***Dal Singh and Others***[6], the Supreme Court expounded that the law on the issue of dying declaration can be summarized to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. The Supreme Court has time and again categorically reiterated that there is no requirement of law that a dying declaration must necessarily be made before a Magistrate and that the statement of the injured in the event of his death, may also be treated as FIR. Moreover, the requirement of a certificate provided by a doctor in respect of such a state of the deceased, is not essential in every case. In ***Paras Yadav and Others*** vs. ***State of Bihar***[7], the Supreme Court was of the view that lapse on the part of the investigating officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. That, a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the Prosecution witnesses clearly establish that the deceased was conscious and was in a fit state of health to make the statement.

***(iv)*** In ***Muthu Kutty and Another*** vs. ***State by Inspector of***

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[6] (2013) 14 SCC 159
[7] (1999) 2 SCC 126

***Police, T. N.***[8], the Supreme Court *inter alia* observed that should the dying declaration be excluded it will result in miscarriage of justice as the victim generally being the only eye witness in a serious crime, the exclusion of the statement would leave the Court with a scrape of evidence. However, the Court further clarified that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness and the Court has to be on guard that the statement of the deceased was not the result of tutoring, prompting and a product of imagination.

***(v)*** The Supreme Court in ***Laxman*** vs. ***State of Maharashtra***[9], authoritatively pronounced that there is no requirement of law that dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind especially when the dying declaration was recorded by a Magistrate. It is the testimony of the Magistrate that the declarant was fit to make the statement, gains importance and reliance can be placed upon declaration even in the absence of the doctor, provided the Court ultimately holds the same to be voluntary and truthful. The Judgment does not lay down a proposition that medical evidence, even if available on record, as also the other attending circumstances should altogether be ignored and kept out of consideration to assess the evidentiary value of a dying declaration whenever it is recorded by a Magistrate (See *Nallapati Sivaiah* vs. *Sub-Divisional Officer, Guntur, Andhra Pradesh* (2007) 15 SCC 465).

***(vi)*** Now, being armed with the above principles of law, while examining the basis of the conviction i.e., the dying

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[8] (2005) 9 SCC 113
[9] (2002) 6 SCC 710

declaration, in the first instance, in this case it has to be noticed that the dying declaration has not been recorded either by a police officer, a Magistrate, a doctor or for that matter any other independent entity. It is an unrecorded oral statement allegedly made by the deceased to PW-2. In such a situation the statement requires deeper scrutiny more so when PWs 3, 4 and 6 who PW-2 claims were with him, when the statement was made fail to corroborate the evidence of PW-2 as PWs 3, 4 and 6 claim to have spoken with the deceased in his house and their statements do not reveal their presence at his bedside in the hospital along with PW-2. Considering the evidence as discussed hereinabove, it becomes doubtful as to whether the victim had indeed made any statement to PW-2 indicting the Appellant and detracts materially from the reliability of the alleged dying declaration. Had PWs 3, 4 and 6 vouched for the statement made by PW-2 regarding their presence in the hospital and hearing the statement made by the victim, this Court could have accepted it without reservation but in light of the vacillating evidence, the Court is required to be more circumspect in such acceptance of the Prosecution evidence.

***(vii)*** The deceased was evacuated to the Namchi District Hospital, on the morning of 12-04-2021. The doctor who first attended to the deceased and whose medical examination is of paramount importance to gauge the mental condition of the deceased, finds no place in the Prosecution evidence, neither do we find the name of any doctor who treated the victim. There is consequently no medical evidence to enable the Court to reach a finding that the victim was in a fit state of mind to make any statement, much less a dying declaration. In such a situation, while weighing in the evidence of PWs 2, 3, 4 and 6 that the

assault on the deceased was severe, it is open to speculation as to whether the deceased was in a fit mental condition to make a statement regarding his assault or whether it was a product of his imagination or hallucination, which has not been ruled out by a competent doctor, thereby requiring the Court to be circumspect while considering such evidence. This gains further importance for the reason that the deceased was an alcoholic as per PWs 6 and 10, giving rise to the above probabilities.

***(viii)*** In ***C. Muniappan and Others*** vs. ***State of Tamil Nadu***[10] the Supreme Court propounded that there is a legal obligation on the part of the Court to examine the Prosecution case *dehors* lapses in investigation and to find out whether the evidence is reliable or not and whether the lapses affected the object of finding out the truth. The conclusion of the trial cannot be allowed to depend solely on the probity of the investigation.

***(ix)*** Indeed, the fault of the investigating agency cannot allow the accused to run scot free but it also needs no reiteration that the statement made by the deceased should strike a prudent person as being genuine, truthful, untainted, wholly reliable and voluntary, in addition to the maker being in a fit medical condition. In view of the lacuna in the Prosecution case as found hereinabove, we are of the considered view that although Section 32 of the Evidence Act is an exception to the rule that hear-say evidence is not admissible, nevertheless, it would, in the facts and circumstances of the instant case as discussed above, be a travesty of justice to base a conviction on it. It was the bounden duty of PW-10 to have resolved the mystery as to how the incident panned out and how the Appellant was involved in it.

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[10] (2010) 9 SCC 567

***10.*** There has been no adherence to the principles propounded in ***Sharad Birdhichand Sarda*** (*supra*) and the Appellant cannot be convicted on vague conjectures, conviction can only be based on absolute conclusions. We cannot convince ourselves to conclude that the circumstances presented by the Prosecution are of a conclusive nature nor has it been shown that in all human probability the act was committed by the accused and none else. PW-10, the IO was required to scratch the surface and uncover possible connections that would have given the clear picture by connecting the dots. In the absence of such evidence, relegating the Appellant to a life of incarceration would singularly be a travesty of justice.

***11.*** For the foregoing reasons we are in disagreement with the findings of the Learned Trial Court.

***12.*** We accordingly set aside the impugned Judgment and the Order on Sentence.

***13.*** The Appellant be set at liberty forthwith.

***14.*** The Jail Authorities shall however examine their records to verify whether he is involved in any other matter before such release.

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

***16.*** Appeal allowed and disposed of.

***17.*** Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

***18.*** Copy of this Judgment also be made over to the PW-10, Investigating Officer of the case P.I. Yogesh Chettri.

***19.*** Copy of this Judgment be forwarded to the Jail Authority at the Central Prison, Rongyek, by e-mail for information

and necessary steps. A soft copy of the Judgment be also made over to the Prisoner by the Jail Superintendent.

**( Bhaskar Raj Pradhan )**
**Judge**
08-05-2024

**( Meenakshi Madan Rai )**
**Judge**
08-05-2024

Approved for reporting : **Yes**

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