

GAHC010081522023



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

**Case No. : I.A.(Crl.)/427/2023**

LILA CHETRY  
S/O LATE JITT BAHADUR CHETRY  
RESIDENT OF VILLAGE DHEKIAJAN  
PS DIGBOI DIST. TINSUKIA  
ASSAM  
786171

VERSUS

THE STATE OF ASSAM AND ANR.  
REPRESENTED BY PP ASSAM

2:SRI MILON THAPA  
S/O LATE PRATAP THAPA  
RESIDENT OF KHERJAN NEPALEE GAON  
PS DIGBOI  
DIST TINSUKIA  
ASSAM 786171

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Advocate for : MR. B CHETRI

Advocate for : PP

ASSAM appearing for THE STATE OF ASSAM AND ANR.

**Crl.A./176/2023**

LILA CHETRY  
S/O LATE JITT BAHADUR CHETRY,  
RESIDENT OF VILLAGE DHEKIAJAN, PS DIGBOI DIST. TINSUKIA, ASSAM,  
786171

VERSUS

THE STATE OF ASSAM AND ANR.  
REPRESENTED BY PP ASSAM

2:SRI MILON THAPA  
S/O LATE PRATAP THAPA

RESIDENT OF KHERJAN NEPALEE GAON  
PS DIGBOI  
DIST TINSUKIA  
ASSAM 78617

**Advocate for the Petitioner** : MR. B CHETRI

**Advocate for the Respondent** : PP, ASSAM

**BEFORE**

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA**  
**HON'BLE MRS. JUSTICE MITALI THAKURIA**

**ORDER**

**27.09.2023**

*(Michael Zothankhuma, J)*

Heard Mr. B. Chetri, learned counsel for the applicant. Also heard Mrs. S. Jahan, learned Addl. Public Prosecutor for the State and Mr. B. Phukan, learned counsel for the respondent No. 2.

2. This application has been filed under Section 389 Cr.P.C for suspension of the sentence passed by the Court of the learned Addl. Sessions Judge (FTC-I), Margherita in Sessions Case No. 24(M)/2017 arising out of Digboi PS Case No. 154/2016, by which the applicant had been convicted under Section 302 IPC and sentenced to undergo Rigorous Imprisonment for life, with a fine of Rs. 5000/-, in default, Rigorous Imprisonment for six months.

3. The applicant's counsel submits that the conviction of the applicant/appellant has been done by the learned Trial Court only the basis of the evidence of PW-1, who had stated that the deceased, prior to his death had laid the blame for the assault on the deceased onto the applicant. He submits that while PW-1 had stated in his evidence that Dhan Bahadur Thapa, Dil Bahadur Thapa, Lok Bahadur Thapa and many other persons were present at the time the deceased had made the oral dying declaration that the applicant had assaulted him, the above three persons were not made prosecution witnesses. Further, Dipak Thapa, who had apparently taken out the deceased from his house at around 10.00 pm on 19.09.2016 had also not been made a prosecution witness, despite being last seen with the deceased. He also submits that there is discrepancy with regard to the place of recovery of the bamboo which had been used to assault the deceased.

4. The evidence of PW-2 also shows that PW-2 was the witness who was first present by the side of the deceased, after the alleged assault, alongwith one Himalaya Thapa. At that particular time, the deceased was speechless. As such, no dying declaration could have been made by the deceased. He also submits that an oral dying declaration would have to be subjected to close scrutiny and corroboration of the dying declaration was required, prior to convicting the appellant. Accordingly, as no corroboration is found, the dying declaration could not have been the basis for convicting the appellant. Consequently, the sentence imposed upon the applicant should be suspended and the applicant should be released on bail.

5. The applicant's counsel also submits that the evidence of PW-1, which is to the effect that an oral dying declaration had been made by the deceased to him, has not been stated by PW-1 during his statement made under Section 161 CrPC.

6. Mrs. S. Jahan, learned Addl. Public Prosecutor and Mr. B. Phukan, learned counsel for the respondent No. 2 submit that the evidence of PW-1 cannot be

discarded on the alleged ground that the PW-1 had not made any statement under Section 161 CrPC to the effect that the deceased had not made any dying declaration. This is due to the fact that PW-1 had not confronted with the said portion of his statement made under Section 161 CrPC and neither was the case I.O examined on that score, in terms of law laid down by the Apex Court in the case of *V.K. Mistra & Another Vs. State of Uttarakhand & Another*, (2015) 9 SCC 588.

7. They also submit that there is nothing to show that PW-2 was the first to arrive at the scene of the crime with Himalaya Thapa, as the evidence of witnesses regarding scenes can vary, as held by various Judgments of the Supreme Court. They accordingly submit that the application should be rejected.

8. We have heard the learned counsels for the parties.

9. On perusing the evidence adduced by the parties, we find that PW-1 has not been confronted with any question during his cross examination to the effect that he had not made any statement before the Police that the dying declaration had not been made by the deceased to him. PW-1, in his cross examination, has denied the suggestion that the deceased had not uttered the name of the applicant to PW-1.

10. PW-3, in his evidence, has also stated that Dil Bahadur Thapa had told him that the deceased had been assaulted by the applicant. Without going into the details of the evidence before us, we are of the view that the sentence imposed upon the applicant cannot be suspended and the applicant cannot be released on bail at this stage.

The application is accordingly rejected.

**JUDGE**

**JUDGE**

## **Comparing Assistant**