

GAHC040005522022



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

Criminal Appeal No. 15 (AP) of 2022

Ram Ghimire

.....Appellant

-Versus-

The State of Arunachal Pradesh & Anr.

.....Respondent.

Advocates for the appellant : Mr. N. Sharma.

Advocate for the respondent: Ms. T. Jini, learned Addl. PP.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND
HON'BLE MR. JUSTICE KARDAK ETE

Date of Hearing : 09.05.2024

Date of Judgment : 09.08.2024

JUDGMENT AND ORDER (CAV)

(Susmita Phukan Khaund, J.)

This appeal is directed against the Judgment and Order dated 30.03.2022 passed by the learned Sessions Judge, Khonsa in connection with Khonsa Sessions Case No. 98/2019 (Miao Police Station Case No. 25/2004) convicting the appellant under Section 302 of the Indian Penal Code, 1860 (IPC for short) and sentencing him to undergo Imprisonment for Life and to pay a fine of Rs.20,000/- (Twenty Thousand) with default stipulation.

2. The genesis of the case was that in the morning of 28.07.2004, Ongtilu Tikhak went to drop her son Phurpa Tamang at school but when Phurpa returned from school, he did not find his mother at home. Next morning, one Megnath Gaur went towards the Saw Mill area for grazing cattle and then he noticed the body of a woman in a pool of blood and a deep gash on her neck. Megnath Gaur informed the matter to the Miao Police Station and the information was reduced into writing, and registered as Miao Police Station Case No. 25/2004 under Section 302 of the IPC and investigation commenced.

3. The Investigating Officer (IO for short) went to the place of occurrence (PO for short) and clicked photographs of the body and prepared a rough sketch map of the PO. Inquest was held in presence of witnesses and the body was identified by Bhokte Tamang as his wife, Late Ongtilu Tikhak. The body was then forwarded to the CHC, Miao for autopsy and thereafter, the body was handed over to the relative of the deceased for her last rites. The IO recorded the statement of the witnesses and on completion of investigation, the IO laid charge sheet against Ram Ghimire, Usha Ghimire and Deepa Ghimire under Sections 302/201/34 IPC.

4. On appearance of the accused, copies were furnished and this case was committed to the Court of learned Sessions Judge (Deputy Commissioner), Changlang, for trial. At the commencement of trial, a formal charge under Section 302/201/34 IPC was framed, read over and explained to the accused persons who have pleaded not guilty and claimed to be tried. Initially the trial was pending in the Court of Deputy Commissioner, Changlang (the then Sessions Judge) and 2 (Two) PWs were examined by the Court and after creation of the Court of District and Sessions Judge, East Sessions Division at Tezu the case was transferred for trial. The Sessions Judge, Tezu examined 4

(Four) prosecution witnesses and thereafter, this case was again transferred to the Court of Sessions Judge at Khonsa as the territorial jurisdiction falls under the Sessions Judge of Khonsa. Thereafter the prosecution examined 3 (Three) witnesses and the defence examined 2 (Two) witnesses. The witnesses were cross-examined by both the sides to rebut the evidence adduced by them. Thus, during trial as many as 9 (Nine) witnesses including the IO were examined and 2 (Two) witnesses were examined as defence witnesses.

5. On the incriminating evidence projected by the prosecution witnesses, several questions were asked to the accused under Section 313 of the Code of Criminal Procedure, 1973 (the CrPC for short) and their statements were recorded.

6. The learned Trial Court delineated the following points for determination of the case:

“I. Whether death of Late Ongtilu Tikhak is culpable homicide amounting to Murder?

II. Whether the accused persons namely A1. Ram Ghimire, A2. Usha Ghimire and A3. Deepa Ghimire in furtherance of common intention have committed murder of Late Ongtilu Tikhak during night of 27/07/2004 and

thereby committed an offence of Murder punishable under Section 302 IPC?

III. Whether the accused persons namely A1. Ram Ghimire, A2. Usha Ghimire and A3. Deepa Ghimire in furtherance of common intention have caused disappearance of evidence to screen themselves from legal punishment and thereby committed an offence punishable under Section 201 IPC?"

7. After a grueling trial, the accused Ram Ghimire was held guilty of offence under Section 302 of IPC and he was convicted and sentenced to undergo Imprisonment for Life and a fine of *Rs.20,000/- (Rupees Twenty Thousand)* with default stipulation. The accused Usha Ghimire and Deepa Ghimire were acquitted from the charges under Sections 302/201/34 of the IPC and were set at liberty forthwith. The accused Ram Ghimire is the appellant before this Court. He will hereinafter be referred as the accused.

Arguments for the accused :

8. Heard learned counsel for the appellant/accused Mr. N. Sharma. It is submitted on behalf of the accused that there is not a single eye witness in this case and the accused was held guilty of offence under Section 302 of IPC on the basis of his confessional statement. During trial, the prosecution could not

examine the IO because the IO passed away and the deposition of the Officer-In-Charge (OC in short) of the same Police Station was recorded in place of the IO. It is submitted that this casts a shadow of doubt over the veracity of the OC's evidence, as the OC did not conduct the investigation.

9. The confessional statement was not properly recorded as the Magistrate failed to ask the accused while recording the confession as to why the accused was willing to confess. It is contended that the Magistrate did not even ask the accused whether he was in police lock-up or he was in the jail when the accused was brought before the Magistrate to record his confessional statement. It is submitted on behalf of the accused/appellant that the Magistrate also did not apprise the accused that he will not be sent back to police custody even if he did not record his confessional statement. It is submitted that the evidence of the informant was not recorded. The informant in this case is not the husband of the deceased but another person namely Megnath Gaur. This is a major discrepancy in the evidence and the evidence has to be rejected on this ground alone. The informant is the first person who noticed the dead body and his examination was crucial to prove whether this is a case of suicide or a case of homicide.

10. Section 100 of the CrPC was not followed during seizure of the articles, seized in connection with this case to substantiate the evidence of the prosecution.

Argument for the prosecution/respondent State:

11. Heard learned Additional Public Prosecutor, Arunachal Pradesh Ms. T. Jini for the respondent State. The learned Additional Public Prosecutor, Arunachal Pradesh has laid stress in her argument that the seizure was properly executed, as the dao was seized in the house of the accused, which clearly reveals that none other than the accused is complicit. The chain of circumstances is complete and the son of the deceased has categorically stated that the deceased was last seen with the accused Ram Ghimire's daughter and thereafter, her body was found lying in the open.

12. It is submitted that the circumstances form a complete chain and the circumstantial evidence is fortified by corroborating evidence.

13. The remaining part of the argument, and the reply of the learned counsel for the accused/appellant and the learned Additional Public Prosecutor will be discussed at the appropriate stage.

Findings of the Trial Court :

14. It has been held by the Trial Court that the death was homicidal in nature and the inquest report as well as the evidence of the MO proves beyond a reasonable doubt that death was homicidal in nature. The MO, PW.7 has admitted in his cross-examination that death was due to massive haemorrhage and brain anoxia as the main carotid artery and the veins which supplies blood to the brain were severed off. It was also observed by the learned trial Court that the Postmortem report reveals that death was ante mortem in nature. The learned trial Court has relied on Section 45 of the Indian Evidence Act, 1872 (the Evidence Act for short) and has held that the opinion of the expert is relevant to this case and the opinion is suggestive in nature.

15. On perusal of Exhibit-03, it was found on the column of External Appearance that the incised cut injury resulted in a deep gash up-to the extent of $\frac{2}{3}$ rd of the neck and the trachea, oesophagus, carotid arteries/veins which were cut by a sharp object. It was thereby held by the learned trial Court that the death was ante mortem in nature and the learned trial Court accepted the evidence of the MO. The learned trial Court has spelt out reasonings, holding

that although the informant Meghnath Gour was not examined as a witness, yet the overwhelming evidence brings home the charges leveled against the appellant.

16. It was held by the learned trial Court that the informant saw the dead body and then he informed the police. Thus, his evidence was necessary to the extent to substantiate the circumstances under which the body was found lying with a deep cut injury. It was held by the learned trial Court that the evidence of the other witnesses could bring home the charges leveled against the accused. The learned trial Court has also sealed the fate of the case by holding that although the IO could not be produced as a witness, it is a settled principle of law that non-examination of the IO is not fatal and it depends upon the circumstances of each case as held by the Hon'ble Apex Court in Rajlopre vs. State of Bihar reported in (2004) SCC (Cri) 212. It was observed by the learned trial Court that the IO B.B. Gurung had passed away and the prosecution had to produce PW.9 in place of the IO. PW.9 Ege Ete identified the FIR, inquest report, sketch map of PO, Postmortem report, charge sheet etc. and also the seal and signature of the OC affixed therein. It was held by the learned trial Court that the documents have been proved by the PW.9 and thus the documents were

held to be proved and non-examination of the IO did not thwart the evidence.

17. The learned trial Court has also held that the photographs and the negatives marked as Material Exhibit-01 have been conclusively proved and this substantiates the evidence. It was held by the learned trial Court that the injury was inflicted with an intention to kill the victim, which establishes that the offence committed was culpable homicide amounting to murder.

18. Trial Court heavily relied on the retracted confession of the accused Ram Ghimire, and also relied on the confessional statements of Usha Ghimire and Deepa Ghimire, and tried to establish a link between their confessional statements to bring home the charges leveled against Ram Ghimire, by pressing into service, Section 80 of the Evidence Act. It was has held that there was no irregularity on the part of the Magistrate while recording the confessional statements. It was held that the accused were duly cautioned and were accorded sufficient time for reflection before their confessional statements were recorded. It was held that the submissions made by the learned counsel for the accused that on 29.07.2004 the accused Ram Ghimire was remanded for 14 (Fourteen) days, is false as the last paragraph of the order dated 29.07.2004 of GR case record reads as "*considering the IO's prayer, above two accused*

persons are remanded to Police Custody for 7 (Seven) days and be produced 06-08-04”.

19. It was held by the learned trial Court that as the accused Ram Ghimire was produced on 03.08.2004 from judicial custody for recording his confessional statement, the confessional statement was thus properly recorded. The trial Court relied on the records and orders passed on 29.07.2004, 02.08.2004, 03.08.2004, 05.08.2004, 06.08.2004 and 11.08.2004 and has held that the confessional statements were properly recorded. The argument of the learned defense counsel relating to the proforma of the confessional statement where it was not recorded that the accused would not be sent back to police custody if he declines to make a confessional statement was not accepted. Moreover, the accused was also not asked whether the police coerced him into making a confessional statement. It was held by the learned trial Court that the confessions made by the accused Ram Ghimire, Usha Ghimire and Deepa Ghimire were voluntary, true and corroborated with material evidences proved by the prosecution.

20. Relying on these confessional statements, it was held that the recovery of the dao although not proved by the prosecution is relevant to this case as the

dao was recovered from the possession of the accused.

21. The remaining part of the decision of the learned trial Court will be discussed at the appropriate state.

Discussions and decisions :

22. Now, the question that falls for consideration is that whether the Trial Court has erred in convicting the appellant/accused. To decide the case in its proper perspective, the evidence is re-apprised.

23. Sri Bhokte Tamang deposed as PW.1 and proved his signature on the inquest report as P.Exh-1(a). He stated that he saw police conducting inquest and in his cross-examination, he stated that he affixed his signature at the Police Station and not at the Saw Mill. He did not know why his signature was taken. It is apt to mention at this juncture that PW.1 is the husband of the deceased Ongtilu Tikhak (hereinafter to be referred as the victim or the deceased).

24. A key witness Sri Phurpa Tamang deposed as PW.2 that at times he was escorted by his mother to the school. On the day of the incident, he along with his mother met the daughter of Ram Ghimire on their way to the school. The

daughter of Ram Ghimire is known to him because she, once visited their house to call his mother. At the relevant point of time his mother and Ghimire's daughter started chatting, but he did not hear them. His mother purchased some biscuits from a shop. PW.2 further deposed that he overheard his mother saying that she would visit Ghimire's house after dropping him (PW.2) off at school. When he returned from school, he did not find his mother at home and his father along with the family set out on a frantic search.

25. The learned Additional Public Prosecutor has placed much reliance on the evidence of this witness stating that the evidence of this witness clearly proves that the victim was last seen with Ghimire's daughter and this is one of the circumstances to the chain of circumstantial evidence against the appellant.

26. It is apt to mention at this juncture that PW.2 was only 8 (Eight) years old when his evidence was recorded by the learned trial Court. His cross-examination is not noteworthy. Although much reliance is placed on the evidence of this witness, it has to be borne in mind that PW.2 saw his mother with one of the accused (Deepa) who was not convicted in this case. Moreover, PW.2 has not mentioned the name of the daughter of the accused Ram Ghimire. He has just stated that he saw his mother chatting with the accused persons'

daughter. This case was against 3 (Three) accused persons but the Court has acquitted the wife and the daughter of the accused Ram Ghimire whereas Sri Ram Ghimire was convicted for offence under Section 302 of the IPC. Moreover, PW.2 saw his mother talking with one of the accused in the morning whereas his mother's body was found on the following day.

27. It is true that he overheard his mother stating before the accused Ram Ghimire's daughter that she would visit them after dropping him (PW.2) off at school. It is also one of the reasons why Ram Ghimire's daughter and his wife, were made accused in this case and why charge sheet was laid against them. Through the conversation between PW.2's mother and the accused person's daughter, it was assumed that the victim must have visited Ram Ghimire's house after dropping PW.2 in the school, but this evidence appears to be far-fetched and sketchy.

28. The last seen theory cannot be brought in, on the basis of the evidence of PW.2. At best, the evidence of PW.2 can be considered to be a stray circumstance and cannot be linked with the retracted confession of the accused.

29. The learned Additional Public Prosecutor has also relied on the retracted

confession of the accused, which will be discussed at a later stage.

30. Miss Shukla Dey, PW.3 did not support the prosecution case. As PW.3, she denied any knowledge about the incident. She also deposed that her statement was not recorded by the police. She identified the accused Ram Ghimire and his wife but she failed to identify the daughter of the accused. This witness was declared as a hostile witness by the prosecution who was allowed to cross-examine its own witness. In her cross-examination by the prosecution, PW.3 has denied that she stated before the IO that one evening she saw two women carrying a lady on their shoulders from Chakma line to Miao Singpho village. This cross-examination by the prosecution was not affirmed by the IO.

31. Another witness Sri Sukumar Dutta deposed as PW.4 that he had taken photographs of the dead body of the deceased on being asked by the police. He has proved the photographs as M.Exh – 1 and the negatives of the photographs as M.Exh - 2. He has proved his signature on the seizure memo as P.Exh-2(a).

32. Shri Kami Tamang deposed as PW.5 that the deceased was his daughter-in-law. He heard that one morning the daughter of the accused came to the house of the deceased and took her somewhere. Thereafter, the deceased never

returned. The dead body of the deceased was recovered from the bank of the river Dihing. On being informed by the police, he brought the dead body to the hospital and then, brought the body back to his house. He further deposed that the accused persons were arrested by the police. In his cross-examination he testified that he was staying in a separate house at the time of the incident.

33. The learned Additional Public Prosecutor has laid stress in her argument that the evidence of the victim's father-in-law clearly supports and corroborates the evidence of the victim's son.

34. In reply to this, the learned counsel for the appellant has submitted that the evidence of PW.5 is hearsay evidence because he has heard that his daughter-in-law was taken to the accused persons' house by the daughter of the accused. He has not named the person who informed him that the accused person's daughter came to the victim's house and took his daughter-in-law to their house at the time of the incident. Moreover PW.5's evidence is not similar to the PW.2's deposition as PW.2 stated that his mother met the accused person's daughter on his way to the school.

35. Sri Damber Bdr. Chetry deposed as PW.6 that he was present at the time

of the inquest and he proved his signature as P.Exh-1(b) on the inquest report. He also identified the accused persons. His evidence also did not substantiate the evidence of the other witnesses.

36. The Medical Officer (MO for short) Dr. Taimik Khimhun deposed as PW.7 that on 28.07.2014, he was posted at CHC, Miao as MO and on that day, he performed Postmortem examination on the body of Late Ongtilu Tikhak, aged 26 years. There was a fresh sharp cut injury over her neck at the level of 5th cervical vertebra. He detected presence of fresh blood clot all around the neck and on the back of the neck. The salwar adorned by the victim was soaked in blood. The neck muscles, trachea, oesophagus, major carotid veins and arteries at the level of injury, were also cut whereas the cervical spinal cord was intact. He has opined that death was due to massive haemorrhage and brain anoxia as the main carotid artery and veins, which supplies blood to the brain, were severed off. The nature of injury leads to sudden cardio-respiratory arrest and causes immediate death. The death was homicidal in nature. He has proved the Postmortem report as Exhibit-3 and his signature as Exhibit-3(a).

37. In his cross-examination, he has admitted that he has not mentioned in

the report whether the injuries were ante mortem or post mortem in nature. He has admitted that he has not mentioned the time since death and the exact size of the cut injury. He has not mentioned from which side the injury was inflicted. He has further admitted that that the Postmortem examination takes one or two hours but he had completed the Postmortem examination of the body within 35 (Thirty Five) minutes. He also stated that half an hour is required to prepare the Postmortem report. He has also not mentioned whether the injury was suicidal or homicidal in nature.

38. The submissions of the learned counsel for the appellant that the injury may have been suicidal in nature can be safely brushed aside. The injury has been specifically described as a cut injury severing off the veins and muscles except the spinal cord. A suicidal injury cannot be caused to such an extent.

39. The Postmortem report in this case, can be relied on and it can be safely held that the injury was ante mortem and homicidal in nature. We agree with the observation of the trial Court that death was homicidal in nature.

40. The Magistrate who has recorded the confessional statement of Ram Ghimire/accused, Sri Gautam Hazarika deposed as PW.8 that on 03.08.2004 he

was posted as EAC cum JMFC at Miao. On that day, Ram Ghimire was produced from judicial custody for recording his confessional statement. He recorded the statement of Ram Ghimire (accused) under Section 164 of the CrPC. The accused confessed his guilt. One lady was killed in his house and on the following morning, they took the body to the river side and abandoned the body. The accused had confessed that he committed the offence as his wife used to suspect him with the victim.

41. PW.8 further deposed that on 11.08.2004, he recorded the confessional statement of the accused Usha Ghimire and Deepa Ghimire. The wife of the accused/appellant, Usha Ghimire has confessed before him that her husband Ram Ghimire used to work as a driver under APST bus but instead of returning home at 6:00 PM, her husband used to stay with the victim/deceased and used to return home late at night. She was enraged because the victim used to threaten that her husband would marry her (victim/deceased). On the day of the incident, her husband took a bottle of alcohol and brought the victim to their house and both consumed the alcohol. The victim was inebriated. She further stated before the Magistrate that she did not know in what manner her husband had committed the offence.

42. The Magistrate PW.8 further deposed that the other accused Deepa Ghimire confessed before him that she is the daughter of Ram Ghimire and Usha Ghimire. On the date of the incident, when she returned home, she found that the victim was in their house and she was inebriated. Her mother Usha Ghimire asked for her help to send away the inebriated victim from their residence. Accordingly, both Usha Ghimire and Deepa Ghimire brought out the victim from their residence. PW.8 has proved the confessional statement of Ram Ghimire as Exhibit-06 and his signature as Exhibit-06(a). He has proved the confessional statement of Usha Ghimire as Exhibit-07 and Exhibit-07(a) as his signature, and Exhibit-08 as the confessional statement of Deepa Ghimire, and Exhibit-08(a) as his signature. In his cross-examination, PW.8 has stated that the accused Ram Ghimire was produced before him on 29.07.2004 for recording his confessional statement and he has recorded the confessional statement of the accused on 03.08.2004. He has recorded the confessional statement of the accused within 7 (Seven) days of his arrest, as 29.07.2004 was the date of first production of the accused. At this juncture it is apt to mention that the brief account of the incident described by the accused persons in their confessional statements is not similar to the deposition of PW.2. Where is the corroboration?

It is thus held that the retracted confession of Ram Ghimire (accused) is not substantiated by corroborative evidence. PW.2 stated that Deepa Ghimire had a discussion with his mother (deceased), whereas Deepa Ghimire deposed that she found the deceased in an inebriated condition in their house.

43. PW.8 further testified in his cross examination that he has followed the procedure as provided under Section 164 of the CrPC for recording the confessional statement, and he has given the accused sufficient time for reflection. He has admitted that he kept the accused under the custody of his office peon and accorded sufficient time to Ram, before the confessional statement of the accused Ram Ghimire was recorded. He has admitted that he had not noted in the statement that he read over the statement to the accused in Hindi.

44. The learned counsel for the appellant/accused has laid stress in his argument that the confessional statement was not recorded as per proper procedure and thus, this confessional statement cannot be accepted as evidence. Thus, the chain of circumstantial evidence is incomplete, lending a benefit of doubt to the accused. It is submitted on behalf of the appellant/accused that learned Magistrate has admitted in his cross-examination

that the accused could not understand English but the confessional statement was recorded in English and there is no note under the confessional statement that the confessional statement was explained to the accused in Hindi.

45. The learned counsel for the appellant laid stress in his argument that he has not mentioned the date of production of the accused and the time of reflection given to the accused before recording his confessional statement in the format of recording the confessional statement of the accused Ram Ghimire, Ushal Ghimire and Deepa Ghimire.

46. PW.8 has also mentioned in his cross-examination that Deepa Ghimire has stated that she and her mother had taken the deceased out of their house towards the riverside.

47. Learned counsel for the appellant has assailed the confessional statement recorded by the Magistrate. At this juncture, it is pertinent to scrutinize the format of recording the confessional statement under Section 164 of the CrPC. A close scrutiny of the format which is marked as Exhibit-06 clearly reveals that the time when the accused was produced from custody has not been mentioned in the format. It is true that the Magistrate, PW.8 has not apprised all the

accused while recording their statements under Section 164 of the CrPC that if they do not even make their confessional statements, they would not be forwarded to police custody but would be forwarded to jail. PW.8 has also not asked the accused as to why they were willing to make such confessional statements.

48. Learned counsel for the appellant/accused has relied on the decision of the Hon'ble Supreme Court in *Shivappa Vs. State of Karnataka reported in (1995) 2 SCC 766* wherein it has been observed that:

“8. From a perusal of the evidence of PW 17, Shri Shitappa, Additional Munsif Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW 17 did not disclose to the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. PW 17 stated during his deposition in court: "I have not stated to the accused that I am a Magistrate" and further admitted: "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW 17 also admitted that "at the time of recording the statement of the accused no police or police officials were in the open court. I cannot tell as to whether the police or police officials were present in the vicinity of the court'.'. From the memorandum

prepared by the Munsif Magistrate, PW 17 as also from his deposition recorded in court it is further revealed that the Magistrate did, not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar, PW 25 admitted that the sub-jail, the office of the Circle Police Inspector and the police station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7- 1986 did the Munsif Magistrate, PW 17 question the appellant as, to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate, PW 17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. The, failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under [Section 164](#) CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the appellant. Under these circumstances, the confessional statement was required to be ruled out of consideration to determine the guilt of the appellant. Both the trial court and the High Court, which convicted the appellant only on the basis of the

so-called confessional statement of the appellant, fell in complete error in placing reliance upon that statement and convicting the appellant on the basis thereof. Since, the confessional statement of the appellant is the only piece of evidence relied upon by the prosecution to connect the appellant with the crime, his conviction cannot be sustained.”

49. Reverting back to this case, it is held that we find force in the submissions of the learned counsel for the appellant. On the contrary, the learned Additional Public Prosecutor has submitted that the confessional statement was properly recorded. It is submitted that the Magistrate has admitted in his cross-examination as PW.8 that the confessional statement was recorded within 7 (Seven) days of production of the accused.

50. It is true that the Magistrate has admitted that the confessional statement was recorded within 7 (Seven) days but at the same time the Magistrate has admitted that he has not mentioned the date and time of production of the accused. PW.8 has also not mentioned whether the accused was produced from judicial custody. This Court is constrained to hold that the confessional statements were not recorded with utmost care and diligence. The statement was recorded in a mechanical manner without ascertaining whether the accused Ram Ghimire was voluntarily making his confessional statement. The Magistrate

did not also ask the accused whether there was any coercion from the police to make the confessional statement. It would be perilous to rely on this retracted confessional statement which is not corroborated by any evidence.

51. The IO B.B. Gurung passed away and the prosecution produced the OC of Miao Police Station in place of the IO. The OC Ege Ete has deposed as PW.9 that the Miao Police Station Case No. 25/2004 under Sections 302/34 of the IPC was registered at Miao Police Station. The PW.9 deposed that during investigation, B.B. Gurung visited the PO, conducted inquest and forwarded the body for autopsy. He collected the cigarettes, match box and even glass and forwarded the same for forensic examination. He also recorded the statements of the informant and the witnesses under Section 161 of the CrPC and forwarded all the accused to the Magistrate for recording their statements under Section 164 of the CrPC. On completion of the investigation, the IO submitted charge sheet against the accused.

52. PW.9 has identified Exhibit-01 as the inquest report;

Exhibit-09 as the FIR lodged by Meghnath Gaur and the seal and signature as Exhibit-09(a) on the FIR;

Exhibit-10 as the charge sheet and the Exhibit-10(a) as the seal and signature of the then OC of Miao Police Station and

Exhibit-10(b) as the signature of the IO.

53. PW.9 has further identified Exhibit-11 as the rough sketch map of the PO and,

Exhibit-11(a) as the signature of the IO;

Exhibit-02 as the seizure memo of cigarettes, match box etc. and

Exhibit-02(b) as the signature of the IO and;

Exhibit-12 as the seizure list of the dao and

Exhibit-12 (a) as the signature of the IO.

54. In his cross-examination, PW.9 has admitted that in the year 2004, he was posted at Daporijo and he joined as OC of Miao Police Station and he has no personal knowledge regarding the case at hand.

55. The trial Court fell into error by recapitulating the entire evidence and holding that the victim was last seen with the accused Deepa Ghimire by PW.2.

In the instant case, the last seen theory cannot be considered to be a circumstance, forming a complete chain of circumstances against the accused.

56. It is true that PW.2 has stated that he was proceeding to school along with his mother and when they reached near the residence of the accused, Deepa Ghimire called his mother (deceased) to their residence. He overheard his mother saying that she will visit them after dropping him (PW.2) off at school. At this juncture, it is apt to mention that the learned trial Court relied heavily on the confessional statement of all the accused and tried to recapitulate the entire evidence by forming a complete chain, whereas this is not so. *It is true that the accused has confessed that the deceased Ongtilu Tikhak went to the residence of the accused persons and embarked upon an argument with Usha Ghimire. She asserted that she would marry Ram Ghimire. She was also carrying a bottle of IMFL, which she consumed to the extent of inebriation. Therefore, the confessional statements of all the accused reveal that Ram Ghimire asked the other two accused to carry her (victim/deceased) outside their residence. Both Usha Ghimire and her daughter Deepa Ghimire carried the deceased to the Pisi Saw Mill. The accused Ram Ghimire who was carrying a dao slit the throat of the victim and killed her.* Now, these confessional

statements cannot be considered as evidence.

57. When the statements of the accused under Section 313 of the CrPC were recorded, they have vehemently denied their earlier confessions, thus retracting their confession. A benefit of doubt has to be extended to the accused as the confessional statements were not recorded as per proper procedure. We would like to reiterate that the following questions were not asked to the accused when their confessional statements were recorded:

- (i) Questions were not asked to the accused as to why were the accused willing to make their confessional statements.
- (ii) Whether the police have influenced them and coerced them into making such statements.

58. Moreover, the accused were not also apprised that if they decline to make any confessional statement they would not be forwarded to police custody but would be remanded to judicial custody. The proforma of recording the confessional statements marked as Exhibit –06, 06 (a), 07, 07 (a), 08 and 08 (a) are proof enough of this fact. The statements of the accused under Section 313 of the CrPC clearly reveal that Ram Ghimire has denied that he made a

confessional statement before the Magistrate and Usha Ghimire and Deepa Ghimire have also denied that they have made any confessional statements before the Magistrate but they have admitted that they were produced before the Magistrate for recording their confessional statements. Ram Ghimire, Usha Ghimire and Deepa Ghimire have admitted that they have affixed their signatures on many papers but they could not recall, if they have affixed their signatures on any statements.

59. The learned Additional Public Prosecutor laid stress in her argument that their statements under Section 313 of the CrPC cannot be considered to be a retracted confession because all the accused have admitted when the question No. 20 was asked under Section 313 of the CrPC about affixing the signatures on their confessional statements, then all the accused have admitted that they have affixed their signatures on their statements. However, the answers of the accused clearly reveal that they could not recall if they have affixed their signatures on any confessional statement. Thus, the argument of the learned Additional Public Prosecutor holds no water.

60. The learned Additional Public Prosecutor has laid stress in her argument that the seizure list marked as Exhibit P.Exh-12 and P.Exh-12(a) clearly reveals

that the dao was seized as produced by the accused Ram Ghimire and this seizure list has been proved by PW.9. Thus, this seizure list fortifies the confessional statement and corroborates the same. This argument of the learned Additional Public Prosecutor can be safely brushed aside. The confessional statements have been retracted by all the PWs, more importantly, the accused Ram Ghimire. The dao was not produced in the Court. Not a single seizure witness has proved the dao or identified the same in the Court. There is no evidence that this dao was forwarded to the Forensic Science Laboratory for forensic examination. There is no evidence that the accused led to the recovery of the dao i.e. the weapon of offence.

61. The decision of the learned trial Court that the confessional statement of the accused Exhibit-06 can be relied upon to prove the recovery of dao, and it is not necessary to prove any disclosure statement relating to recovery of the dao, is a flawed decision. Thus, the stray circumstances do not form a complete chain. There is no denial that the victim was murdered and there is no denial of *corpus delicti*. Although PW.2 deposed that he overheard his mother's conversation with Deepa Ghimire that she would visit their house after dropping him (PW.2) off at school, yet it could not be affirmed beyond a reasonable doubt

that the deceased/victim went to the accused persons' house after dropping him (PW.2) off at school. The victim was found missing in the evening and then, the entire family set out on a frantic search but could not find her till the next morning. The victim's body was found by the informant who was not examined as a witness. The duration when the victim was last seen with Deepa Ghimire *vis-à-vis* the time her body was recovered is too wide to form a last seen theory.

62. The retracted confession of Ram Ghimire has not been corroborated by any reliable evidence. Although the victim was seen with Deepa Ghimire, this accused was acquitted from the charges under Section 302/201/34 of the IPC. It would be perilous to convict the appellant solely on the retracted confession. It is writ at large that the stray circumstances do not form a complete chain.

63. The confessional statement of the accused reflects that the victim Ongtilu Tikhak was known to him since 1991/1992. Thereafter, 4 (Four) months prior to 03.08.2004, he met the victim at Miao market and thereafter, a love relationship developed between him and the victim. He used to visit her house frequently and also indulged in physical relationship with the victim. In the month of May, 2004, his wife learnt about his illicit relationship with the victim and his wife confronted him and the victim. On 27.07.2004, when he reached Miao from

Dibrugarh at about 7:00 PM, he met the victim in his quarter. The victim was inebriated and was behaving in an aggressive manner. She stated that she would take him along with her and would kill his wife and children. He (Ram Ghimire) asked his wife and daughter to send the victim away from his quarter and to keep her near the jungle area. Thereafter, he followed his wife and daughter up-to the jungle area near the residence of Sri Gumjanong and asked his wife and daughter to return to their quarter. From thereon, he and the victim went to the Old Mill building situated about 100 meters away from Gumjanong's house. He slit the throat of the victim with his dao which he was carrying with him as the victim was completely inebriated.

64. This confessional statement was retracted by Ram Ghimire when his statement under Section 313 of the CrPC was recorded.

65. Both the learned Additional Public Prosecutor and the learned counsel for the appellant has relied on the decision of the Hon'ble Supreme Court in *Parmananda Pegu Vs. State of Assam reported in (2004) 7 SCC 779* wherein it was held and observed that:

“17. Having thus reached a finding as to voluntary nature of a confession, the truth of the confession should then be tested by the Court.

The fact that the confession has been made voluntarily, free from threat and inducement, can be regarded as presumptive evidence of its truth. Still, there may be circumstances to indicate that the confession cannot be true wholly or partly in which case it loses much of its evidentiary value.

18. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the Court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the Court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true. The law on the subject of retracted confession has been succinctly [laid down by](#) a three Judge bench of this Court in [Subramania Goundan Vs. State of Madras](#) [(1958) SCR 428] which lays down:

"The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was [laid down in](#) certain cases one such being *In re Kesava Pillai* [ILR 53 Mad 160 : (AIR 1929 Mad 837)] (B) that if the

reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being Balbir Singh Vs. State of Punjab (S) AIR 1957 SC 216 (C), but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

"19. In [Pyare Lal](#), supra, the same principle in regard to the evidentiary value of retracted confession has been reiterated. Subba Rao, J. speaking for a four Judge Bench, stated the legal position thus:

"...A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only, a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars..."

By the use of the expression "corroboration of material particulars", the Court has not laid down any proposition contrary to what has been

clarified in [Subramania Goundan](#)'s case (supra) as regards the extent of corroboration required. The above expression does not imply that there should be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the confession, as pointed out in [Subramania Goundan](#)'s case."

66. The appellant Paramananda Pegu was acquitted from the charges under Sections 302/365 of the IPC and was set forth at liberty.

67. In the instant case too, it has already been held in the foregoing discussions that the retracted confession of the accused cannot be relied upon, moreso, when the confession was perfunctorily recorded by the Magistrate. The accused ought to be given a benefit of doubt as the accused was not cautioned properly by the Magistrate who recorded his statement and this confessional statement was later retracted by the accused when his statement under Section 313 of the CrPC was recorded. The retracted confession of the accused is without any corroboration. The evidence of PW.2 cannot be considered as evidence corroborating the retracted confession of the accused in material particulars. Rather contradiction has surfaced in the evidence of PW.2 and the confessional statement of Deepa Ghimire.

68. In the light of the decision of the Hon'ble Supreme Court in Paramananda Pegu (supra) and the decision of the Hon'ble Supreme Court in Shivappa

(supra), it is held that a benefit of doubt has to be extended to the accused. In the wake of the foregoing discussions, it is held that the prosecution has failed to prove beyond a reasonable doubt that the accused Ram Ghimire committed murder of the deceased by intentionally causing her death. We do not think that it will be safe to rely upon the evidence of PW.2 and the retracted confessional to confirm the conviction entered by the learned Sessions Judge against the accused. We therefore set aside the conviction and the sentence passed against the accused.

69. The appeal is allowed. The judgment and order dated 30.03.2022 passed by the learned Sessions Judge, Khonsa in connection with Khonsa Sessions Case No. 98/2019 (Miao Police Station Case No. 25/2004) is set aside. The accused is acquitted from the charges under Section 302 IPC and is set at liberty forthwith.

70. However, keeping in view the provisions of Section 437-A CrPC, the appellant Ram Ghimire is directed to furnish personal bond in sum of Rs.30,000/- (Rupees Thirty Thousand) and assure the bond in the like amount before the learned trial Court which shall be effective for a period of six months.

71. In terms of the above observations, this Criminal Appeal stands disposed

of.

72. Send back the Trial Court Records.

JUDGE

JUDGE

Comparing Assistant