

GAHC010026482020



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

Case No.

Criminal Appeal No. 60/2020

Suman Biswas@ Sumanta Biswas
S/O Shri Santosh Biswas,
R/O Subra-Subri,
P.O. & P.S. Urang,
Dist.-Udalguri, Assam

.....Appellant

Versus

1. The State of Arunachal Pradesh and Anr.
Rep. by P.P., Arunachal Pradesh

2. Shri Limkon Mossang
R/O Borsatam Village
P.S. Manmow, Dist.-Changlang,
Arunachal Pradesh
Pin-792103

.....Respondents

BEFORE
HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the appellant(s) : Mr. M. Biswas, Adv.
Ms. M. Das, Adv.
For the respondent(s) : N.N.B. Choudhury,
Public Prosecutor, Arunachal Pradesh
Date of judgment : 11.08.2023.

JUDGMENT AND ORDER (CAV)

(Mridul Kumar Kalita, J)

1. This Criminal Appeal has been filed by the appellant Shri Suman Biswas @ Sumanta Biswas under Section 374 of the Code of Criminal Procedure, 1973 against Judgment and Order dated 18.12.2019 passed by learned Sessions Judge, Tirap, Changlang and Longding at Khonsa, Arunachal Pradesh in Khonsa Sessions Case No. 44/2019 convicting the present appellant under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life and to pay a fine of Rs. 10,000/- (Rupees Ten Thousand only) and in default of payment of fine to undergo further imprisonment for 2(two) months.

2. We have heard Mr. M. Biswas, learned counsel for the appellant and also heard Mr. N.N.B. Choudhury, learned Public Prosecutor, Arunachal Pradesh.

3. The facts relevant for adjudication of the present appeal, in brief, are as follows:-

i. That on 22.12.2016 at about 10:45 A.M., one Shri Limkon

Mossang lodged an FIR before Officer-in-Charge of Miao Police Station, in the district of Changlang, Arunachal Pradesh, *inter-alia*, alleging that the younger brother of the first informant, namely, Manthai Mossang who was an employee of the Government of Arunachal Pradesh and was posted in Government Middle School, Newton left his quarter on 21.12.2016 at about 8:00 A.M in his i10 Grand Car to attend his duty at Newton, but did not return till evening. It is also stated in the said FIR that a search was made to find out Manthai Mossang. However, he could not be traced out and his wife Smti. Nonnun Mossang had verbally reported a missing report at Miao Police Station. Later on the morning of 22.12.2016, at about 10:00 A.M., his dead body was found in his car near Tibetan Refugee Camp Tri Junction (T.R. Camp Tri Junction), Miao and it was alleged that it was a case of murder.

- ii. On receipt of the said FIR, Miao P.S. Case No. 39/2016 under Section 302 of the Indian Penal Code was registered and one Ms. Tome Modi, S.I. of Police was entrusted with the investigation of the said case. The present appellant was arrested on 24.12.2016 at 8:00 P.M and ultimately after completion of the investigation charge-sheet was laid against the present appellant under Section 302 of the Indian Penal Code.
- iii. On 31.07.2018, charge under section 302 was framed by learned Sessions Judge, East Sessions Division, Tezu Lohit district Arunachal Pradesh, against the present appellant and when the said

charge was read over and explained to him, he pleaded not guilty and claimed to be tried. The present appellant faced the trial remaining in custody

iv. During trial the prosecution side examined 8(eight) prosecution witnesses and exhibited 19(nineteen) documentary evidence and 1(one) material exhibit which were marked as Exhibit-1 to Exhibit-19 as well as material Exhibit-1(one) respectively.

4. Before we consider the submissions made by learned counsel for both the sides, let us go through the evidence of the prosecution witnesses which is available on record.

5.1 PW-1 Shri Limkon Mossang, who is also the first informant in this case has deposed that on 20.01.2016 he got information that his younger brother namely, Manthai Mossang has not returned back from his duty and at around 9:00 P.M., PW-1 was called by his sister, Ms. Gantam Mossang. He has further deposed that on 21.06.2016 PW-1 along with some of his relatives proceeded to Miao to the residence of his deceased brother where he saw his sister-in-law who informed her that she had not received any information about his brother and she had already informed the matter to police.

5.2 PW-1 has also deposed that he was surprised to notice that his sister-in-law was not having any trauma even though her husband had not returned back. Thereafter, PW-1 proceeded to Miao Police Station, where information was received that the vehicle of his brother was standing near Tibetan Refugee Camp Area and one dead body was inside the vehicle. PW-1 has further deposed that on receipt of the said information, a police team and one extra

Assistant Commissioner rushed to the spot and PW-1 also followed the said team. On reaching the said spot, PW-1 noticed that the vehicle belonged to his brother and his brother was inside the vehicle on the driver seat. Police opened the vehicle in his presence and he saw there was marked on his neck which showed that his neck was tied by the seat belt of the vehicle. He also saw blood stain on the abdomen area of the body and he also noticed mark of human being passing towards the jungle near the said vehicle. He further deposed that the police thereafter sent the dead body of his brother for post-mortem examination and after post-mortem examination, on 22.12.2016, the dead body was handed over to him and thereafter, same was taken to the village of the PW-1, where last rites of the deceased were performed. PW-1 has further deposed that on 23.12.2016, he again went to Miao Police Station and he was asked by the police to bring his sister-in-law to the Police Station for interrogation. Accordingly, he called his sister-in-law to the Police Station on 24.12.2016.

5.3 PW-1 has further deposed that in the Police Station, he came to know that police has arrested the present appellant who was a driver and had good relationship with his deceased brother and family members. PW-1 has further deposed that he also came to know that his sister-in-law was having a relationship with the present appellant.

5.4 He has further deposed that he was informed by police that the present appellant had killed his brother with a knife while returning from Tibetan Refugee Camp Area (T.R. Camp Area).PW-1 has further deposed that the present appellant had disclosed that he had thrown the knife and the mobile of

his brother in the jungle near the place of occurrence and as per the disclosure of the present appellant police has recovered the blood stained knife and the mobile of his brother from the jungle near the place of occurrence.

5.5 PW-1 has further deposed that he was informed by the housemaid of his brother, namely, Sumi Morah that the present appellant used to come to the house of his brother whenever his brother goes out and he used to lock himself inside the house of the brother of the PW-1 along with his son-in-law in the absence of his brother. PW-1 has also stated that the present appellant was having an extra marital relationship with the sister-in-law of the first informant and because of that reason, he had killed his brother.

5.6 During cross-examination PW-1 has stated that he has not seen the present appellant killing his brother. He has also stated that before the incident he has not seen the present appellant with his brother.

6.1 PW-2 Ms. Gantam Mossang has deposed that in the year 2016, she was a student of Class-X and she had seen the present appellant coming to the residence of her deceased brother and at that time she was not aware about any relationship between the present appellant and her sister-in-law. She has also deposed that on the night before her Class-XII examination while she was sleeping, one of her neighbour knocked the window and told her that some person is inside their residence and on that day her brother (since deceased) was not there. PW-2 has further deposed that when she went outside the residence of her brother, she saw the sleepers of the present appellant at the doorsteps. Thereafter, she knocked the bedroom of her sister-in-law, but she did not open the door. As PW-2 has further stated that as she had seen the sleeper

of the present appellant outside the door of her house, she came to know that he was there inside the bedroom of her sister-in-law, when her deceased brother was not there. After about two days of the said incident, her brother (since deceased) came back to the residence and she disclosed everything to her brother whatever she had seen.

6.2 PW-2 has further deposed that on 20.01.2016, when she came back to her residence, she did not find her brother. So she inquired her sister-in-law regarding whereabouts of her brother, who told her that the brother of PW-2 has gone to the school and he will return back at about 12:00 noon. She has further deposed that on that day whereabouts of her brother was not known and on the next day the dead body of her brother was found recovered.

6.3 During cross-examination, PW-2 has deposed that she had not seen any quarrel between the present appellant and her deceased brother and she had not seen the present appellant killing her deceased brother.

7.1 PW-3 Shri Duleswar Handique has deposed that he knows the present appellant as well as the deceased. He has stated that the deceased Late Manthai Mossang purchased a car and as he did not know how to drive, the present appellant used to come to the residence of the deceased for driving and for teaching him how to drive. He has also stated that the deceased earlier used to reside in the quarter which was next to his quarter. However, later on, he shifted to another colony and after 11 months of his shifting to the another colony, he came to know that Manthai Mossang was murdered.

7.2 During cross-examination, PW-3 has stated that he has not seen

accused persons killing Manthai Mossang.

8. PW-4 Smti Junali Gogoi has also stated that the wife of the deceased used to work with her in the same office and she does not know how the deceased died.

9.1 PW-5 Smti Nonnun Mossang, who is the wife of the deceased, has stated that she knows the appellant, who used to work as a driver of her husband. She has also deposed that the appellant taught herself as well as her Late husband how to drive. She has deposed that the appellant used to come to their residence and they had a good relationship with him.

9.2 She has also deposed that on the day of incidence, the appellant called her over phone and inquired about her husband and she informed him that her husband has gone to the office. She has stated that after her husband went to the office, she also left for her own office and when she was in the office her brother-in-law called her and asked her to receive him at Naoghat. At that time, PW-5 called the present appellant and inquired as to whether he can go to Naoghat for receiving her brother-in-law. However, the present appellant did not affirm whether he could go there or not. PW-5 has also deposed that while she returned back to her residence, she did not find her husband. Thereafter, she called her husband over mobile phone, but found her mobile phone in switch off mode. Thereafter, she left for practicing carol dance as it was Christmas time.

9.3 She has further stated that after coming back from practicing carol

dance to her residence, she found that her husband did not return till that time. She inquired her brother-in-law as to whether her husband returned. She inquired from her sister-in-law about her husband, who also answered in negative. She has also deposed that she also spoke to the present appellant to inquire as to whether he had seen her husband or their car to which the present appellant also answered in negative.

9.4 Thereafter, PW-5 called the Gao Bura of Namphai village and informed him that her husband has not yet returned. She has further deposed that she and other villagers searched for her husband, but they could not find her husband. She went to the Circle Officer Madam and informed her everything to her who advised her to file an FIR at the Police Station. Accordingly, PW-5 went to the Police Station and informed the matter to the police.

9.5 PW-5 has further deposed that on the next day morning, she again called the present appellant for his vehicle to search her husband and the present appellant replied that his vehicle is damaged and he is going to Jagoon for returning the same.

9.6 Thereafter, PW-5 went to the Police Station and police informed that they had traced out the car of her husband. Thereafter, PW-5 along with other people and police went to the place where the vehicle was traced out. On reaching the said place, PW- 5 saw the vehicle was parked near the road and the dead body of her husband was at the front seat near the driving seat. Thereafter, police brought the vehicle and the dead body of her husband to the Police Station and after completion of the post-mortem examination of the dead body, it was handed over to them and thereafter, last rites of her husband was

performed.

9.7 She has also deposed that police summoned her to the Police Station for recording her statement and she was also arrested as an accused on suspicion that she might be involved in the killing of her husband. However, PW-5 has deposed that she is not involved in killing of her husband rather she called the present appellant asking for his help to find out her husband. She has also deposed that her statement was also recorded under Section 164 of the Code of Criminal Procedure, 1973 which is exhibited as Exhibit-4.

9.8 Her cross-examination was declined by the defence side.

10.1 PW-6 Shri Apolo James Lungphi who has deposed that on 29.12.2016, he was serving as Extra Assistant Commissioner-cum- Judicial Magistrate First Class at the office of ADC, Miao and on that day he recorded the statement of the present appellant. He has deposed that the present appellant had confessed before him that he had killed the deceased Manthai Mossang by strangulating him by the seat belt of the vehicle and after strangulating him the present appellant had stabbed thrice on the deceased by the dao which was inside the vehicle. PW-6 has also deposed that on 03.03.2017, he had recorded the confessional statement of another accused, namely, Nonnun Mossang (PW-5) who confessed that she had an extra marital affair with the present appellant but she denied that she had any involvement in the killing of her husband. PW-6 had exhibited the confessional statement of Nonnun Mossang as Exhibit-4 and the confessional statement of present appellant as Exhibit-5.

10.2 During cross-examination, PW-6 has deposed that he followed the

procedure as per Section 164 of the Code of Criminal Procedure, 1973, while recording confessional statement. He has also stated that the accused person, namely, Suman Biswas (present appellant) was produced from judicial custody, Miao.

11.1 PW-7 Dr. Hensam Jongsam has deposed that on 22.12.2016, he was posted at CHC, Miao as Medical Officer and on that day, at about 4:00 P.M. the dead body was brought to the CHC for conducting post-mortem examination and the dead body which was identified to be of Late Manthai Mossang was brought to the CHC for post-mortem examination and the said post-mortem examination was conducted at 9:00 AM on 23.12.2016. PW-7 stated that he found following during post-mortem examination:-

“On examination, the dead body was identified as Lt. Manthai Mossang, male 35 yrs. There were lacerated wound on the base of left thumb 3cm X 1cm X muscle deep, there were two stabbed wound at left and right pelvic region at the lower abdomen. There were lacerated wound in left upper thigh. Bruise injury in left knee. There were multiple ligature mark on the front side of the neck from 1cm X .5 cm, 1cm X 15cm running parallel to each other about 3cm below the chin and stopping in right side of neck. There were darkening of skin at adjoining ligature mark on the neck.”

11.2 PW-7 has further deposed that though on examination he found that death was caused due to ligature the final result of death can be given only after doxological (*sic*) analysis of viscera. The post-mortem examination report was exhibited as Exhibit-6 by PW-7.

11.3 During cross-examination, PW-7 has stated that the stabbed injury was caused due to some pointed weapon and he was also of the opinion that since there was ligature mark the strangulation was done by rope like material.

11.4 PW-8 Ms. Tome Modi, who was the Investigating Officer of Miao P.S. Case No. 39/2016 has deposed that on 22.12.2016, she was posted at Miao Police Station as Sub-Inspector of Police. On that day, one Limkon Mossang (PW-1) had lodged an FIR alleging that the dead body of his brother Manthai Mossang was found near the road at T.R. Camp Area inside a car. She has further deposed that after registration of Miao P.S. Case No. 39/2016 under Section 302 of the Indian Penal Code, she was entrusted with the investigation of this case. She has further deposed that during investigation, she visited the place of occurrence and took photographs there. She also took the photographs of foot prints found at the place of occurrence. She has also deposed that finger print experts were called for recovery of fingerprints.

12.1 She has also deposed that hair samples were found in the car and the same was collected. She has also deposed that inquest was conducted over the dead body and later on, the dead body was forwarded of CHC, Miao and after post-mortem examination viscera, blood sample and hair of the deceased were collected for FSL examination. She has further deposed that the car from where the dead body was recovered was seized and brought to the Police Station. She has also deposed that the wife of the deceased was called to the Police Station and her mobile handset was seized and the Call Data Records (CDR) of deceased and his wife were obtained. PW-8 has further deposed that on analysis of the CDR, she found that the wife of the deceased was in constant

touch with the appellant. Accordingly, she apprehended the present appellant confessed before her that he committed the alleged offence.

12.2 She also deposed that she took the present appellant to the place of occurrence where he identified the foot prints and stated that the said foot prints belonged to him. She also deposed that on the disclosure and identification of by the present appellant she had also seized the shoe of the present appellant. She has deposed that during interrogation the present appellant had stated that while committing the crime he had thrown the Nokia Mobile handset of the deceased to the bushes near the place of occurrence. PW-8 has further deposed that the present appellant also stated that the dao which was used for stabbing was also thrown by him after the commission of crime. PW-8 has further stated that as per the disclosure, she took the accused to the place of occurrence and on his assertion, she recovered the Nokia Mobile handset of the deceased and the dao from the jungle near the place of occurrence.

12.3 She has also deposed that she has seized the cloths of the present appellant which were worn by him at the time of commission of offence. She has also stated that the seat belt was the weapon of offence for causing death of the accused.

12.4 PW-8 has also deposed that after obtaining the CDR of the phone number belonging to the present appellant which was found that he had some illicit relationship. It is also stated that the present appellant had admitted having illicit relationship with the wife of the deceased. PW-8 has further stated that he forwarded the present appellant to the Magistrate for recording his confessional

statement. Thereafter, on completion of the investigation, finding sufficient materials against the present appellant, she laid the charge-sheet against him under section 302 of the Indian Penal Code.

12.5 However, PW-8 has deposed that the seized materials were forwarded for FSL examination, but no reports were received by her. She has exhibited the confessional statement of the present appellant as Exhibit-5 and the disclosure statement of the present appellant as Exhibit-8 and she has also exhibited the seizure memo of dao as Exhibit-13 and seizure memo of the hair and finger prints of the present appellant as Exhibit-16. She has also exhibited one material exhibit, one compact disc containing photographs of the place of occurrence as Material Exhibit-1.

12.6 During cross examination, PW-8 has stated that the present appellant had confessed before her as well as before the Magistrate regarding commission of murder by him. She has also stated that during the time of recording the statement of the accused (present appellant) was in judicial custody and his statement was recorded as per her application.

13. During his examination under Section 313 of the Code of Criminal procedure, 1973, the appellant has pleaded his innocence and has denied the incriminating testimony of the prosecution witnesses which was against him. He has denied the fact of having any illicit relationship with the wife of the deceased. He has also denied making any disclosure statement. While answering to the question no. 15 put to him during his examination, the appellant has stated that his confessional statement was recorded by the Magistrate by threatening him and he was severely assaulted by the police

before his confessional statement was recorded. Though, the appellant had stated during his examination under Section 313 of the Code of Criminal Procedure, 1973 that he was to adduce the evidence one Junali Sonowal as defense witness, however, it appears no defense witness has been examined during the trial.

14. Mr. M. Biswas, learned counsel for the appellant has submitted that though the prosecution case is mainly based on the confessional statement made by the present appellant, which is exhibited as Exhibit-5 and disclosure statement of the present appellant which is exhibited as Exhibit-8, however, he submits that neither the confessional statement was recorded as per law nor the disclosure statement fulfills the mandate of law and therefore, he submits that the learned trial Court erred in coming to the conclusion of guilt of the present appellant on the basis of the said evidence.

15. Learned counsel for the appellant has submitted that though the present appellant was shown to be arrested by police on 24.12.2016 at 8.00 pm as per the arrest memo, however, the PW-1 had stated in his deposition that when he visited Miao Police Station on 23.12.2026, he came to know that the appellant was already arrested, hence, he submits that the appellant was arrested even prior to 24.12.2016. Thereafter, he was produced before learned Magistrate on 25.12.2016 and four days of police remand was sought, which was granted by the learned Magistrate with a direction to produce him again on 29.12.2016. It is submitted by the learned counsel for the appellant that the appellant was produced before the Magistrate on 29.12.2016 at 11.00 am and learned Magistrate directed him to be produced again at 4.00 pm for recording his confessional statement on the same day. Accordingly, at 4.15 pm on 29.12.2016, the appellant was produced by the Investigating Officer (PW-8)

before the Magistrate for recording his confessional statement. Thereafter, fifteen minutes of reflection time was allowed to the present appellant before recording his statement and at 4.30 pm, the confessional statement of the present appellant was recorded.

16. Learned counsel for the appellant has submitted that though the appellant was kept in police custody for a period of five days prior to producing him before Magistrate for recording his statement, however, only fifteen minutes of reflection time was given to him prior to recording his confessional statement. Learned counsel for the appellant has also submitted that though only fifteen minutes time was given to the petitioner for reflection, learned Magistrate, namely, Shri Apolo James Lungphi (PW-6) has wrongly recorded in Exhibit-5 i.e., confessional statement form that the present appellant was allowed reflection time which was equal to or more than the period for which he was in police custody as apparently only 15 minutes reflection time was given whereas, the present appellant was in police custody for about 5(five) days.

17. Learned counsel for the appellant has submitted that in the instant case proper reflection period was not granted to the present appellant and he was directly produced from police remand where he was there for last five days and only fifteen minutes was afforded to him, hence, he was not free from police influence when his confession was recorded.

18. Learned counsel for the appellant has also submitted that entire confessional statement of the present appellant, which is exhibited as Exhibit-5 has been recorded in English language and there is no mention in Exhibit-5 as to in which language the procedural safeguards against making confession were explained to the present appellant. Learned counsel for the appellant has submitted that the appellant is not an illiterate person which is the discernable

from fact that only thumb impression appears to have been given where the place for putting signature of the accused is there in the confessional statement. Learned counsel has also submitted that during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant had retracted the confession made by him on the ground that the same was obtained by threatening him and by subjecting him to torture during police custody.

19. It is submitted by the learned counsel for the appellant that under the facts and circumstances of the present case and the manner in which the confessional statement of the appellant was recorded, it may not be regarded as a voluntary confession and the conviction based on such confession is liable to be set aside.

20. In support of his submission, learned counsel for the appellant has cited the ruling of Hon'ble Supreme Court of India in "***Shankariya Vs. State of Rajasthan***" reported in "***(1978) 3 SCC 435***", wherein it was held that the amount of reflection time is given to the accused before recording his confessional statement depends on facts and circumstances of each case, however, the Magistrate recorded the confessional statement must be satisfied that the confession has been made voluntarily. Learned counsel for the appellant has also cited rulings of this Court in (1) "***Kamal Hazarika Vs. State of Assam***" reported in "***2013 (2) GLT 953***" (2) "***Khagen Buragohain Vs. State of Assam***" reported in "***2014 (1) GLT 507***" (3) "***Bitupan Bora Vs. State of Assam***" reported in "***2021 0 Supreme (Gau) 391***" and (4) "***Guddu Tati Vs. State of Arunachal Pradesh***" reported in "***2019 (4) GLT 312***", wherein this Court observed that sufficient time for reflection should be given before recording the confessional statement of an accused.

21. The learned counsel for the appellant has also submitted that otherwise

also there are discrepancies in the confessional statement vis-a-vis the other evidence available on record i.e. as per confessional statement the body of the deceased was on the seat adjacent to the driver's seat whereas, as per the evidence PW-1 and the inquest report the deceased was found in the driver's seat of the vehicle and secondly, as per the confessional statement the body of the deceased was kept in a leaned behind condition so that others cannot notice it, whereas as per inquest report the seat was found straight. Thirdly, as per the confessional statement the appellant stabbed thrice in the abdomen region of the deceased, whereas as per the post-mortem examination reports only two stabbed injuries were found on the abdomen.

22. The learned counsel for the appellant has thus submitted that the confessional statement was not voluntary without and it was recorded without affording adequate reflection time to the present appellant and thus not admissible and thus not safe to rely upon in absence of other corroborating evidence.

23. As regards the disclosure statement which is exhibited as Exhibit-8, learned counsel for the appellant has submitted that the person who has been shown to have signed as witness in the disclosure statement namely, Shri L. Tesia has not been examined by the prosecution side and as such an adverse inference under Section 114 illustration (g) of the Indian Evidence Act may be drawn. It is also submitted that the disclosure statement has not been properly recorded as no date and time has been mentioned in the disclosure statement and the space from the date and time in the Exhibit-8 has been kept blank, thereby raising doubt about its credibility. Learned counsel for the appellant has also submitted that the dao which was seized was recovered from a jungle near the place of occurrence which is an open space and accessible to anyone,

hence, so far recovery is concerned much importance may not be attached to it. In support of his contention, learned counsel for the appellant has relied on ruling of Supreme Court of India in “**Kora Ghasi vs. State of Orissa**” reported in “**(1983) 2 SCC 251**”. It is also submitted by learned counsel for the appellant that though two witnesses, namely, Limkon Mossang and Buka Mossang were shown as seizure witness in Exhibit-13, however, the prosecution side has not examined Mr. Buka Mossang. It is also submitted by learned counsel for the appellant that though, the dao recovered from jungle was stated to be the weapon of offence, no such dao was exhibited by any of the prosecution witness during trial and from the said ground itself the conviction is liable to be set aside. Learned counsel for the appellant has submitted that though PW-1 has deposed that blood stained dao was recovered from the jungle, however, no forensic laboratory report has been produced by the prosecution side, to connect the recovered dao with the alleged offence and hence, no inference may be drawn against the appellant even if said dao has been recovered on the basis of the disclosure statement made by the appellant. To support his contention, learned counsel for the appellant has cited a ruling of Hon’ble Supreme Court of India in “**Sk Yusuf Vs. State of West Bengla**” reported in “**(2011) 11 SCC 754**”, wherein it was held as follows:

“The nature of the admissibility of the facts discovered pursuant to the statement of the accused under [Section 27](#) of Indian Evidence Act, 1872 is very limited. If an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused.”

24. Learned counsel for the appellant has also submitted that though the Investigating Officer has stated in her deposition that hair samples were also collected from the car as well as of the appellant, blood samples and wearing apparels of deceased and the wearing apparels and shoes of the appellant, finger prints from the place of occurrence, photographs of the footprints, seat belt of the driver seat of the car, Nokia Mobile hand set were collected, however, no FSL report or any other evidence has been produced to connect the present appellant with the alleged offence and hence, it is submitted by the learned counsel for the appellant that the prosecution side has failed to prove the charge under Section 302 of the Indian Penal Code against the present appellant beyond reasonable doubt and therefore, the conviction on the present appellant in the impugned judgment is liable to be set aside.

25. On the other hand, Mr. N.N.B. Choudhury, learned Public Prosecutor, Arunachal Pradesh has submitted that the learned trial court correctly convicted the present appellant on the basis of his confessional statement and disclosures statement and other evidence produced by the prosecution side and the finding of conviction of the learned trial court does not warrant any interference by this Court.

26. It is submitted by learned Public Prosecutor that PW-5, who is the wife of the deceased as stated in her testimony that on the date of incident the appellant her over telephone and inquired as to where her husband is and she informed him that he has gone to office. Learned Public Prosecutor also submits that the testimony of PW-8 to the effect that from analysis of call detail record (CDR) of the telephonic conversation between the wife of the deceased threatened appellant shows that they had some illicit relationship. Learned

Public Prosecutor submitted that the above testimony was not demolished by cross-examining the aforesaid witnesses and hence, said facts are taken to be established and same constitute incriminating circumstance which when conjointly considered with other confessional statement of the appellant only leads to the conclusion of guilt of the present petitioner.

27. Learned Public Prosecutor also submits that PW-6 who exhibited the confessional statement of the appellant as Exhibit-4 has stated during his cross-examination that he has followed the procedure as per Section 164 of the Code of Criminal Procedure, 1973, while recording the statement and accused person, namely, Suman Biswas was produced from judicial custody and no suggestive question was put to him by the defence side neither any further cross-examination was done by the defence side to demolish his testimony. Hence, his testimony could not be disbelieved. Learned Public Prosecutor submits that as the Judicial Magistrate himself deposed that the appellant was produced from judicial custody before recording his testimony and as he was not cross-examined on this aspect, there is no basis for taking any other view in this regard. Learned Public Prosecutor has also submitted on perusal of Exhibit-5 itself, it appears that no injury was found on the appellant when he was produced before the learned Judicial Magistrate First Class and it also appears that the appellant has himself stated to the PW-5 that he was detained in Police custody for 20 hours and no force or threat was applied by him during such custody. Learned Public Prosecutor submits that there is nothing on record to suggest that the confessional statement of the appellant is not voluntary or it was recorded under any threat or duress. Learned Public Prosecutor has also submitted that the present appellant retracted his confession belatedly only at the stage of his examination under Section 313 of the Code of Criminal

Procedure, 1973, however, the defence side has not put any suggestion to any of the prosecution witnesses specifically to PW-6 and PW-8 regarding any threat or duress for recording his confessional statement.

28. Learned Public Prosecutor has also submitted that the disclosures statement of the appellant where he gave information as to where the weapon of offence has been kept was duly recorded by PW-8 and same was duly proved also. It is further submitted that PW-8 was also not cross-examined regarding disclosure statement and PW-8 had also stated that at the time of recording of confessional statement of the appellant, he was in judicial custody. Learned Public Prosecutor has submitted that as there was an illicit relationship between the appellant and the wife of the deceased to which the deceased objected to, which was the motive for killing of the deceased by the appellant. Learned Public Prosecutor has also submitted that though there may be some lapse on the part of the Investigating Officer, same is not fatal to the prosecution's case. The main thrust of the argument of the learned Public Prosecutor was that the defence side has been unable to demolish the prosecution case during cross-examine of the prosecution witnesses.

29. Learned Public Prosecutor, in support of submissions made by him has cited a ruling of this Court in "***Aswini Kalita and Ors. –VS- Kismat Ali (Dr.) and Ors.***" reported in "**2023 3 GLT 252**" wherein this Court had discussed on various aspects of confessional statement and has observed that if a confession is found to be voluntarily made and is truthful conviction can be based on it, even if it is retracted. Learned Public Prosecutor also cited a ruling of Hon'ble Apex Court in "***Devi Singh –VS- State of Rajasthan***" reported in "**(2005) 10 SCC 453**" to show that if the Magistrate followed the legal formalities while recording the

confession and if the confession is corroborated by other evidence conviction may be based on same. Learned counsel has also submitted ruling of this Court in “**Rajiv Phukan and Another Vs. State of Assam**” reported in “**2009 (2) GLT 414**” to impress upon the probative value of the disclosure statement made by the appellant. Learned Public Prosecutor also cited a ruling of Hon’ble Supreme Court of India in “**Bodhraj @ Bodha and Others Vs. State of Jammu and Kashmir**” reported in “**(2002) 8 SSC 45**” wherein it has been observed that if on the basis of disclosure statement a discovery of fact is made same become reliable information which may be used by the prosecution side. To show that no fix time for reflection is mandated in law and in a given circumstance even fifteen minutes of reflection time may be sufficient before recording confessional statement, learned Public Prosecutor relied on ruling of Hon’ble Supreme Court of India in “**Shankariya Vs. State of Rajasthan**”(Supra). Learned Public Prosecutor has also cited ruling of Hon’ble Supreme Court of India in “**Manoharan Vs. State by Inspector Police, Variety Hall Police Station, Coimbatore**” reported in “**(2020) 5 SSC 782**” to show that even if confession is treated as retracted still the conviction can be on the strength of original confession, if there are corroborated evidence. Learned Public Prosecutor has also cited ruling of Hon’ble Supreme Court of India in “**Bheru Singh Vs. State of Rajasthan**” reported in “**(1994) 2 SSC 469**” to show that retracted confession may be used for convicting the accused if caution envisaged by Section 164 of the Code of Criminal Procedure, 1973, where properly administered to the accused before such confession was recorded. Learned Public prosecutor also relied upon a ruling of Hon’ble Supreme Court of India in “**State of Tamilnadu Vs. Kutty @ Lakshmi Narasimhan**” reported in “**(2001) 6 SSC 550**” where it has been observed that merely because a judicial confession is retracted by its maker, it

does not become unreliable, if it is otherwise found to be voluntarily and truthful. Learned Public Prosecutor has also relied upon a judgment of Orissa High Court in “**Kadraka Sitana and Another Vs. State**” reported in “**1975 SSC Online Ori 111**” to impress upon the probative value of judicial confession and extra judicial confession. Learned Counsel has also cited a ruling of this Court in “**Ahon Wangsa Vs. State of Arunachal Pradesh**” reported in “**MANU/GH/1076/2022**” where it has been observed that if a confessional statement is recorded after complying with the procedure requirement laid down in Section 164 of the Code of Criminal Procedure, 1973 same may not be discarded merely because of the fact that the accused during his examination under Section 313 of the Code of Criminal Procedure, 1973, has merely feigned ignorance about recording of such confessional statement. Further, to show that merely due to defective investigation the conviction of the appellant may not be interfered with, learned Public Prosecutor has cited a ruling of Hon’ble Supreme Court of India in “**Veerendra Vs. State of Madhya Pradesh**” reported in “**(2022) 8 SSC 668**” and “**Yogesh Singh Vs. Mahabeer Singh and Other**” reported in “**(2007) 11 SSC 195**”.

30. We have considered the submission of learned counsel for both sides and have gone through rulings cited by learned counsel for both sides as well as the evidence available on record meticulously.

31. On perusal of the impugned judgment, it appears that learned trial Court in paragraph No. 43 of the impugned judgment has stated that it found nothing to disbelieve that the confession made in the instant case was voluntary. Thereafter, learned trial Court arrived at the finding of guilt of the present appellant mainly on the basis of confessional statement and disclosure

statement made by the appellant.

32. As the conviction of present appellant is based mainly on the confessional statement made by him, hence, let us first of all, examine as to whether the confessional statement made by the present appellant and recorded by PW-6 was voluntary and free from any influence of police. Hon'ble Supreme Court of India in "***Dara Singh vs. Republic of India***" reported in "**(2011) 2 SCC 490**" has observed as follows:

"64. The following principles emerge with regard to Section 164 CrPC:

(i) The provisions of Section 164 Cr.P.C must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the

conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence."

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement.

33. Thus, it appears from the above observation made by Hon'ble Apex Court that affording sufficient time for reflection to the accused by the Magistrate before he makes any confessional statement is necessary, so as to ensure that the statement so made by the accused is made voluntarily. The Magistrate who records the confession is duty bound to ascertain the voluntariness of the maker before he records such a statement and affording sufficient time for reflection is an essential element to ensure such voluntariness.

34. As, Hon'ble Supreme Court of India has observed in "***Shankariya Vs.***

State of Rajasthan”(Supra) that there is no inflexible rule regarding the time to be given to the accused for reflection before recording his confession and it depends on facts and circumstances of each case, hence, let us examine as to whether under the facts and circumstances of the present case, sufficient time for reflection was afforded to the appellant before his confessional statement was recorded by the PW-6 so that it may be ascertained as to whether the appellant had made the confessional statement voluntarily or not.

35. Learned Public Prosecutor has submitted that the defence side has not been able to demolish the testimony of prosecution witness by cross-examining them or by adducing any evidence in rebuttal and therefore, the Court is bound by the evidence on record. On perusal of the depositions of prosecution witnesses, we are also of the opinion that the prosecution witnesses have not been effectively cross-examined by the defence side. Some of the witnesses are not even cross-examined, and even those witnesses who were cross examined were asked one or two questions only. Considering the nature of cross-examination of the prosecution witnesses, it appears that the present appellant was not properly defended during his trial. However, we are of the considered opinion that courts are not bound to accept whatever the witness depose merely because the testimony remains uncontroverted. Courts may discard even an uncontroverted oral testimony or other evidence if it otherwise finds the evidence to be unacceptable on some valid grounds.

36. Though, on perusal of Exhibit-5, it appears that it is mentioned therein by the Magistrate who recorded the confessional statement that the appellant was in Police custody for twenty hours, however, if we peruse the order-sheets maintained in Miao P.S. Case No. 39/2016, which is available on

record, it appears that the present appellant was arrested on 24.12.2016 at about 8.00 pm and on the next day, i.e., on 25.12.2016, he was produced before learned Magistrate who remanded him to police custody for four days up to 29.12.2016. It also appears that on 29.12.2016, the present appellant was produced before learned Magistrate that at 11.00 am. who directed him to be produced again at 4.00 pm. Accordingly, the appellant was again produced by Smti. T. Modi, SI of Police (Investigating Officer) before learned Judicial Magistrate First Class, Miao at 4.15 pm and he was given reflection time for fifteen(15) minutes under the supervision of one Shri Ram Bahadur, ALC and thereafter, his confessional statement was recorded at 4.30 pm.

37. Thus, it is apparent that though the appellant was under police custody for five days, i.e., from 24.12.2016 to 29.12.2016 and till the time he was produced before the learned Judicial Magistrate First Class, Miao by the Investigating Officer of case, he was under police custody. Though, it was incumbent on the part of the learned Magistrate to ensure compliance of the provision of Section 164 of the Code of Criminal Procedure, 1973, not only in form but also in essence, the perfunctory manner in which the statement of the appellant has been recorded is apparent from the fact that though the appellant was produced from Police custody after five days of Police remand, it has been stated in the confessional form that he was in Police custody for only twenty hours. Further, even if it is assumed that he was in police custody for twenty hours (though, he was in Police custody for five days), it has been stated by the Magistrate in the form for recording confession that the appellant was placed under the supervision of Sri Ram Bahadur, ALC for reflection from *1615 hrs to 1630 hrs, which is equal to or more than the period for which he was in police custody*, which is apparently a wrong statement recorded therein.

38. Further, though, the learned Public Prosecutor has pressed hard to impress upon that as PW-6 as well as PW-8 have stated in their testimony that the appellant was in judicial custody when his confessional statement was recorded and the same has not been controverted during cross-examination by the defence side, hence, no procedural illegality has been committed in recording of confessional statement, however, it is apparent from record that the present appellant was in judicial custody only for fifteen (15) minutes before recording of his confessional statement. As till the moment when the appellant was produced before the learned Magistrate at 4.15 pm on 29.12.2016, he was in police custody since last five days before such production, we are of the considered opinion that affording only fifteen minutes reflection time to him before recording his confessional statement is not adequate time to ensure that he was completely free from any possible influence of the police in whose custody he was there for last five days prior to recording of such confessional statement. We are therefore, constrained to hold that the confessional statement made by the present appellant cannot be treated to the voluntarily made and hence, same cannot be relied on for arriving at the finding of guilt of the present appellant.

39. It also appears that though the present appellant has put his thumb impression in the filled up form of the confessional statement which is exhibited as Exhibit-5, which implies that he is an illiterate person, however, his confession was recorded by PW-6 (Extra Assistant Commissioner-cum-Judicial Magistrate First Class) in English language. There is nothing, on record, to show that the appellant understands English language. Neither there is any endorsement made in the Exhibit-5 by the PW-6 to show that the statutory cautions as provided under Section 164 of the Code of Criminal Procedure,

1973, were explained to the present appellant in the language understood by him. Nor there is any endorsement in Exhibit-5 by the PW-6 which shows that after recording the confessional statement of the present appellant in English, same was explained to him in the language understood by him before he was asked to put his signature/thumb impression to it. To ensure that the accused understand the statutory cautions provided under section 164 of the Code of Criminal Procedure, 1973, same should be communicated to him only in the language understood by him. Similarly, we are of the view that to ensure the voluntariness of the maker of the confessional statement, after recording of the confessional statement same should be explained to the maker in the language understood by him and an endorsement to that effect should be made in the confessional statement by the Magistrate recording the confessional statement.

40. After discarding the confessional statement, let us now examine as to what other material remains from which the finding of guilt of the present appellant could be sustained.

41. As regards disclosure statement is concerned, which is exhibited as Exhibit-8, even if we believe that a dao was recovered on the basis of information given by the present appellant from the jungle near Tibetan Refugee Camp (place where the car in which the dead body of the deceased Manthai Mossang was found), which is a open space accessible to all, said dao was not exhibited by any of the witnesses in the Court during trial. Further, as the confessional statement is discarded for the reasons stated hereinbefore, and as no forensic report of the said dao has been adduced as evidence by the prosecution side or for that matter no other evidence was adduced to show that

the recovered dao was used as a weapon of offence, we find that there is no evidence connecting the recovered dao with the crime alleged to have committed by the alleged offence.

42. Hon'ble Supreme Court of India in "***Sk Yusuf Vs. State of West Bengla***" (***Supra***) has observed that "*if an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused*". Thus, in absence of any evidence connecting the dao, which was recovered on the basis of a information given by the present appellant, with the crime alleged to have been committed by the present appellant, no adverse inference may be drawn against him merely on the basis merely on the basis that the dao was recovered on the basis of his disclosure statement.

43. Further, it also appears that the Investigating Officer (PW-8), during the course of the investigation had seized the clothes and shoes of the present appellant (Exhibit-14), seat belt of the car (Exhibit-15) hair samples and finger prints of the present appellant (Exhibit-16). We have also discussed herein before that the PW-8 (Investigating Officer) has also stated during her testimony that she had also collected the hair samples which were found in the car and also finger experts were called for recovery of finger prints from the place of offence. It is also stated by the PW-8 that photographs of the footprints found at the place of occurrence were also taken. However, it appears that no forensic report has been exhibited or produced, during the trial, to show that the hair samples found in the car from the place of occurrence tally with the

hair samples of the present appellant or that the finger prints collected from the place of occurrence tally with the finger prints of the present appellant. In absence of any evidence to connect the seized materials with the appellant to show that he was present at the place of occurrence, no adverse interference may be drawn against the present appellant. Mere collection and seizure of certain articles from the place of occurrence and other places by the Investigating Officer during the stage of investigation, without producing any evidence, during trial to show that how the materials collected by the Investigating Officer connect the present appellant with the crime alleged to have been committed by him, is not sufficient to draw any adverse inference against the present appellant.

44. The prosecution case is based wholly on the confessional statement made by the present appellant and on the circumstantial evidence as there is no eye-witness to the alleged incident. We have already discussed in foregoing paragraphs that due to not affording of sufficient time for reflection to the present appellant before his confessional statement was recorded, the confession made by the present appellant cannot be regarded as voluntary confession and hence same has been discarded by us. Further, we have also discussed that as the dao, which was recovered, was not produced during trial and exhibited by any of the witness and no evidence was produced to connect the recovered dao with the crime alleged to have been committed by the present appellant, no adverse inference can be drawn merely because of the fact of recovery of a dao from the Jungle near the place of incident. Moreover, the prosecution side has also failed to adduce any forensic or any other evidence which connects the forensic materials collected from the place of occurrence with the present appellant to show that he was present at the place

of the alleged offence. Though, we do agree that mere defective investigation may not, in itself, be a ground to absolve the present appellant, however, the prosecution side, in a criminal trial, based on circumstantial evidence, has to fully establish the circumstances on which it relies. However, for the reasons stated in the foregoing paragraphs, we are of the considered opinion that the prosecution side has failed to fully establish the circumstance which only leads to the conclusion of the guilt of the present appellant. We are, therefore, of the considered opinion that the present appellant is entitled to get the benefit of doubt. We are also of the considered opinion that learned Trial Court erred in arriving at a finding of guilt on the basis of tainted confessional statement of the present appellant and on the circumstances which were not fully establish by the prosecution side in the trial.

45. In view of above discussion, we give benefit of doubt to the present appellant and set aside the impugned judgment of conviction against the present appellant. The appellant be set at liberty forthwith if his detention is not required in connection with any other case.

46. It also appears that though the present appellant has put his thumb impression in the filled up form of the confessional statement which is exhibited as Exhibit-5, which implies that he is an illiterate person, however, his confession was recorded by PW-6 (Extra Assistant Commissioner-cum-Judicial Magistrate First Class) in English language. There is nothing, on record, to show that the appellant understands English language. Neither there is any endorsement made in the Exhibit-5 by the PW-6 to show that the statutory cautions as provided under Section 164 of the Code of Criminal Procedure, 1973, were explained to the present appellant in the language understood by

him. Nor there is any endorsement in Exhibit-5 by the PW-6 which shows that after recording the confessional statement of the present appellant in English, same was explained to him in the language understood by him before he was asked to put his signature/thumb impression to it. To ensure that the accused understand the statutory cautions provided under section 164 of the Code of Criminal Procedure, 1973, same should be communicated to him only in the language understood by him. Similarly, we are of the view that to ensure the voluntariness of the maker of the confessional statement, after recording of the confessional statement same should be explained to the maker in the language understood by him and an endorsement to that effect should be made in the confessional statement by the Magistrate recording the confessional statement.

JUDGE

JUDGE

Comparing Assistant