



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : CrI.A. 9/2021

1:Smt. Maniya Taku,
represented by Shri Tai Tok
S/o Shri Kapa Taku,
Resident of Yarthepobe village under Pakke Kessang District, PO/PS Pakke Kessang,
Arunachal Pradesh

VERSUS

1:THE STATE OF AP
Represented by Public Prosecutor

2:Harang Taku
S/o Lt. Mrya Taku

residing at Yarthepobe village under Pakke Kessang District
PO/PS Pakke Kessang
Arunachal Pradesh

::BEFORE ::

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

For the appellants : Mr. T.T. Tara, Mr. T. Gadi, Mr. D. Loyi,
: Mr. J. Jini, Mr. G. Bam, Mr. G. Lollen,
: Mr. Kinnani L., Mr. T. Kamch, Advocates.

For the respondents: Mr. G. Tado, Addl. P.P., Arunachal Pradesh,

Date of hearing : 21.11.2022.

Date of judgment : 04.01.2023.

JUDGMENT & ORDER

(C.A.V.)

(Mrs. M. Thakuria, J)

Heard Mr. T.T. Tara, learned counsel for the appellant and Mr. G. Tado, learned Addl. P.P. for the State.

2. The memo of appeal has been filed by one Sri Tai Tok, the son of Smt. Maniya Taku. The said Maniya Taku is the accused and sentenced by the learned trial Court. However, it is noticed that the name of Sri Tai Tok is entered in the cause title as appellant. However, as the *de facto* appellant is Smt. Maniya Taku, the word "appellant" used in this judgment would mean and denote the "accused", i.e. Smt. Maniya Taku.

3. This appeal under Section 374(2) of the Criminal Procedure Code is preferred against the judgment and sentence passed on 04.09.2021 by the learned Sessions Judge, West Kameng District, Bomdila in Sessions Case No. 30/2017, thereby convicting the appellant, Smt. Maniya Taku under Section 302 of the Indian Penal Code and sentencing her to undergo imprisonment for life, out of which the appellant was directed to undergo rigorous sentence for a period of six months and to pay a fine of Rs.5,000/-, with default stipulation to further undergo further sentence of three months.

4. The prosecution case was set rolling by a complaint dated 28.03.1983 made by Sri Hadang Taku, *Gaon Bura* of village Yortepobe before the Deputy Commissioner, East Kameng District, Seppa, informing that his maid servant, namely, Smt. Maniya Taku (the appellant), daughter of Sri Rigso Taku of village Temyola, Ranghad Circle, Balijan had poisoned Smt. Yame Taku, who

died on 21.03.1983. On the same day, i.e. on 28.03.1983, the E.A.C. (Judicial), Seppa had forwarded the said written complaint to the Officer-in-Charge, Seppa P.S. to be treated as an FIR. Accordingly, Seppa P.S. Case No. 6/1983 was registered. During investigation, the dead body of the deceased was exhumed and postmortem was conducted by the Medical Officer. The viscera and the seized poison were sent for chemical examination by Forensic Science Laboratory (FSL for short). As per chemical examination report, the poison was identified as zinc phosphide, which was present in the viscera of the deceased. According to the prosecution, the poison was produced by the appellant and she had confessed her guilt. On completion of investigation, charge-sheet was submitted against the appellant.

5. It may be mentioned that at the said point of time, the judiciary was not separated from the Executive and thus, upon submission of the charge-sheet before the learned Executive Magistrate, East Kameng District, Seppa, the said learned Court took cognizance of the offence. Thereafter, charge was framed against the appellant on 08.01.1987.

6. The prosecution had examined 8 (eight) witnesses, viz., Sri Harang Taku (PW-1); Smt. Yesap Taku (PW-2); Sri Tado Taku, (PW-3); Sri Tsang Taku (PW-4); Sri Kapa Taku (PW-5); Sri Chama Tachang (PW-6); Dr. T. Saikia, Medical Officer (PW-7); Sri N.N. Gogoi, Executive Magistrate (PW-8). The appellant, Smt. Maniya Taku had examined herself as DW-1. In course of trial, the following documents were exhibited, viz., FIR (Ext.1); one bottle suspected to be poison, seized from Ringcho Taku (Ext.2); seizure list (Ext.3); dead body challan (Ext.4). The appellant, as accused, was examined under Section 313 Cr.P.C., and the appellant denied the charges against her and examined herself as DW-1.

7. The PW-1 had stated in his evidence-in-chief that Ringcho Taku was his brother, who brought the appellant to his house and the PW-1 then arranged her marriage with Tado Taku, his servant, from whom she had a son. It was stated that appellant developed illicit relationship with Kapar Taku, the brother of her husband, for which her husband left her. The deceased Yame Taku was the wife of Kapar Taku. He had stated that Yame Taku was vomiting blood from mouth and died. Thereafter, they performed *puja* and were planning to do *mangal* (*a type of local sorcery*) to find truth and on inquiry, the appellant had stated that she had administered to the deceased rat poison mixed with *apong* (local rice beer). He reported the incident to Sri R. Hajing, E.A.C. He had also exhibited his report (Ext.1) as well as his thumb impression (Ext.1/1). The police and doctor came to village and the police seized 1 bottle (Ext.2) from the house of Ringcho Taku and prepared seizure list (Ext.3), which contained his signature (Ext.3/1). His cross examination was deferred. It appears that the presence of the said PW-1 could not be procured for cross-examination.

8. PW-2, in her evidence in chief had stated that the deceased had died due to vomiting something black and her face had become bluish. She had also stated that after her death, the appellant had told that she had given black colour medicine used to kill rats, mixed with *apong* as the deceased was troubling her and the appellant wanted to live alone with her husband Kapa Taku. During cross-examination, her evidence could not be shaken.

9. PW-3 is the previous husband of the appellant. He had stated in his examination-in-chief that Ringcho Taku gave the appellant to me as my wife and he has a son with her. It was stated that the appellant developed relation with Kapor Taku, his brother, after which she was set at liberty and she became

the wife of Kapor Taku, who had the deceased victim as his wife. The appellant had mixed rat medicine with *apong* and gave to the victim, and she died due to vomiting. The colour of vomit was bluish and after death her colour was also bluish. The appellant had told that she had given rat medicine. The deceased was quarreling with her. She wanted to live alone with Kapa Taku. C.O., Doctor, Police and P.I. came to village and report was made. During cross-examination, his evidence could not be dislodged.

10. PW-4 resides about 100 yards away from the house of the appellant. In his examination-in-chief, he had stated that the deceased had told that she was given medicine by the appellant and she was dying. The appellant had also told that she had given rat killing medicine mixed in *apong* to the deceased and that she wanted to live with Kapu. During cross-examination, his evidence could not be dislodged.

11. PW-5 is the present husband of the appellant. He is referred to in different places as Kapa, Kapu, Kapar, and Kapor. He had stated in his examination-in-chief that deceased was his first wife and the appellant is his second wife. He had stated that the appellant had told him that the deceased was given medicine mixed with *apong*. He had stated that the appellant did not tell him why she had killed the deceased. He had also stated that the appellant was earlier wife of Tado Taku and he had quarrel with Tado Taku. In his cross-examination, he had stated that he, the deceased and the appellant were sleeping together and after some time, the deceased woke him up and said that she was suffering from stomach pain and was about to die and died on the next date. He had also stated that dispensary is located at Pakke-Kesang, which was one day's walk and that there was no one in the village who could give her medicine. The victim remained in bed during the day time and that he did not

tell the police that appellant had killed the deceased. He had stated that he did not know whether the appellant had given poison or how the deceased had died.

12. In respect of the evidence of PW-6, it is seen that only the form of deposition was filled up, but except his name and other particulars, he had stated nothing in his evidence-in-chief. His cross examination was declined.

13. PW-7 was the medical officer who had performed postmortem of the dead body of the deceased on 02.04.1983. He had stated in his examination-in-chief that rigor mortis had set in and body was partially decomposed and emitting foul smell and the face was blackish in colour, with segno-sanguineous fluid dripping from the mouth. There was no external injury and the scalp was decomposed with peeling of hairs. The scalp bone and vertebra were loosened and other bones were healthy. He had also stated that the stomach and its contents were partially decomposed. Portion of fondus and pelvic region was taken and preserved for chemical analysis. Small intestine and its contents was full of gas and partially decomposed. One small portion of small intestine was cut and preserved for chemical examination. He has detected to case to be of poisoning and the opinion was kept pending till report is received from chemical examiner. He had exhibited the postmortem report (Ext.2), his signature as Ext.2/1 and signature of DMO (Ext.2/2). He had also exhibited his signature on seizure list (Ext.3/2).

14. PW-8 had exhibited dead body challan (Ext.4) and his signature thereon (Ext.4/1). His cross-examination was declined.

15. Thereafter, the appellant was examined under Section 313 Cr.P.C. The appellant had stated that Harang Taku forcefully brought her to his house

and married her to Tado Taku and later on he passed away and then she married Kapa @ Kapar Taku, elder brother of Tado Taku. The appellant had denied having illicit relationship with Kapa @ Kapar Taku during lifetime of Tado Taku. The appellant had denied telling PW-1, PW-2, PW-3, PW-4 that she had administered rat poison mixed with *apong* to the deceased. She had stated that she did not remember disclosing any statement to PW-5. She also denied knowledge of post mortem report or exhuming of dead body as she was then in custody.

16. The learned trial court had accepted the evidence tendered by the PWs. The learned trial Court did not find any error in non-examination of the I.O. Although the chemical examiner's report was not exhibited and proved, by taking recourse to the provision of Section 294 Cr.P.C., it was held that the same was served to the appellant, and no objection was raised, the said report dated 08.04.1984 was accepted to be admissible in evidence as it was undisputed and uncontested document. The confessional statement made by the appellant was discarded because of the absence of certificate and/or memorandum of correctness at the foot of such statement. However, although it was observed that there was no direct evidence against the appellant, but owing to circumstantial evidence appearing against the appellant, as well as extra-judicial confession made by the appellant before the PWs, the learned trial Court had held that the same pointed out towards the guilt of the appellant. Accordingly, based on evidence and chemical examiner's report wherein poison was found in the viscera, the appellant was convicted and sentenced as indicated herein before.

Submissions of the learned counsel for the appellant:

17. The learned counsel for the appellant had submitted that while

framing charges against the appellant, she was not provided with any defence counsel and the appellant was also not informed about her right to be represented by an advocate. However, after framing of charges against the appellant, she was provided with a defence advocate. Accordingly, it was submitted that the admission of guilt, if there was any, was without any knowledge of the process to defend herself during trial. It was submitted that the Chemical examiner's report having not been exhibited, could not have been made the basis of conviction in the absence of any other direct evidence. It was also submitted that the so called extra-judicial confession before the PWs 1 to 5 was liable to be discarded as they were all interested witnesses and they all made similar statement, for which they must be deemed to be tutored witnesses.

18. In support of his submissions, the learned counsel for the appellant had referred to the following cases, viz., (1) *Subramanya v. State of Karnataka*, Crl. Appeal No. 242/2022, decided by Supreme Court of India on 13.10.2022, (2) *Sonu @ Amar v. State of Haryana*, (2017) 8 SCC 570, (3) *Raj Kumar Singh @ Raju @ Satya v. State of Rajasthan*, (2013) 5 SCC 722, (4) *Keshav Dutt v. State of Haryana*, (2010) 9 SCC 286, (5) *State of Haryana v. Ram Singh*, (2002) 2 SCC 426, (6) *Sakharam Shankar Bansode v. State of Maharashtra*, AIR 1994 SC 1594, (7) *The State of Punjab v. Jagir Singh & Ors.*, (1974) 3 SCC 277, (8) *Tulen Manki v. The State of Arunachal Pradesh*, Crl. Appeal (J) No. 2 (AP)/2020, decided by Division Bench of this Court on 19.04.2022.

Submissions of the learned counsel for the respondent:

19. The learned Addl. P.P. had also made elaborate submissions to support the impugned judgment and sentence. It was submitted that the extra-

judicial confession was voluntary, inspired confidence of the Court of its truth and was made by the appellant in fit state of mind. It was also submitted that in this case, the extra-judicial confession was proved just like other evidence and therefore, could be the basis of conviction. In this regard, reliance was placed on the case of *Sivakumar v. State by Inspector of Police, (2006) 1 SCC 714*.

20. It was submitted that the non-examination of the I.O. in this case was not fatal because the eight witnesses examined by the prosecution in Court were not confronted with their previous statement made before the police. Therefore, it was submitted that no prejudice was caused to the appellant in any manner. In support of the said contention, reliance was placed on the case of *State of Karnataka v. Bhaskar Kushali Kotharkar & Ors., AIR 2004 SC 4333*.

21. It was submitted that the hypothesis that the PW-1 to PW-5 were all interested witnesses and therefore, hostile to the appellant has to be discarded because their animosity with the appellant could not be culled out in course of cross-examination of those witnesses. In support of the said contention, reliance is placed on the case of *Sucha Singh & Anr. v. State of Punjab, (2003) 7 SCC 643*.

22. It was submitted that the confessional statement inspired confidence, as the same was not retracted at the earliest moment and therefore, although the learned trial Court had discarded the same, such statement could be the basis to affirm the conviction and sentence. In support of the said submission, reliance was placed on the case of *Shankaria v. State of Rajasthan, AIR 1978 SC 1248*.

23. It was submitted that PW-4 was an independent witness, who was not related to the deceased, but was residing in the village about 100 yards away from the house of the deceased. Therefore, his testimony about extra-judicial confession was required to be accepted. In support of the said submission, reliance was placed on the case of *Shravan Dashrath Datrange v. State of Maharashtra, (1997) 2 Crimes (HC) 47*.

REASONS AND DECISION:

24. Date of crime i.e. administration of poison not stated by any PW and not mentioned in the impugned judgment: The attention of the Court is drawn to the fact that except for a statement made in the explanation of charges recorded on 08.01.1987, that the appellant had administered poison mixed with *apong* (rice beer) on 19.03.1983, none of the witnesses have mentioned the date on which poison was allegedly administered by the appellant. Accordingly, in the impugned judgment of the trial Court, the date when the crime was allegedly committed has not been mentioned.

25. Inordinate delay of 38 (thirty eight) years in conducting the trial: In the present case in hand, the deceased was administered poison on 19.03.1983 and the victim had died on 21.03.1983. However, the impugned trial court judgment was passed on 04.09.2021. Thus, there has been an inordinate delay of $38\frac{1}{2}$ (thirty eight year six month) in concluding the trial. The dates relevant for determination of delay are as follows:-

- a. The deceased was allegedly administered zinc phosphide mixed with *apong* (local beer) on 19.03.1983 and she had died on 21.03.1983.
- b. By an order dated 20.06.1986, passed by the learned Assistant

Commissioner-cum- Judicial Magistrate First Class, Seppa found *prima facie* case against the appellant and the case was committed for trial to the learned Court of Sessions, Seppa.

c. The learned Deputy Commissioner, Seppa, who was then conducting trial, had examined the 8 (eight) witnesses during the period from 1987 to 1995. Be it mentioned that during those days, the judiciary was not separated from the Executive.

d. In the year 2002, the trial was transferred to the Fast Track Court, Yupia. However, there is no explanation on record as to why the trial was stalled and/or kept pending from 1995 to 2002. It is noted that the presence of the witnesses could not be secured during trial before the Court of the learned Addl. Sessions Judge, Yupia.

e. Thereafter, the trial was transferred to Bomdila. Accordingly, in the year 2005, the trial of the case was taken up by the Court of the learned Addl. Sessions Judge, Yupia holding Circuit Court at Bomdila. However, there was no progress in trial from the year 2005 to 2013.

f. The regular Sessions Court started functioning in the year 2013. However, the present case was taken up for trial on 17.08.2017.

g. The appellant was examined under Section 313 Cr.P.C. on 14.06.2021. She examined herself as DW-1 on 31.07.2021 and cross-examined and discharged on the same date. However, on 04.09.2021, the appellant (DW-1) was again examined by the Court. On the same date i.e. on 04.09.2021, the impugned judgment was delivered by the learned trial Court, hereby convicting the appellant.

26. *Irregularity in the re-examination of DW-1 on 04.09.2021:*

a. It is seen from the LCR that the last PW, i.e. PW-8 was examined during trial on 26.09.1995. Thereafter, the appellant was examined

under Section 313 Cr.P.C. on 14.06.2021. The appellant was asked whether she wanted to adduce evidence in defence, to which the appellant answered in a 'yes'. Thereafter, on 31.07.2021, the appellant examined herself as DW-1 and during her cross-examination, the appellant had explained that she had admitted to commit the offence, but it was admitted under pressure from the brother of the deceased.

b. Thereafter, on 04.09.2021, the appellant was once again examined by the learned Sessions Judge. On the same day, i.e. on 04.09.2021, judgment was delivered by the learned trial Court.

c. From the order-sheet, it is seen that the case was fixed on 31.07.2021 for examination of DWs. On examination of the appellant as DW-1, the case was fixed for judgment on 04.09.2021. Thus, for all purpose, the trial must be deemed to be concluded on 31.07.2021, after which the case was reserved for judgment. On the date of judgment, the Court once again examined the appellant purportedly in exercise of power under Section 281/313 Cr.P.C., as the said provisions are quoted on the heading of the printed form. The record of examination is as follows:-

“Q.1 PW-7, Dr. T. Saikia deposed that he is the seizure witness of seized poison which was recovered from the house of Ringcho Taku on your leading and identification of the seized poison of 5 gm in transparent bottle. Do you have anything to say?”

Ans. It is correct that the police seized 5 gm of suspected poison on my identification except they came for exhumation for the dead body of deceased.”

d. Nonetheless, once the examination of appellant was done under Section 313 Cr.P.C., and she had been examined as DW-1 and discharged, in the considered opinion of the Court, the appellant could thereafter, only have been further re-examined as per the mandate of Section 138 of the Evidence Act. In this case, as the Court had

exercised power under Section 281/313 Cr.P.C. to re-examine the appellant- accused, it must be held that the said re-examination on the date of delivery of judgment was only to fill up the lacuna.

e. There is no material on record to show that the appellant as DW-1 had been put to notice that she is being recalled as DW-1 for her re-examination. Thus, the appellant was caught by element of surprise, which in the considered opinion has vitiated the re-examination of the appellant (DW-1) on 04.09.2021.

f. The dead body challan was dated 02.04.1983 and thus, it is apparent that the dead body was exhumed on 02.04.1983. The seizure list in respect of bottle containing 5 gm suspected poison was prepared on 02.04.1983. The appellant, in course of her examination on 14.06.2021, in answer to question relating to evidence of PW-7, had stated that she does not know about the exhumation of the deceased and post mortem report as she was in custody.

g. The prosecution had not proved any memorandum of "leading to discovery", which is required to be made before an accused leads to discovery.

h. Therefore, after denying her presence during exhuming of dead body, an admission was extracted from the appellant to the effect that she had led to discovery and seizure of poison.

i. The prosecution did not seek re-examination of the appellant. Thus, the laches on part of prosecution to prove that it was the appellant who had led to recovery of poison was filled-up by the learned trial Judge, who appears to have taken over the dual task of a prosecutor and a judge at the same time.

under Section 313 Cr.P.C.:

a. It is seen that long questions relating to evidence of PW-1 to PW-8 was put to the appellant, which contained more than one suggestion. The questions were long because the gist of evidence of the PWs examined by the prosecution was asked by the Court in form of question. As the questions are long and complex, in the considered opinion of the Court, effective answers could not have been given by the appellant. Thus, the Court has to concur with the submissions made by the learned counsel for the appellant that the appellant has suffered prejudice. In this regard, the Court finds support from the case of *Jai Prakash Tiwari v. State of Madhya Pradesh, 2022 LiveLaw (SC) 658: 2022 Cr.L.J. 4060*. Paragraphs 19, 20 and 25 to 27, thereof are quoted below:-

“19. *In the case at hand, the alternate version put forth by the appellant-accused could not be ignored. Section 313 CrPC confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right, as a constitutional right to a fair trial under Article 21 of the Constitution. [See Reena Hazarika v. State of Assam, (2019) 13 SCC 289]*

20. *This Court in the case of Satbir Singh v. State of Haryana, (2021) 6 SCC 1, while emphasising upon the significance of Section 313 CrPC, has delineated the duty of the trial Court and held thus:*

‘22. It is a matter of grave concern that, often, trial courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice 'audi alteram partem', as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the court to question the accused fairly, with care and caution. The court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defence, since the inception of the trial, with due caution' (emphasis supplied)

25. In the present case, the courts below failed to scrutinize the defence version put forward by the appellant-accused in his Section 313 statement. The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. (See Asraf Ali v. State of Assam, (2008)

16 SCC 328]

26. The purpose of Section 313 CrPC is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial. A reasonable opportunity entails putting all the adverse evidences in the form of questions so as to give an opportunity to the accused to articulate his defence and give his explanation.

27. If all the circumstances are bundled together and a single opportunity is provided to the accused to explain himself, he may not be able to put forth a rational and intelligible explanation. Such exercises which defeat fair opportunity are nothing but empty formality. Non-fulfillment of the true spirit of Section 313 may ultimately cause grave prejudice to the accused and the Court may not have the benefit of all the necessary facts and circumstances to arrive at a fair conclusion."

Reliance of the learned trial Court on Chemical Examination report dated 08.03.1984:

28. The learned trial Court had based its judgment of conviction, amongst others, on the report of the FSL dated 08.03.1984. Although the said report dated 08.03.1984 was not proved by any witnesses by exhibiting it, the said report was read in evidence on the strength of the provisions of Section 293 and 294 of the Criminal Procedure Code. The provisions of Section 293 and 294 Cr.P.C. are quoted below:-

293. Reports of certain Government scientific experts.- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The court may, if it thinks fit, summon and examine any such expert as to the subject matter of his report.

(3) Where any such expert is summoned by a court and he is unable to attend personally, he may, unless the court has expressly directed him to appear personally, depute any responsible officer working with him to attend the court, if such officer is conversant with the facts of the case and can satisfactorily depose in court on his behalf

(4) This section applies to the following Government scientific experts, namely.

- (a) Any Chemical Examiner or Assistant Chemical Examiner to Government;
- (b) The Chief Inspector of Explosives;
- (c) The Director of the Finger Print Bureau;
- (d) The Director, Haffkine Institute, Bombay;
- (e) The Director Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State forensic Science Laboratory;

(f) *The Serologist to the Government.*

(g) *any other Government scientific expert specified, by notification, by the central Government for this purpose.*

294. *No formal proof of certain documents.- (1) Where any document is filed before any court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.*

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided that the court may, in its discretion, require such signature to be proved."

29. Thus, there is no doubt that the Chemical Examination report dated 08.03.1984 by the Director of Forensic Science, is a document within the meaning and scope of Section 293 Cr.P.C., which can be used as evidence in trial. But merely because of the provision of Section 294 Cr.P.C., in the considered opinion of the Court, the said report dated 08.03.1984 cannot be read as an evidence without some witness having exhibited the same. The Court would only have the power to dispense with the proof of signature of the authorities mentioned under Section 293(4) Cr.P.C.. However, such a document can be proved by any witness including I.O. because under the provision of Section 294 Cr.P.C., subject to fulfilling the prerequisites mentioned in Sub-Section (1) and (2) of Section 294 Cr.P.C., no formal proof of the document is necessary. In this case, from the impugned judgment and LCR, it does not appear that the said FSL report dated 08.03.1984 was entered in a list by the prosecution and the appellant or her advocate were called upon to admit or deny the genuineness of such document. On a perusal of the LCR, there is no order-sheet disclosing that an opportunity was given by the prosecution to the appellant to admit or deny the FSL report dated 08.03.1984, and that the appellant had orally or in writing had admitted or denied the genuineness of

such document. The learned Addl. P.P. could not show from the LCR that the notice of the appellant was brought to the chemical examination report dated 08.03.1984 of the viscera and part of small intestine of the deceased, which was conducted by the Forensic Science Laboratory.

30. The manner in which the report of the FSL dated 08.03.1984 has been relied upon by the learned trial Court, appears to have seriously prejudiced the appellant. The LCR has been examined with the assistance rendered by the learned Addl. P.P. Not to speak of compliance of the provision of Sub-Section (1) of Section 294 Cr.P.C., there is no order-sheet containing entry that the copy of the Report no. FSL.142/6420/ Tox-169/83 dated 08.03.1984 was furnished to the appellant before charges was explained to her on 08.01.1997 or furnished before the appellant was examined on 14.06.2021 under Section 313 Cr.P.C. Nonetheless, it may be mentioned that in the committal order dated 20.06.1986, a reference has been made to the said FSL report dated 08.03.1984. However, it is to be noted that the medical officer (PW-7) had clearly and unambiguously stated during his examination-in-chief that he had detected the case to be of poisoning and the opinion was kept pending till report is received from chemical examiner. Hence, the cause of death was not proved by the prosecution. Thus, on 02.03.1983, when the Medical Officer was examined as PW-7, the FSL report was very much available on record, yet the same was not proved by the prosecution through any witness. Hence, it is quite clear that while the appellant was examined under Section 313 Cr.P.C., the notice of the appellant was not brought to the contents of the Report no. FSL.142/6420/ Tox-169/83 dated 08.03.1984 forwarded by the Director of Forensic Science Laboratory, Assam to the Magistrate First Class, East Kameng District, Seppa. Therefore, the finding of guilt based on FSL report dated 08.03.1984 is not sustainable on facts and in law.

31. *Incorrect reading of confessional statement of the appellant, recorded on 03.01.1986, which does not vitiate the proceeding:* The confessional statement of the appellant was incorrectly read by the learned trial Judge. The appellant was brought before the Assistant Commissioner, Seppa on 03.01.1986 for the purpose of recording her confessional statement. In para 3 of the form of appended to the confessional statement, the learned Assistant Commissioner, Seppa had clearly recorded that the appellant was placed in charge of Sri Ropo Tachang, *Gaon Bura* of Yartepabe, Peon, Armed Police Constable and he had directed the appellant to wait in his Court giving time to reflect. In question no. 2 put to her as to why she wanted to make a statement, the appellant had replied as follows – “*I want to make a statement for early settlement of the case.*” Thus, (a), the appellant was placed under the custody of armed police; (b) the appellant was under an impression that if she gave a statement, the case would be settled. Thus, it is apparent that the appellant was not put to notice that she might be facing a sentence for death, or imprisonment for life, and fine. Moreover, the space provided for in page-3 of the printed form of confession was insufficient to record the entire statement of the appellant and therefore, in the bottom, there is a note “continued at page-5”. The remaining statement of the appellant, in handwriting, after page-3 is continued at page-5. At the bottom of page-5, there is a note “continued at page-4”. At page-4 is the certificate of the Magistrate that the statement was voluntarily made and contained a true account of her statement. Therefore, the confessional statement does have a certificate by the Magistrate, which was completely missed out by the learned Sessions Judge, perhaps because after four pages of printed form, the statement of the appellant is spilled over to page-5. Thus, the rejection of the confessional statement is not sustainable.

Erroneous reliability on the confessional statement of the appellant made before the Magistrate:

32. We have carefully examined the confessional statement of the appellant and we are disinclined to rely upon the said confessional statement of the appellant recorded on 03.01.1986 for three reasons. Firstly, the learned Magistrate has recorded in the said statement that the appellant was kept in the custody of armed police. Secondly, along with the armed police personnel, the appellant was also kept in custody of Sri Ropo Tachang, *Gaon Bura*. It is noted that during the examination of the appellant under Section 313 Cr.P.C., she had stated that she was forced by Sri Ropo Tachang to admit before PW-1 that she had administered poison to the deceased. Thus, the appellant was kept in the custody of a person who was one of the prosecution witness and therefore, not a neutral person, so far as it concerns the appellant. Thirdly, the appellant was not informed about the sentence which could be awarded to her for committing the alleged offence punishable under Section 302 IPC. This can be gathered from her answer against question no. 2, wherein the appellant had answered with an impression that by giving statement, her case would be "settled early". Therefore, the said confession, having been made under the impression that the same would lead to an early settlement cannot be said to be voluntary, rather, it can be said that the petitioner had given her confession in wrong faith. Therefore, the confessional statement cannot be said to be voluntary and cannot be acted upon, notwithstanding that the learned trial Court had discarded it on incorrect premise.

33. The learned Addl. P.P. had submitted that the confessional statement was not retracted by the appellant at earliest point of time. We do not find it fatal because the appellant had made the statement with an impression that on making such confession, the matter would be settled, and

perhaps on being so mislead, the appellant had not retracted her statement. We cannot ignore the fact that the appellant then resided in a very remote village from where even the nearest medical centre was a days' walk away. Therefore, under the distinguishable facts, the case of *Shankaria (supra)*, cannot be applied in the present case in hand, wherein the confessional statement was relied upon as it was not retracted earliest in point of time.

34. *Incorrect manner in which the I.O. and the then Director, FSL were presumed to be dead:* It is noted that in the order dated 10.02.2003, the trial Court had recorded that the I.O. of the case had expired. Without visiting the said previous order-sheet, the learned trial Court had issued summons on several occasions to the I.O., and then without any report, merely because more than about 38 years had passed, the I.O. as well as the Director FSL were presumed to be dead.

35. *Recovery of alleged poison from the house of Ringcho Taku:* It has already been mentioned herein before, that in her statement made under Section 313 Cr.P.C., the appellant had denied knowledge of post mortem report or exhuming of dead body as she was then in custody. The prosecution made no attempt to have the suspected poison analysed by FSL to show that the same poison was found contained in the viscera or small intestine of the deceased. The said Ringcho Taku, from whose house bottle containing suspected poison (Ext.2) was recovered, was not examined to prove that the appellant had taken some quantity of poison from the bottle seized by the I.O. Moreover, no memo prepared by the I.O. regarding "leading to discovery" of Ext.2 was proved. Therefore, the mere seizure of Ext.2 could not have been the basis of conviction of the appellant.

Extra judicial confession made by the appellant before the PW-1 to PW-5:

36. The examination-in-chief of the PW-1 had become liable to be expunged because his examination-in-chief was recorded on 12.10.1987. His cross-examination was deferred. There is no record that he was summoned to face cross-examination. Therefore, the extra-judicial confession alleged to have been made before PW-1 cannot be relied upon. P.W.2 and P.W. 3 were recalled for cross-examination and they were accordingly cross-examined on 12.10.87 through the help of interpreter. But, the signature of the interpreter is surprisingly taken on 07.12.87. Thus, reasonable doubt arises regarding the presence of the interpreter at the time of cross examination of P.W. 2 & P.W. 3 which were shown to have been recorded on 12.10.87. Further, prosecution could not corroborate or contradict the evidence of P.W. 4 where he claimed that he stated before I.O. that the accused made confession before him and thus, non-examination of I.O. is also fatal for the prosecution case and for which the benefit goes to the accused. Although PW-5 had stated in his examination-in-chief that the appellant had confessed before him of giving medicine mixed with *apong*, but he had admitted in his cross examination that he had not stated before the I.O. that the appellant had killed the deceased and he also admitted that he did not know whether the appellant gave poison or how the deceased had died. The PW nos. 1, 2, 3 and 5 are related witness. Therefore, the evidence of the said PWs cannot be relied upon as a proof of extra-judicial confession made by the appellant. Nonetheless, there is no other corroborative material or cogent evidence to nail the appellant of the crime of administering zinc phosphide poison to the deceased by mixing it with *apong* (local beer).

37. In this regard, the learned Addl. P.P. had placed reliance on the case of *Subramanya (supra) (para-47)*. Para-47 to 49 thereof is quoted below:-

47. *A three-Judge Bench of this Court in Sharad Birdhichand Sarda v. State of*

Maharashtra, (1984) 4 SCC 116, held as under:

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]:

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.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) *the circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793: 1973 SCC (Cri) 1033: 1973 Cri LJ 1783] where the following 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 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."

48. *In an Essay on the Principles of Circumstantial Evidence by William Wills by T. and J.W. Johnson and Co. 1872, it has been explained as under:*

"In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief, though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially inferential. There is no apparent necessary connection between the facts and the inference; the facts may be true, and the inference erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions. ?"

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy, The word "presumption," ex vi termini, imports an inference from facts; and the adjunct "presumptive," as applied to evidentiary facts, implies the certainty of some relation between the facts and the inference. Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only apparent, and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ, therefore, as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the reductio ad absurdum."

49. *Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.*

38. In his examination-in-chief, the PW-1 had stated that they had performed a puja and were thinking of doing *mangal*. We were informed at the Bar that people of the community of which the PW nos. 1 to 5 and the appellant belonged, perform a ritual. In the presence of community people and villagers,

the accused has to undergo the ritual, which may involve walking over fire, holding a very hot iron, or similar other procedure, which differs from village to village and differs from priest to priest performing the ritual. We were also informed that if the accused suffer any bodily pain in course of the ritual, he/she is deemed to have done the offence. We do not know about such ritual and do not vouch for its correctness. Nonetheless, if anything that we were informed about *mangal* is true, then it is apparent that the appellant was facing imminent danger of suffering bodily hurt had she not confessed her guilt before the members of her community and villagers. Hence, it cannot be said that the extra judicial confession by the appellant before the PW nos. 1, 2, 3 and 4 was voluntary. Therefore, the Court is unable to rely on the extra-judicial confession, as stated by the said PW nos. 1 to 4. On the aforesaid distinguishable facts of this case, the Court is of the considered opinion that the case of *Sucha Singh (supra)* would not help the appellant.

39. Thus, in the light of the ratio of the case of *Subramanya (supra)*, we are unable to accept the submissions made by the learned Addl. P.P. that on the basis of extra-judicial confession, the appellant was rightly held guilty, in total absence of any corroborative evidence. In the case of *Kashmira Singh v. The State of Madhya Pradesh, AIR 1952 SC 159*, the Supreme Court had observed that the confession of an accused cannot be made foundation of a conviction. The passage to that effect is quoted in para-58 of the case of *Subramanya (supra)*.

40. The learned Addl. P.P. had also relied on para-42 and 46 of the case of *Sivakumar (supra)*. As there are no convincing corroborate evidence against the appellant, and was not proved to be voluntary and in a fit state of mind, the said case do not help to sustain the conviction. Nonetheless, the said

paras are quoted below:-

“42. *In Mohan Lal Pangasa v. the State of U.P. [(1974) 4 SCC 607: AIR 1974 SC 1144], whereupon Mr. Sampath placed strong reliance, this Court held:*

"3. ... It is true that there are no direct witnesses to the actual murder. Even so, an impressive array of telling circumstances has, according to the Courts below, convincingly shown the accused to be guilty. Men are convicted not merely on direct evidence alone but also on circumstantial testimony. In the present case, the accused was the person last seen with the deceased; his conduct of running away when challenged and chased and crouching underneath a bogie when the rakshaks were about to run him down, his wearing clothes which were bloodstained, the recovery of the knife, Ex. 1, from his trouser pocket and his conduct in telling the rakshaks that he murdered his companion, are too overwhelming for any possible inference of innocence. Moreover, the accused led the police party to the discovery of the dead body which also has an incriminating impact."

* * *

46. *Yet again in State of Rajasthan v. Raja Ram, (2003) 8 SCC 180, it was stated:*

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility." [Emphasis supplied]

On non examination of I.O.:

41. The learned Addl. P.P. had placed reliance on the case of *Bhaskar Kaushali Kotharkar (supra)* on the point that non-examination of I.O. would not be fatal. Para 11 of the case was relied upon. The said para [extracted from (2004) 7 SCC 487] is quoted below

6. ...It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161, Cr.P.C or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161, Cr.P.C. In the present case, no such serious contradiction is pointed out in respect of the evidence of the important, eye witnesses PW-1, PW-2 and PW-10. So also the non-examination of head constable who recorded FI statement is not of serious consequence as PW-1 was examined to prove the fact that she had given the statement before the police. The learned Single Judge was not justified in reversing the order of the Sessions Court by holding that the non-examination of investigating officer and the constable who recorded the FI statement had caused prejudice to the accused.

7. The learned Single Judge did not consider the evidence of two eye witnesses and that of PW-10 in detail. The appeal was disposed of on technical grounds. PW-1 is none other than the wife of the deceased. PW-2 is a neighbour who happened to be at the place of incident for purchasing some grocery items. PW-1 deposed that respondents 1 to 4 and others came to her house at about 7/ 7.30 p.m. on 20-9-1993. First accused Bhaskar Kushali Kotharker and the 5th accused Dattaran Kushali Kotherkar dragged her husband and thereafter all the accused caused various injuries on his body. She identified these respondents and we do not find any infirmity in her evidence.

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11. In *Behari Prasad and others v. State of Bihar*, (1996) 2 SCC 317, this Court held that non-examination of the investigating officer is not fatal to the prosecution case especially when no prejudice was likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar*, (2000) 9 SCC 153, this Court held that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for prosecution was of no consequence and under such circumstance no prejudice had been caused to the accused by such non-examination.

42. However, it would be relevant to quote para-22 of the said case of *Behari Prasad (supra)*, referred in above cited case. The same is quoted below:-

22. It however appears to us that the entire diary should not have been allowed to be exhibited by the learned Additional Sessions Judge. In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidence of the eye-witnesses. Such evidences are in conformity with the case made out in F.I.R. and also with the medical evidence. Hence, for non-examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground

that the accused were deprived of the opportunity to effectively cross-examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial.

43. Thus, in the above referred cases of *Baskar Kushali Kotharkar (supra)* and *Behari Prasad (supra)*, the cases were proved by eye witnesses, and their evidence could not be contradicted and under such circumstances, the non-examination of I.O. was not considered to be fatal. However, in the present case in hand, not to speak of any eye witness, there is no corroborative evidence against the appellant. Therefore, in the considered opinion of the Court, the non-examination of the I.O. would be fatal to the prosecution.

44. Therefore, the appeal has to succeed and accordingly, this appeal stands allowed.

45. Ordinarily, the matter could have been remanded before the learned trial Court for a fresh trial. However, from 19.03.1983, the date of alleged commission of crime, about 39 years- 9 months has elapsed. The appellant had endured the trial for $38\frac{1}{2}$ years and therefore, we do not find any purpose for a further re-trial after lapse of such long time.

46. Hence, in light of the discussions above, the Court is inclined to pass the following:

ORDER

47. This appeal is allowed. Accordingly, the impugned judgment and sentence passed on 04.09.2021 by the learned Sessions Judge, West Kameng

District, Bomdila in Sessions Case No. 30/2017, thereby convicting the appellant, Smt. Maniya Taku under Section 302 of the Indian Penal Code and sentencing her to undergo imprisonment for life and to pay a fine of Rs.5,000/- is set aside and quashed.

48. Let the appellant be set at liberty forthwith, however, on furnishing bail bond for Rs.10,000/- with one surety of like amount to the satisfaction of the learned Sessions Judge, West Kameng District, Bomdila. The said bail bond will remain in force for a period of 6 (six) months from the date when such bond is submitted, and thereafter, the same shall stand discharged.

49. Before parting with the records, we direct the Registry to amend the cause title of appeal by incorporating the name of Smt. Maniya Taku, and show her to be represented by the present appellant, who has filed the appeal as the said accused is in jail. In the cause title of this order, we have referred Smt. Maniya Taku as appellant.

JUDGE

JUDGE.

Comparing Assistant