

GAHC040000712018



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

Crl. Appl. No. 09 (AP)/2018

Shri Pabitra Ningda,
S/O Late Bhuteswar Ningda
P.O. Dibong, P.S. Margherita,
District: Tinsukia, Assam,
PIN- 786181.

...APPELLANT

VERSUS

1. The State of Arunachal Pradesh,
represented through the Public Prosecutor.

...RESPONDENT

Advocate for the Petitioners : Mr. S. K. Bhattacharjee

Advocate for the Respondent : Ms. T. Jini, Addl. P.P., A.P.

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 24.01.2024

Date of Judgment & Order : 26.04.2024

JUDGMENT & ORDER (CAV)

Heard Mr. S. K. Bhattacharjee, learned counsel for the appellant. Also heard Ms. T. Jini, learned Additional Public Prosecutor for the State respondent.

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973, filed by the appellant on behalf of the accused, against the impugned judgment and order dated 27.03.2018, passed by the learned Session Judge, Tezu, East Session Division, Arunachal Pradesh, in Sessions Case No. 05/CLG/2012, under Sections 302/201 of the Indian Penal Code, convicting the accused under Section 304 Part-II of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment of 5 (five) years with fine of Rs. 20,000/- and in default imprisonment for another 6 (six) months.

3. The brief facts of the case is that on 21.09.2011, one Khifuja Yobin lodged a complaint before the Circle Officer, Vijaynagar against the present accused-Tashi Sherpa with the allegation that in the evening of 15.09.2011, at about 7.45 p.m., the accused eloped with his daughter, Ms. X (name withheld), from Bazar Line, Vijaynagar. When the accused was enquired by the village authority, he admitted that he gave Rs. 1,000/- to her and sent her with a torch to Yobin

Camp, Miao where she was asked to wait for him. But, despite their best efforts, they could not find his daughter and during inquiry, the police received an information regarding recovery of a dead body on 22.09.2011 and accordingly, VNR P.S. Case No. 04/2011, under Section 302 of the Indian Penal Code, was registered. Thereafter, in absence of the superior police officer at Vijaynagar Police Station, the Head Constable Mr. Awad Kumar Mehta was instructed over telephone to visit the place of occurrence and to conduct the inquest and also to prepare a rough sketch map of P.O. on 22.09.2011. Later on, the investigation was taken up by I.O. Late Toji Singpho. During the course of investigation, she recorded the statement of complainant and other witnesses and also seized some material evidences. The accused, who was brought before the Gaon Burah, also admitted that he sent the deceased to Yobin Camp Miao with a torch and Rs. 1,000/- and he admitted the same before the learned Magistrate while his statement was recorded under Section 164 Cr.P.C. He further admitted in his confessional statement that she pushed down the deceased girl to a deep George resulting to her death. Accordingly, finding a *prima facie* case, the Charge-Sheet was filed under Sections 302/201 of the Indian Penal Code.

4. On receipt of the case from the committal Court, the learned Sessions Judge, Tezu, East Session Division, Arunachal Pradesh, accordingly framed charge against the accused under Sections 302/201 of the Indian Penal Code and after recording all the 17 numbers of witnesses, statement of accused under Section 313 Cr.P.C. was recorded and hearing the arguments put forwarded by learned counsels for both sides, the judgment was passed by the learned Sessions Judge in Session Case No. 05/CLG/2012 convicting the accused under Section 304 Part-II of the Indian Penal Code and sentenced him to suffer

Rigorous Imprisonment of 5 (five) years with fine of Rs. 20,000/- and in default imprisonment for another 6 (six) months.

5. On being aggrieved and dissatisfied with the impugned judgment and order dated 27.03.2018, the present appeal has been preferred by appellant on behalf of the accused.

6. Mr. Bhattacharjee, learned counsel for the appellant, has submitted that the learned Sessions Judge, while passing the judgment, did not consider the evidence of the prosecution in its true perspective and arrived at a wrong decision and the conviction order was passed only relying on the testimony of the prosecution witnesses. From the entire evidences on record and other circumstances of this case, it is seen that there is no conclusive prove that the accused is the perpetrator of the alleged offence and thus, the judgment and sentence passed by the learned Session Judge is bad in law and liable to be set aside and quashed. From the evidence of P.W.-1, the Village Headman, it is seen that he took permission from the Assam Riffle Authority to interact with the accused- Teshi Sherpa to know the whereabouts of the girl. But, subsequently, on 22.09.2011, the dead body of the victim girl was recovered from landslide area and during the time of recovery of the dead body, there was no Magistrate at the spot. Further, from the evidences, it is seen that the Mahila Party found a bundle of inner garments on the way to the Office of the Circle Officer. Thus, there is no evidence or circumstances that the accused give Rs. 1,000/- and a torch to the victim on the night of the incident. He further submitted that the P.W.-2, the father of the deceased, is only a hearsay witness and he heard about the entire incident from the Village Headman, but he was present on

19.09.2011 when the first enquiry was conducted by constituting a committee. The learned Sessions Judge also did not consider the evidence of P.W.-4, who deposed that the accused and the deceased went out of the video hall and also came back and all of them went home after the movie was over and thus, the alleged offence has not been proved beyond all reasonable doubt that the accused is the perpetrator of the alleged offence.

7. Further it is submitted that the PW-12 also did not see any girl with the accused while he was living the video hall and he has not seen any girl or anybody coming out of the video hall along with the accused on the night of incident. Accordingly, it is submitted that there is no eye witness to the incident nor there is any circumstances to fulfill the entire chain of the case to convict the accused on the basis of the circumstantial evidence. The learned Court below solely based on the statement made by the accused under Section 164 Cr.P.C. and there is no other supporting evidence to prove the prosecution case. The learned Sessions Judge, while convicting the accused, had believed only on the statement made by him under Section 164 Cr.P.C. and has failed to observe safeguards which not only impairs evidentiary value of confession, but cast a doubt on nature and voluntariness of confession. The confessional statement may be the foundation of the conviction, but the same can only be used in support of the other evidences. The conviction cannot be made solely on the basis of confession if the other circumstances or other witnesses did not support the prosecution case. It is not safe to rely on such judicial confession or even treat as corroborative piece of evidence when the judicial confession is not found to be voluntary, more so if it is retracted. The conviction cannot be based on such retracted judicial confession and hence, the impugned judgment and

order passed by the learned Sessions Judge is liable to be set aside and quashed. More so, the accused was in police custody before recording his statement under Section 164 Cr.P.C., which cannot be considered at all and further the retraction petition was also filed by the accused where no order was passed on the said retraction petition. There is no specific time mentioned in the form of recording the statement under Section 164 Cr.P.C. and there is no proper pagination in the said statement made by the accused under Section 164 Cr.P.C. Further it is submitted that after leaving the video hall, there is no evidence to fulfill the chain of circumstances. The confession, as recorded under Section 164 Cr.P.C., was not at all a voluntary statement on the basis of which the conviction order was passed by the learned Session Judge.

8. In support of his case, the learned counsel for the appellant further relied on the following decisions:

- (i) **Chandrakant Chimanlal Desai Vs. State of Gujarat**, reported in **(1992) 1 SCC 473**.
- (ii) **Anjan Kumar Sarma & Ors. Vs. State of Assam**, reported in **2017 Legal Eagle (SC) 511: (2017) SCR (Cri) 1185**.
- (iii) **Shital Singh Vs. State**, reported in **1975 CRI. L. J. 699**.
(Allahabad High Court)
- (iv) **State of Assam Vs. Anupam Das**, reported in **2008 CRI. L. J. 1276**. (Gauhati High Court)

- (v) **State of Assam Vs. Rabindra Nath Guha**, reported in **1982 CRI. L. J. 216**. (Gauhati High Court)
- (vi) **Riaz Ali Vs. State (Govt. of NCT) Delhi**, Crl. A. No. **909/2010**, dated **22.02.2012**. (Delhi High Court)
- (vii) **Smt Bormoty Panggeng Vs. The State of Arunachal Pradesh**, Crl. A. No. **205/2018**, dated **27.01.2021**. (Gauhati High Court)

9. From the above referred judgments relied by the learned counsel for the appellant, it is seen that in case of **Chandrakant Chimanlal Desai (supra)**, the Hon'ble Supreme Court has expressed the view that the Court should take into consideration, the confession only after marshaling the evidence against the accused and then only the conviction can safely be based on the confession as a supporting evidence. It cannot be made the foundation of a conviction and can only be used in support of other evidences.

10. A co-ordinate Bench of this Court in case of **Anupam Das (supra)**, as relied by the learned counsel for the appellant, also expressed the view that the extra-judicial confession if made when the accused was in custody, such confession is inadmissible in evidence and it cannot be proved against the accused. Paragraph No. 30 of the said judgment reads as under:

“30. In the light of the foregoing discussions and the conclusions, in our view, Exts. 15 and 17, insofar as they purport to contain a confession on the part of the accused, cannot be proved against the accused. Insofar as Ext. 15 is concerned,

admittedly, the accused was in the custody of the police when he made the confession to the doctor (P.W. 8) and nothing is available on record that such a confession was made in the immediate presence of a judicial Magistrate. Coming to Ext. 17, insofar as it pertains to the confession of the accused, it cannot be proved against the accused for the same reasons assigned for rejecting the confession made under Ext. 15."

11. In the case of **Riaz Ali (supra)**, the Hon'ble Delhi High Court has held that in case of failure to prove the chain of evidence by which it is clearly and unequivocally reach to a conclusion which points only to the guilt of the accused appellant for commission of the crime.

12. Relying on the above referred judgments, Mr. Bhattacharjee, learned counsel for the appellant, has submitted that in the instant case also, there is no chain of circumstances to come to a conclusion that the accused had committed the murder of the deceased.

13. He further submitted that the last seen theory is also not applicable in the instant case. The Hon'ble Apex Court in the case of **Anjan Kumar Sarma (supra)** has held that the circumstances of last seen together cannot by itself form the basis of holding the accused guilty of offence. He basically emphasized on paragraph No. 18 of the said judgment, which reads as under:

"18. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In [Kanhaiya Lal v. State of Rajasthan](#), (2014) 4 SCC 715 this court held that:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime.

There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

.....

15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in [Madho Singh v. State of Rajasthan](#) [(2010) 15 SCC 588].”

In [Arjun Marik v. State of Bihar](#), 1994 Supp (2) SCC 372 this court held that:

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

14. Accordingly, he submitted that in the instant case also, it is seen that the P.W.-4 saw the deceased with the accused while they went out of the Video Hall, but that cannot be the sole basis of the last seen theory as from the evidence of P.W.-4, it is also seen that they also came back home after the movie was over. Thus, the last seen theory is also not applicable in the instant case. More so, a retraction petition was also filed by the accused praying for retracting from his statement made under Section 164 Cr.P.C., but that was not considered and no

order was passed in the said petition. The learned Magistrate, while recording the statement of the accused under Section 164 Cr.P.C., also did not recorded the statement properly and there is no pagination in the statement. In this context, he also relied on a decision of Hon'ble Allahabad High Court passed in **Crl. A. No. 2701/1970, dated 09.08.1974.**

15. He further submitted that the accused was stated to be seen along with the deceased only on the Video Hall, but thereafter there is no evidence as to what had happened and thus, there is no evidence to fulfill the chain of circumstances to convict the accused. Thus, it is seen that there is no material to convict the accused neither on the circumstantial evidence nor on the strength of confessional statement of the accused recorded under Section 164 Cr.P.C. He further submitted that the learned Session Judge, East Sessions Division, Tezu passed the conviction order solely on the basis of the confessional statement alleged to have been made by the accused without any corroborating evidence or without fulfillment of chain of circumstances. Thus, the learned Session Judge committed grave error or mistake and did not appreciate the evidence on record in its true perspective and arrived at a wrong decision whereby the accused was convicted under Section 304 Part-II of the Indian Penal Code in Sessions Case No. 05/CLG/2012, and thereby sentenced to suffer Rigorous Imprisonment of 5 (five) years with fine of Rs. 20,000/- and in default imprisonment for another 6 (six) months. Thus, the judgment and order dated 27.03.2018, passed by the learned Session Judge, Tezu, East Session Division, Arunachal Pradesh, is liable to be set aside and quashed and the accused is entitled for acquittal.

16. In this context, Ms. T. Jini, learned Additional Public Prosecutor, has submitted that regarding the initial investigation done by the Head Constable, it is seen that at the relevant time of incident, when the matter was reported in the Police Station, there was no superior authority available and for which, the initial investigation had to be done by the Head Constable as he was authorized to do so in absence of any superior police officer. Further she submitted that from the evidence of P.W.-1, it is seen that in spite of request made before the Assam Rifles, the accused did not report before the committee, rather he went out of the Camp and he was given out pass on the same day. Further she submitted that thereafter when he appeared, the matter was enquired and during the entire enquiry, the accused did not disclose anything, but in the last moment, he admitted that he had given torch light and Rs. 1,000/- to the deceased and asked her to come to Miao and wait for him at Liso Camp. Further, the P.W.-3 also supported the evidence of P.W.-1 and as per him also, when the matter was enquired, the accused stated before them that he gave Rs. 1,000/- and a torch to the victim and asked her to come to Miao and wait at Liso Camp. Accordingly, she submitted that when the matter was enquired by the Committee, there was no any police officer and from the statement made by the P.W.-1 & P.W.-3, it is seen that the deceased was last seen together with the accused which he admitted before the Committee. She further stressed on the question No. 25 put to the accused under Section 313 Cr.P.C., wherefrom it is seen that the accused went out of the Video Hall before the end of the picture, which he also admitted. Further he made an explanation that he went out of the Video Hall as he was supposed to join his duty on the next day.

17. Coming to the retraction of the statement recorded under Section 164

Cr.P.C., it is submitted by learned Additional Public Prosecutor that though one petition is available in the LCR in page No. 239, but the petition was neither signed nor there is any endorsement to held that the order was not passed by the learned Sessions Judge even after production of the said petition filed by the accused for retraction of his confessional statement. She further submitted that the P.W.-4 & P.W.-6 also saw the accused coming out of the Video Hall before the end of the picture and the P.W.-4 also saw the accused along with the deceased when they went out of the Video Hall. Accordingly, she submitted that there are sufficient evidences against the present accused, who not only confessed before the learned Magistrate, but also made a confession that he asked the deceased to come to List Camp at Miao and he also gave her Rs. 1,000/- and a torch to met him at Miao. Apart from that, he gave the detail as to how the incident had happened while recording his statement under Section 164 Cr.P.C. More so, she submitted that before recording the statement, when the accused was in the custody of the police, all the formalities were observed and the statement was recorded only when the Magistrate was satisfied himself that he was making the statement voluntary without any pressure. Thus, the last seen theory and other circumstances of this case also supported the prosecution version and the statement under Section 164 Cr.P.C. of the accused fully supports the prosecution case and therefore, the learned Sessions Judge committed no error or mistake while recording conviction against the present accused on the basis of the chain of circumstances and the statement made by the accused under Section 164 Cr.P.C.

18. In support of her submissions, the learned Additional Public Prosecutor relied on the following decisions:

- (i) **Munna Lal Vs. The State of Uttar Pradesh**, reported in [2023] 0 AIR(SC) 634.
- (ii) **Shankaria Vs. State of Rajasthan**, reported in [1978] 0 AIR(SC) 1248, and emphasized on paragraph Nos. 40 & 42 of the judgment which basically deals with the retraction time given to an accused before recording his confessional statement.
- (iii) **State of Tamil Nadu Vs. Kutty @ Lakshmi Narasimhan**, reported in [2001] 0 AIR(SC) 2778, and emphasized on paragraph Nos. 13 & 14 of the judgment, wherein the Hon'ble Supreme Court has expressed the view that the confession should not be considered as a tainted only for his retraction as non-retracted confession are very rare in criminal cases. Paragraph Nos. 13 & 14 of the said judgment reads under:

“13. It is not the law that once a confession was retracted the court should presume that the confession is tainted. As a matter of practical knowledge we can say that non- retracted confession is a rarity in criminal cases. To retract from confession is the right of the confessor and all the accused against whom confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The twin test of a confession is to ascertain whether it was voluntary and true. Once those tests are found to be positive the next endeavour is to see whether there is any other reason which stands in the way of acting on it. Even for that, retraction of the confession is not the ground to throw the confession overboard.

14. We are unable to understand how a judicial confession would become bad by reason of the fact that articles belonging to the victims were recovered prior to the making of the confession. That aspect, instead of vitiating the confession, could be a factor in favour of the voluntariness of the confession. When the culprit finds that the articles concealed by him are all disintered it is possible that he might feel that there is no use in concealing the facts any more. Then he may desire to make a clean breast of everything to any person or authorities.”

- (iv) **Mukesh Singh Vs. State (Narcotic Branch of Delhi)**, reported in [2020] 0 AIR(SC) 4794, and emphasized on paragraph No. 5.6 of the said judgment, wherein non-

compliance in recording of confession under Section 164 Cr.P.C. is considered and the said paragraph reads as under:

“5.6 Section 462 of the Code provides that no finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice. Section 463 of the Code provides that even if there is non-compliance in recording the confession under Section 164 of the Code, even then the same may be admissible if such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement. Section 465 of the Code provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a Court of Appeal on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, or any error or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. Thus, under Section 465, irregularity in other proceedings under the Code shall not lead to reversal of conviction unless it led to failure of justice. Irregularity in investigation would not lead to acquittal unless failure of justice is shown.”

- (v) **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh**, reported in [2022] 0 AIR(SC) 5293, and emphasized on paragraph No. 81 of the judgment, wherein it has been held by the Hon'ble Apex Court that the Court should not start with a presumption that the extra judicial confession is a weak type of evidence and 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. In order to accept extrajudicial confession, it must be voluntary and must inspire confidence. If it is specified that the extrajudicial confession is voluntary, it can be acted upon to base conviction.
- (vi) **Rajkumar Vs. State of M.P.**, reported in [2014] 2 SCC (Cri) 570, and mainly emphasized on paragraph No. 12 of the judgment, which reads as under:

“12. The accused has a duty to furnish an explanation in his statement under [Section 313](#) Cr.P.C. regarding any incriminating material that has been

produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under [Section 313 Cr.P.C.](#) is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: [Ramnaresh & Ors. v. State of Chhattisgarh](#), AIR 2012 SC 1357; [Munish Mubar v. State of Haryana](#), AIR 2013 SC 912; and [Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan](#), AIR 2013 SC 3150). In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him."

19. After hearing the submissions made by the learned counsel for the appellant as well as the learned Additional Public Prosecutor representing the State respondent, it is seen that as per the prosecution case, on the evening of the occurrence, i.e. on 15.09.2011, some of the witnesses saw the accused talking with the deceased in the Video Hall and P.W.-4, who is the vital witness of the prosecution, also saw the deceased along with the accused while going out of the Video Hall. But, after some time, they went back to the Video Hall and thereafter the girl was missing. Thereafter, when the accused was enquired by the village authorities, he admitted that he gave Rs. 1,000/- and also a torch to the deceased girl and asked her to come to Yobin Camp, Miao. But, in spite of the best efforts, the informant and the villagers could not find the daughter of the informant and during the enquiry, the police received an information regarding the recovery of a dead body and in absence of any other superior police officer, the Head Constable Mr. Awad Kumar Mehta was instructed to visit the place of occurrence to do the inquest and the preliminary investigation. It is also the case of the prosecution that when the accused was subsequently brought before the Gaon Burah, he admitted that he asked the deceased to

come to Yobin Camp, Miao and gave her a torch and Rs. 1,000/-, which he also admitted while recording his statement before the learned Magistrate under Section 164 Cr.P.C.

20. So, basically the case of the prosecution is based on the extra-judicial confession as well as confession made by the accused under Section 164 Cr.P.C. and also based on the circumstantial evidence as some of the prosecution witnesses have seen the accused with the deceased in the Video Hall and also saw them while they were going out of the Video Hall. On the other hand, it is the case of the defence that no one had seen the occurrence and there is also no eye witness who saw the accused while going along with the deceased out of the Video Hall. More so, the accused was forced to confess before the learned Magistrate and he accordingly filed an application praying for retraction of this confessional statement. So, the vital witnesses of the prosecution are P.W.-1, P.W.-3, P.W.-4, P.W.-6 and P.W.-12.

21. Accordingly, let us scrutinized the evidences of the prosecution witnesses who are considered to be the vital witnesses of the prosecution case.

22. P.W.-1 is the Head Gaonburah and he came to know about the incident when one Smti Chaya Yobin came to his residence and informed that since last evening, i.e. on 15.09.2011, her niece is missing and the accused- Tashi Sherpa took her from Bazar Line Video Hall and accordingly she requested to make an enquiry in this regard. On the basis of that, on the next day morning, they came to know that the accused- Tashi Sherpa will be given out pas to come out from his camp and accordingly, they formed a Committee consisting of 9 (nine)

numbers to enquire the case in regards to the missing of the girl. Accordingly, the Committee sought permission from the Assam Rifle Authority and in the evening time, they came to know that that the accused- Tashi Sherpa has already been given out pass from the Gate No. 2, however he did not report before the Committee. Subsequently, they came to know from the brother of the accused that he again went inside the camp and after getting the permission, they met the accused. Accordingly, on enquiry, the accused initially did not disclose anything, but on the last moment, he admitted that he has given a torch and Rs. 1,000/- to the deceased girl and asked her to go to Miao and wait for him at Liso Camp. Thereafter, the entire Committee again searched for the missing girl and made search in the entire area and ultimately on 22.09.2011, it was informed that a dead body was found and recovered from landslide area about 300 steps away from the house of the accused. Accordingly, the matter was reported to police and the police came to the spot and the dead body was identified from her wearing apparels. P.W.-1 also saw the dead body of the deceased. Next day, Mahila party gathered to protest against non-conduct of post-mortem over the dead body and while proceeding towards the circle office, they found some bundles of inner garments from about 150-200 mtrs. away from the place of recovery of the dead body.

23. P.W.-2 is the father of the deceased and he also supported the version of the P.W.-1 to the extent that the Committee was also formed to find out his daughter and subsequently, the dead body was found which was recovered by police and he accordingly lodged the F.I.R. He was not in the said Committee while the Committee was searching for his missing daughter as he was sick. But he also deposed that the accused finally disclosed before them that he gave one

torch and Rs. 1,000/- to his deceased daughter and sent her to Miao.

24. P.W.-3 was discharging his duty as Gaon Burah at the relevant time of incident and he was also a member of the Committee who made search for the missing girl after they came to know about the missing daughter of the informant and as per him also, when they interrogated the accused after getting permission from the authority concerned. Initially, the accused did not disclose anything for long time and at the last moment only, he disclosed that he gave Rs. 1,000/- and a torch to the deceased girl and asked her to go ahead and to wait for him at Lissu Camp, Miao from where he will take her along with him in aeroplane. After the interrogation, they handed over the accused to the authority and again searched for the deceased girl and finally they got the information that the dead body of the deceased girl was found out in a deep ditch and subsequently the police came to the spot and recovered the body of the deceased, which was partially buried.

25. P.W.-4 deposed that on 15.09.2011, she along with 2 (two) of her friends, went to watch cinema at Vijoynagar. The deceased girl and the accused was also found inside the video hall and the deceased was talking with the accused, who also asked her to come out of the video hall and then the deceased went along with the accused from the video hall to outside. Both of them came back to the video hall after sometime. After watching the cinema, P.W.-4, along with her friends, went back to the house and they were not accompanied with the deceased girl. Next day only, she came to know about the incident and the missing of her friend and she also put her signature in the seizure list whereby the police seized the undergarments of the deceased. From her cross-evidence,

it is also seen that when they entered into the video hall, the accused was already there and he was sitting next to their chair. She also found that the accused introduced himself to the deceased and also told his name and stated that he is working in army.

26. P.W.-6 is the cousin brother of the accused, who also went to the video hall on the night of incident where they also met the accused, but he found that the accused left the video hall before the end of the picture and they did not find the accused in the video hall when they came out from the video hall. However, from his cross evidence, it is seen that when he reached home after watching the cinema, he found that the accused was sleeping in his room.

27. P.W.-7 is the father of the accused who was also present in the meeting when he was also called for along with his son to attend the meeting as the villagers charged his son for committing murder of the missing girl. It was told by some of the people who were present in the meeting that his son confessed that he had sent the missing girl to Miao after giving her Rs. 1,000/- and a torch. From his evidence, it is seen that from Vijohnagar Bazar one can go to Miao and the dead body was also recovered nearby the gorge of the road near to their village which lead to Vijohnagar and then to Miao.

28. P.W.-8 is the another witness who was also present in the video hall and as per him also, initially he along with some others were sitting in the same bench, but after some time, the accused went in the other bench which was in the front line of the bench and on the next day only, he came to know from the owner of the video hall that the girl is missing.

29. P.W.-11 also came to know about the missing girl from video hall and it was stated that the accused- Tashi Sherpa took the missing girl from the video hall and thereafter both the Gaon Burha went to the house of the accused to enquire about the missing girl and he also accompanied them to the house of the father of the accused. But the accused was not present and it was told by the father of the accused that he had already joined his service at Assam Rifles Camp at Vijaynagar. On the next day, they again gathered and took initiative by all the members of the Committee to search the missing girl and finally the dead body of the missing girl was traced out from a deep gorge near the road between Daragaon and Vijaynagar. The body was already decomposed and from the wearing apparels, she was identified and thereafter the police came to recover the dead body. He has no personal knowledge about the incident. But, from his cross-evidence, it is seen that he was told by the Gaon Bura that the friend of the deceased girl saw the deceased went out of the video hall along with the accused.

30. P.W.-12 was also present in the video hall on the day of incident and as per him also, the accused was sitting in the front of them and in the middle of the show, he saw the accused leaving the video hall and subsequently he heard about the missing of the deceased girl.

31. P.W.-13 is the Medical Officer, who conducted the post-mortem of the deceased girl. From his evidence, it is seen that he could not ascertain any injury externally on the body of the deceased as it was already decomposed. However, he found fracture on the right shoulder. The head was found

separated from the body and fracture was also found in the occipital skull. During post-mortem, the doctor could not collect the substance from the private part of the deceased as it was already eaten by maggots and no flesh were found in the head and the face of the dead body even the hairs were also missing from the head. However, as per him, the cause of the death is due to cervical fracture and fracture of skull on the temporal bone and occipital bone leading to massive haemorrhage. The exact cause of the death could not be ascertained due to extreme decomposition, but the head was found to be separated from the neck and the circumstantial of the recovery of the body shows that the death was homicidal in nature. He also examined the accused on 29.09.2011 and found some scar marks on his right face, another 2 (two) scar marks on his right hand and one liner scar mark on fore arm of the right hand. Some other scar marks also found in his left hand and over right knee.

32. P.W.-13 further deposed that at the time when the police interrogated the accused, he was also present and the accused was giving all sort of confusing statements and was saying that he sent the deceased girl to Miao by giving her a sum of Rs. 1,000/- with an assurance that he will come to meet her.

33. P.W.-14 is the seizure witness and P.W.-15 is also the police personnel, who prepared the W.T. Message and sent the control room of Changlang.

34. P.W.-16 is the police officer who conducted the preliminary enquiry and at that time, he was working as general duty incharge at Vijaynagar Police Station in absence of the Officer-In-Charge. As per instruction, he started the preliminary investigation. After getting the information, he also contacted his

senior lady police officer T. Singpho, Circle Inspector of the area, and as per her direction, he made a GD Entry and thereafter recovered the dead body and as per instructions, he observed all the formalities while recovering the dead body. The Circle Inspector also instructed him to prepare the inquest of the dead body as she could not come to Vijaynagar due to road blockage and as per her instruction, he went to recover the dead body where the dead body was found half buried. He also prepared the rough sketch map of the P.O. where the dead body was found. From his cross-evidence, it is seen that he recovered the dead body and made the preliminary enquiry as per the instruction of his senior officer as there was no Officer-In-Charge at the relevant time of incident. As per him, he had done the preliminary enquiry, prepared the inquest report and also recovered the dead body only as per instructions of his senior officer.

35. P.W.-17 is the judicial officer who recorded the confessional statement of the accused on 31.10.2011. As per him, he put the preliminary questions to the accused before his confession. As per the confessional statement, the accused met the deceased in the evening of 15.09.2011 in the video hall and within a few hours, they attracted with each other and went out of the video hall. They sat for sometime in the road near the SB camp and thereafter they went inside the jungle and had sex. The accused then asked the deceased to go back to her house, but the deceased insisted the accused to take her with him and on that, the accused pushed her back once but the deceased again come back and was adamant to go with the accused and when the accused pushed the deceased for the second time, the deceased fell into the deep gorge. He then went down to the place, but when he found that the deceased was already died, he put some boulder on her body, came up and he wanted to disclose the entire

incident, but out of fear he could not do so and on next day, he joined his duty. It is further deposed by the learned Magistrate that the accused disclosed before him that the incident had happened unintentionally. He also disclosed the name of one Miss Ainash Yobin, who was also present inside the video hall in the evening.

36. From the cross evidence of P.W.-17, it is seen that the accused was produced before him on 24.10.2011 after 26 days of custody and then he received the requisition from the I.O. for recording of confessional statement on 28.10.2011 and thereafter he gave him reflection time and on 31.10.2011, he recorded the statement of the accused. The Magistrate denied when suggested that the statement was not voluntary but admitted that in the page Nos. 1, 2 & 4, the signature of the accused was not reflected.

37. P.W.-18 is another police officer, who identified the signature of the then I.O. Toi Singpho who investigated the matter at the relevant point of time, but the prosecution could not produce the I.O. as she died during the pendency of this case.

38. So, from the above discussion of the P.Ws., it is seen that the accused made his confession before the P.Ws.- 1, 2 & 3 and P.Ws.- 1 & 3 are the Head Gaon Bura and Gaon Bura who were also the member of the Committee. As per these witnesses, including the P.W.-2, who is the father of the deceased, the accused did not disclose anything even after enquiry for a long time. But, subsequently, he disclosed that he gave Rs. 1,000/- and a torch to the deceased and asked her to come to Miao at Liso Camp. Thus, it is seen that the accused

made extra-judicial confession before these witnesses who do not have any previous grudge with the accused to give their evidence falsely against the accused regarding his extra-judicial confession.

39. As relied by the learned Additional Public Prosecutor, Ms. T. Jini, the Hon'ble Apex Court in the case of **Ramanand @ Nandlal Bharti (supra)** has held that the Court should not start with a presumption that the extra judicial confession is a weak type of evidence and 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. In order to accept extrajudicial confession, it must be voluntary and must inspire confidence. If it is specified that the extrajudicial confession is voluntary, it can be acted upon to base conviction. Here in the instant case also, it is seen that there is nothing to disbelieve P.Ws.- 1, 2 & 3 who stated that the accused made extra-judicial confession before them and stated as to how the accused asked the deceased girl to come to Miao at Liso Camp giving her Rs. 1,000/- and a torch. Further it is seen that even after the said confession, they did not handed over the accused to police and made a vigorous search of the deceased and then only they came to know about the recovery of the dead body of the deceased girl from a deep gorge, which was half buried. Thus, it is seen that these P.Ws. have no personal grudge or previous enmity with the accused to falsely implicate the accused in this case.

40. More so, the father of the accused, who has been examined as P.W.-7, did not directly implicate the accused. But, from his evidence also, it is seen that he heard about the confession of his son made before the Committee wherein he

was also present along with his son.

41. Coming to the evidences of P.Ws.- 4, 6, 8 & 12, it is seen that they all were present in the video hall on the night of incident and they saw the accused in the video hall and as per P.W.-4, the accused along with the deceased went out of the video hall for some time and thereafter they returned back. She also deposed that the accused introduced himself to the deceased and he also stated that he is an army personnel. The other P.Ws. also saw the accused inside the video hall and they also saw him while leaving the video hall in the mid of the cinema. However, it is a fact that none of the witnesses have seen what had happened after completion of cinema or after leaving the video hall by the accused and the deceased. But from their evidences, it cannot be denied that all these witnesses have seen the accused inside the video hall and the P.W.-4 also saw the accused along with the deceased leaving out of the video hall and thus, it can be held that the accused was last seen together along with the deceased. More so, from the other evidences of the prosecution witnesses, it is seen that though no one has seen what had happened after leaving of the video hall, but from the extra-judicial confession of the accused, it is seen that he confessed before the P.Ws.- 1, 2 & 3 that he asked the deceased to come to Liso Camp at Miao and for that he also gave her Rs. 1,000/- and a torch to her. Thus, even if there is no evidence that as to what had happened after the accused along with the deceased came out of the video hall, but it cannot be denied that all these P.Ws. have seen that the accused had left the video hall in the mid of the cinema and since then, the victim was missing for which there was a suspicion that the accused might have involved in the missing of the deceased girl and accordingly the enquiry was made by the villagers forming a Committee and the

accused was interrogated after obtaining permission from the concerned authority.

42. Thus, it is seen that though the complete chain is not fulfilled from the prosecution witnesses, but it cannot be denied that the deceased was last seen along with the accused and he also made confession before the P.Ws.- 1, 2 & 3 that he asked the deceased to come to Miao by giving her torch and Rs. 1,000/-. As stated above, there is no ground to disbelieve the P.Ws.- 1, 2 & 3 before whom the accused made the extra-judicial confession and in the same time, there is no ground to disbelieve the P.W.-4 and the other P.Ws., as mentioned above, who saw the deceased along with the accused inside the video hall. More so, P.W.-7, who is the father of the accused, also admitted that he heard from the members present in the meeting in regards to the confession made by his son that he gave Rs. 1,000/- and a torch to the deceased and asked her to come to Miao.

43. The another issue raised by the defence in regards to recording of the confessional statement of the accused under Section 164 Cr.P.C. As submitted by the learned counsel for the appellant in this regard that the learned Magistrate failed to observe the safeguards which is necessary before recording of statement under Section 164 Cr.P.C. and which not only impairs evidentiary value of the confession but cast a doubt on nature and voluntariness of confession. He further submitted that the conviction cannot be based solely on the confession if the other circumstances or other witnesses did not support the prosecution case. Further, if it is not safe to rely on such judicial confession or even treat as the corroborative piece of evidence when the judicial confession is

not found to be voluntary, more so if it is retracted. But, here in the instant case, it is seen that the learned Magistrate complied with all necessary formalities before recording the statement of the accused and he was also gave sufficient time for reflection before recording of the statement. From the record, it is seen that though a retraction petition was filed before the learned Court below, but the same was not pressed before him by the accused during the course of the trial. From the evidence of P.W.-17, the Judicial Magistrate who recorded the confessional statement of the accused, it is seen that he gave him sufficient time for reflection and the accused was produced from the judicial custody. He received a requisition from the I.O. on 28.10.2011 for recording the confessional statement and accordingly, it was recorded by him after giving proper reflection time and putting some preliminary questions and he also cautioned the accused which is required as per the law before recording the statement of the accused.

44. As discussed above, the Hon'ble Apex Court in the case of **Kutty @ Lakshmi Narasimhan (supra)** has held that the confession should not be considered as a tainted only for his retraction as non-retracted confession are very rare in criminal cases. The Hon'ble Apex Court further expressed the view that *"to retract from confession is the right of the confessor and all the accused against whom confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it."*

45. Here in the instant case also, it is seen that the Magistrate recorded the statement after satisfying himself regarding the voluntariness and thereafter

only the confession was recorded by the learned Magistrate (P.W.-17) and thus, only the retraction of the confession by the accused, while recording his statement under Section 313 Cr.P.C., cannot be the only basis to disbelieve the evidence of P.W.-17 as well as the confession made by the accused.

46. The Hon'ble Apex Court in the case of **Bhagwan Singh Vs. The State of Punjab**, reported in **AIR 1952 SC 214**, has held that the burden is on the accused to prove that the confessional statement was obtained by threat, duress or promise. The above ratio of law was reiterated by the Hon'ble Apex Court in case of **K. I. Pavunny Vs. Asstt. Collector(HQ), C.E.C.**, reported in **(1997) 3 SCC 721**.

47. Further, from the statement of the accused recorded under Section 313 Cr.P.C., it is seen that he denied all the allegations brought against him by the P.Ws. and it is the plea that the deceased was not known to him and he immediately joined in his camp. He further denied about his confession made before the learned Magistrate and he took the plea that he made the confession only because of torture on him by the police. However, he admitted that he was present in the video hall along with Samir Chetry and Dawa Dorjee and he also admitted that he left the video hall before the end of the picture. However, he stated that he left the video hall only to join his duty on the next day morning. But he declined to produce any defence on his behalf, though he retracted his confession made before the P.W.-17, the learned Magistrate. Thus, it is seen that except his denial, the accused did not produce any other witnesses to substantiate his plea. In this context, the judgment of the Hon'ble Supreme Court in the case of **Rajkumar Vs. State of M.P.**, reported in **[2014] 2 SCC**

(Cri) 570, which is relied by the learned Additional Public Prosecutor, can be relied on, wherein it has been held that if the accused remain silent or even remain in complete denial, the Court would be entitle to draw an inference including such adverse inference against the accused as may be permissible in accordance with law.

48. Coming to the point of conducting the preliminary investigation in absence of senior officer, who could not present at the place of occurrence at the relevant point of time, the judgment of the Hon'ble Apex Court in the Case of **Ranjit Kumar Ram & Ors. Vs. State of Bihar [MANU/SC/0635/2015]** can be relied on, wherein it has been held that "*it is well settled that in criminal trials even if the investigation is defective, the rest of the evidence must be scrutinized independently of the impact of the defects in the investigation otherwise the criminal trial will plummet to the level of the investigation. Criminal trials should not be made casualties for any lapses committed by the investigating officer. In State of M.P. v. Mansingh and Ors. : (2003) 10 SCC 414, it was held that even if there was deficiencies in the investigation that cannot be a ground for discrediting the prosecution version. The same view was reiterated in Sheo Shankar Singh v. State of Jharkhand and Anr. : (2011) 3 SCC 654 and C. Muniappan and Ors. v. State of Tamil Nadu: (2010) 9 SCC 567.*"

49. Thus, from the above discussion, it is seen that the prosecution could establish that from the evidence of P.Ws. and from the confessional statement of the accused recorded by the learned Magistrate that on the evening of 15.09.2023 he met the deceased in the video hall and he also introduced himself to be an army personal and after having sex with the deceased, a

scuffle took place between them as the deceased girl was insisting the accused to take her with him and when the accused applied force resulting which the deceased fell into the deep gorge and subsequently died. But, from the entire circumstances of this case, it is seen that there was no intention of the accused to cause her death and the cause of actual death is also could not be determined by the medical officer as the body was already decomposed. However, it is opined by the Doctor that the death may be a homicidal one. From the evidence of the Doctor, it is seen that the part of the face and other parts of the body was almost decomposed and some parts have already been eaten by maggots for which the external injury also could not be determined by the Doctor. So, considering the entire circumstances of the case the learned Court below rightly held that the accused had no premeditation to kill the deceased to attract Section 300 of the Indian Penal Code.

50. The Exception 4 of Section 300 of the Indian Penal provides that “*culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner*”.

51. Here in the instant case also, it is seen that the deceased was not known to the accused earlier, but after meeting her in the video hall, they come closure and he took her to the place of occurrence and after having sex with her, when she insisted him to take her with him, he pushed her and accidentally she fell down into the gorge and subsequently died. Thus, it is seen that there is no premeditation of mind to cause death of the deceased girl, but it has happened out of sudden provocation or sudden fight between the deceased and the

accused as she insisted him repeatedly to take her with him. Thus, the learned Court below convicted the accused under Section 304 II of the Indian Penal. The learned Court below discussed in detail in paragraph No. 54 of the said judgment while convicting the accused under Section 304 II IPC and for ready reference, paragraph No. 54 of the judgment of the learned Court below is extracted herein below:

“54. The confessional statement of the accused relied upon by the prosecution clearly shows that when there was sudden quarrel over the issue of marriage, he without intention to cause the death of the deceased forcefully pushed her away resulting to her death by falling down into deep gorge. And therefore in absence of any prosecution evidence to show premeditation of the accused and his intention to cause the death of the deceased, I find this case covered by exception 4 of the Section 300 IPC. However since the place of occurrence as per the independent witnesses and father of the accused admittedly locates nearby the house of the accused, the accused must have knowledge that his act of pushing down the deceased into gorge was likely to cause the death of deceased. And as such I find the accused liable to be convicted under Section 304 II of the IPC.”

52. The learned Court below also rightly opined that from the evidences of the prosecution, there is no evidence of disappearance of evidence of crime to convict the accused under Section 201 of the Indian Penal Code. Further, from the judgment passed by the learned Court below, it is seen that the learned Sessions Judge also discussed in detail about the settled principle of criminal law in imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence was committed. Considering all these aspects, the learned Sessions Judge has convicted the accused under Section 304 II of the Indian Penal Code and sentenced to suffer the R.I. for 5 (five) years with a fine of Rs. 20,000/- in default S.I. for 6 (six) months, which in my opinion is just and adequate

punishment provided by the learned Court below.

53. So, from the discussions made above and also considering the entire facts and circumstances of the case, in the considered opinion of this Court, the judgment dated 27.03.2018, passed by the learned Sessions Judge, East Sessions Division, Tezu in Session Case No. 05/CLG/ 2012, convicting the accused under Section 304 II of the Indian Penal Code, sentencing him to suffer Rigorous Imprisonment of 5 (five) years with fine of Rs. 20,000/- and in default imprisonment for another 6 (six) months, requires no interference of this Court and accordingly, the same stands affirmed.

54. Resultantly, the appeal stands dismissed.

55. Send back the LCR along with a copy of this judgment and order. The Registry shall serve a free copy of this judgment and order to the appellant through the jailor concerned.

JUDGE

Comparing Assistant