IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Crl. A. No. 03 of 2020

Sanchi Rai,
Yangtey, Gyalshing,
West Sikkim.

... Appellant

Versus

State of Sikkim.

... Respondent

BEFORE

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

For the appellant : Mrs. Puja Lamichaney, Advocate (Legal Aid Counsel)

For the respondent : Dr. Doma T. Bhutia, Public Prosecutor, Sikkim.

Date of hearing : 09.10.2020 & 12.10.2020.

Date of judgment : 06.11.2020.

JUDGMENT

(*Arup Kumar Goswami, CJ*)

This appeal is preferred by the appellant against the judgment dated 21.11.2019 passed by the learned Sessions Judge, West Sikkim at Gyalshing in Sessions Trial Case No.02/2018 whereby the appellant was convicted under Section 302 of Indian Penal Code,1860 (for short, IPC). The learned Sessions Judge, Sikkim had sentenced the appellant to suffer imprisonment for life and to pay a fine of Rs.10,000/-.

2. It is also to be noticed that learned Sessions Judge, West Sikkim had awarded compensation to the minor daughter of the deceased and the appellant, who is aged about 13-14 years, a sum of Rs.1 lakh under Sikkim Compensation to the Victims or his Dependants Amendment Scheme, 2016.

3. The appellant is accused of mariticide. An FIR was lodged by one Naresh Chettri, Sub-Inspector of Police of Gyalshing Police Station before the Station House Officer(SHO), Gyalshing Police Station on 06.04.2018 at about 11:45 pm stating that on being directed, he had visited Yuksom Public Health Centre (PHC), and it was learnt upon enquiry that at around 09.45 pm, one Nima Tshering Lepcha was declared brought dead by the Medical Officer of PHC, Yuksam with alleged history of murder by his wife by poisoning him with rat poison and by assaulting him with wooden log on his head. On the basis of the said FIR, G.P.S Case No.17/2018 under Section 302 IPC was registered against the appellant and the SHO had taken up the investigation himself.

4. After completion of investigation, finding that a *prima facie* case is made out against the appellant under Section 302 IPC, charge sheet was submitted on 31.05.2018. Subsequently, in the Court of learned Sessions Judge, West Sikkim at Gyalshing Sessions Trial Case No.02/2018 was registered. Charge being read over, the appellant pleaded not guilty and claimed to be tried.

5. During trial, prosecution examined 22 witnesses and the accused had also examined two witnesses. Statement of the accused was recorded under Section 313 Cr.P.C.

6. The learned Sessions Judge, on consideration of materials on record including the evidence of the doctor (PW-21), who conducted the post-mortem of the deceased, and the Forensic Report (Exhibit-17), which revealed that the viscera of the deceased tested negative for poison, held that the allegation of the prosecution that the accused had poisoned the deceased had not been proved beyond reasonable doubt. The learned Sessions Judge held that voluntary extra- judicial confession made by the accused to PW-1, PW-3, PW-4 and PW-8 is a strong circumstance pointing

unerringly towards commission of the offence by the accused. Learned Sessions Judge held that PW-4, who was declared hostile, must have been won over by the accused being a friend. It was also held that recovery of the fire-wood, the weapon of offence, in the bed room of the accused is also a vital link in the circumstances. The probability of the deceased sustaining injuries in the form of an assault elsewhere was discounted holding that in such an event the deceased would have gone for seeking medical attention. The evidence of DW-1 was considered unbelievable and unreliable in view of evidence of PW-4, the hostile witness. Evidence of DW-2 was found to be not convincing because of evidence of PW-8.

7. Ms. Puja Lamichaney, learned Counsel for the appellant has submitted that the learned trial Court committed error of law as well as of facts in convicting the appellant in as much as the prosecution failed to bring home the guilt of the accused beyond reasonable doubt. It is submitted that prosecution had hoisted a false case against her and had also falsely introduced poisoning of her husband by her. She submits that the learned trial Court committed manifest error of law in relying upon on the extra-judicial confession allegedly made by the appellant to PW-1, 3 and 4 and 8. She submits that there is glaring contradiction on vital aspects going to the root of the prosecution case and as such the appellant cannot be convicted on the basis of alleged circumstantial evidence. Call details of PW-3 being not produced, no reliance can be placed on the evidence of PW-3, who deposed that the accused had called her up confessing her guilt, she submits. Non-examination of B. L. Bhandari, a policeman who appears to be the first person at the P.O before anybody else vitiates the prosecution case in the facts of the case, she contends. It is submitted that the learned trial Court totally misconstrued the evidence of PW-8 .She submits that no reliance can be placed on recovery of the "wooden log", stated to be the weapon of offence and the Discovery Statement because of inherent

infirmities. She submits that the alleged weapon of offence having not been shown to the doctor (PW-21), adverse presumption may be drawn against the prosecution. Accordingly, she submits that the appellant is entitled to acquittal. She places reliance on the judgments in the cases of ***Ishwar Singh vs. State of U.P.,*** reported in ***AIR 1976 SC 2423, Lakshmi Singh And Ors. vs. State of Bihar,*** reported in ***(1976) 4 SCC 394, Heramba Brahma and anr. vs. State of Assam,*** reported in ***AIR 1982 SC 1595, Jaharlal Das vs. State of Orissa,*** reported in ***(1991) 3 SCC 27, State of Haryana vs. Ram Singh,*** reported in ***(2002) 2 SCC 426, Suchand Pal vs. Phani Pal and Anr.,*** reported in ***AIR 2004 SC 973, State of Goa vs. Sanjay Thakran & Anr.,*** reported in ***(2007) 3 SCC 755, State of Rajasthan vs. Hakam Singh,*** reported in ***(2011) 15 SCC 171*** and ***Sahadevan Anr. vs. State of Tamil Nadu,*** reported in ***AIR 2012 SC 2435.***

8. Dr. Doma T. Bhutia, learned Public Prosecutor supports the impugned judgment and contends that impugned judgment does not suffer from any infirmity and therefore, the appeal is liable to be dismissed. She submits that confessional soliloquy of the accused admitting his guilt, evidence of PW-3 as well as *res gestae* witnesses in the form of PW-5 and PW-6, the accused being present alone with the deceased at the P.O on the date of incident, recovery of murder weapon "wooden log" from the bed-room of the accused and the motive to murder the husband for extra-marital affairs coupled with the extra-judicial confession on record clearly establish the prosecution case. She further submits that that the accused had not gone to the hospital when the injured husband was taken to the hospital , is also an indication that she had committed the murder of her husband. She has placed reliance on the judgments in the cases of ***Sahoo vs. State of UP***, reported in ***AIR 1963 SCC 40***, ***Bhugdomal Gangaram & Ors vs. State of Gujarat***, reported in ***(1984) 1 SCC 319***, ***Divakar Neelkantha Hegde &***

Ors vs. State of Karnataka, reported in ***(1996) 10 SCC 236, State of UP vs. Harban Sahai & others***, reported in ***(1998) 6 SCC 50***, ***Banti alias Guddu vs. State of M.P.***, reported in ***(2004) 1 SCC 414***, ***Dhanaj Singh & Ors vs. State of Punjab***, reported in ***(2004) 3 SCC 654***, ***State of MP (through CBI) & Ors vs. Paltan Mallah and Ors.***, reported in ***(2005) 3 SCC 169***, ***Manoranjan Sil vs. State of West Bengal***, reported in ***2008 Cri. L.J. Cal 4719***, ***Javed Alam vs. State of Chhattisgarh & Anr.***, reported in ***(2009) 6 SCC 450***, ***Krishna Kr. Malik vs State of Haryana***, reported in ***(2011) 7 SCC 130*** and ***Pattu Ranjan Vs. State of T.N.***, reported in ***(2019) 4 SCC 771***.

9. We have considered the submissions of the learned Counsel for the parties and have examined the materials on record.

10. The deceased and the accused were married for 13 years and they have one 11 year old daughter. There is no evidence with regard to where the daughter was on that fateful day.

11. PW-1, Nar Bahadur Gurung stated that the accused had been his tenant from 17.12.2017. On 06.04.2018 at around 08.00 pm, they went to sleep after having dinner and at around 09.30 pm , his wife (PW-7) woke him up and told him that one Reena (PW-4) had called her up to say that the appellant had committed murder of her husband. Hearing that he rushed to the place of occurrence (P.O) and finding one police personnel P.L Bhandari present there, both of them went inside the house of the accused. They found the deceased lying on the mattress on the floor and the accused walking around the house saying that she had killed her husband. He stated that as the police personnel said that the deceased was still breathing, they immediately took him to hospital and in the meantime, one lady police personnel had arrived at the P.O. He also deposed that he had recorded his statement under Section 164 Cr.P.C (Exhibit-1).

In cross-examination, he stated that the accused had made the self implicating statements in presence of police personnel.

12. PW-2 is the informant of FIR, which he exhibited as Exhibit-3. In his cross-examination, he stated that he did not go to the P.O.

13. PW-3, Mingma D. Sherpa stated that on 06.04.2018, while he was conducting patrolling duty at Yuksom *Bazar*, he received a phone call from the accused, who told him that she had committed murder of her husband Nima Tshering Lepcha and asked him to arrest her. On receiving the call, he informed about the same to the In-charge Head Constable Padam Lal Chettri (PW-5) and later on both of them went to the house of Nim Tshering Lepcha where they found the deceased lying on the floor. He also stated that they had evacuated him to Yuksom PHC.

In cross-examination, he admitted that he cannot say whether the person who had made the phone call was actually the accused and that he also does not know the phone number from which he had received the call.

14. PW-4, Ms.Reena Gurung, who is a neighbour of the accused, stated that on 6th day of a month she had heard some noise from the house of the accused and had accordingly informed the landlord through phone. When she stated that she did not tell police that the accused had knocked on her door and had said that she had killed her husband, prayer was made to declare her a hostile witness, which was allowed.

In her cross-examination by the prosecution, she admitted that she had stated before police that when she was sleeping, one Manita Rai (PW-8) had knocked on her door and had told her that the appellant had telephonically informed police that she had committed murder of her husband and that she had also telephonically informed the landlord that some fight was going on in the house of the accused and he should therefore go there. She admitted the statement recorded under Section 164 Cr.P.C

(Exhibit-5) to be her statement and signature in questionnaire (Exhibit-6) to be her signature. However, in cross-examination by the defence, she stated that she did not hear any scream or noise from the room of the deceased. She stated that she did not state in her statement under Section 164 Cr.P.C that she had heard the accused knocking at her door and saying that she had killed her husband and that she had also not stated that she had called up the wife of the landlord and told her that the accused was saying that she had murdered her husband. A perusal of her statement made under Section 164 Cr.P.C belies such assertion and it is also seen that she had stated that the accused was saying that she killed her husband because he had tortured her for years. She also stated that she did not remember anything about Manita (PW-8) coming to her house as she was in deep sleep owing to her post-delivery recovery and had called up the house owner only when she heard noise of the neighbours outside.

15. PW-5, Padam Lall Chettri is a Head Constable of Yuksom Police Out-post. He stated that on 06.04.2018 at 09.00 pm constable Migma Sherpa (PW-3) telephonically informed him to convey that the appellant had telephonically informed him that she had committed murder of her husband and had asked him to arrest her accordingly. Thereafter, he went to the house of Nima where he found him lying on bed unconscious in a serious condition. He informed SHO of Tikjuk Police Station. He further stated that Tenzing Bhutia (PW-6) and other villagers evacuated Nima Tshering Lepcha to Yuksom PHC.

In his cross-examination, he admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him.

16. PW-6, Tenzing W. Bhutia also claims to be Head Constable of Yuksam Police Outpost. He stated that on 06.04.2018 at around 09.10 pm

Head Constable Padam Lall Chettri (PW-5) telephonically informed him that the appellant had committed murder of her husband Nima Tshering Lepcha at Kopchay and asked him to go to the place of occurrence and as such, he went to the P.O in the vehicle of one Naren (PW-10). Finding that Nima Tshering Lepcha was lying on the floor with blood oozing from mouth and ear, he took the injured in the vehicle of PW-10 to Yuksom PHC where the Medical Officer on duty had declared him brought dead.

In cross-examination, PW-6 admitted that in his statement before police he did not state that Padam Lall Chettri (PW-5) had told him that the appellant had committed murder of her husband.

17. PW-7, Boi Maya Gurung is the wife of PW-1. She deposed that on the relevant day at around 03.30 pm the accused had come to her shop and had purchased a packet of rat killer poison and that at around 09.30 pm Reena Gurung (PW-4) telephonically informed her that the appellant was shouting that she had killed her husband. Hearing that she along with her husband immediately went to the place of occurrence and they noticed that police and some persons had already assembled there and subsequently, police had taken the appellant and the deceased to Yuksom PHC.

In her cross-examination, she stated that the deceased and accused was a lovely and caring couple and that she had not ever seen them fight. She stated that the room occupied by the accused and deceased was a *kutcha* wooden house and there were other rooms of neighbours which were so close to each other that any kind of noise, shout or talk could easily be overheard by the neighbours. She admitted that she cannot say whether the accused had brought rat killer on the day of incident and that she did not tell police about Reena Gurung (PW-4) telephonically informing her at around 09.30 pm regarding the appellant shouting that she had killed her husband.

18. Manita Rai, PW-8 stated that at around 09.00 pm on the day of occurrence the accused had knocked her door and had shouted "Daju Marey" (she had killed her husband) but as she was not well she did not visit the room of the accused.

In her cross-examination, she admitted that they were next door neighbours and the accused and the deceased were a happily married couple and she had not seen them fight or exchange heated words. She stated that they share a common toilet accessible by a common passage and while going to the toilet they see the room of the deceased and accused. She had seen the deceased sleeping in his room and at that time neither the accused nor her brother was present. The deceased had returned home after many days and lights of the rooms were not turned on. It is also stated by her that the accused along with her brother returned to the rented room only around 09.30 pm. They had come to her room at first and had enquired about her well being. Just 2-3 minutes after they left her place the accused had screamed and started crying uncontrollably but she could not say with certainty whether the accused had screamed "Daju Maryo" (her husband was dead) or Daju Marey (she had killed her husband) as her child was crying. She also stated that she did not find any unnatural behaviour on the part of the accused on that day.

19. PW-9, Promod Chettri is the son of Padam Lall Chettri (PW-5). He deposed that his father had left for the house of the accused after receiving a phone call. He also proceeded to the house of the accused and he had helped in evacuation of the deceased to the hospital on being requested by one police person called Tenzing with the help of Naren (PW-10). In his cross-examination, he stated that the accused was sitting near the deceased and was crying uncontrollably.

20. PW-10, Naren Rai is a co-villager of the accused. He stated that at around 09.30 pm while he was in Yuksom *Bazar* with friends, one Tenzing Bhutia (PW-6) requested him to take him to Kopche in his vehicle. On being requested by police person he evacuated the deceased in his vehicle along with Tenzing Bhutia (PW-6) and some other police personnel and villagers to Yuksom PHC.

Though he had stated that he was told by Tenzing Bhutia (PW-6) that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under section 161 Cr.P.C.

21. PW-11, Anish Gurung is aged about 17 years and his deposition was recorded by the learned trial Court on being satisfied that he is competent to testify. PW-11 is the son of PW-1 and PW-7. He deposed that at around 08.00 pm on the relevant date, Reena (PW-4) telephonically called her mother over to the ground floor of their house and accordingly, he along with his mother, had proceeded to the ground floor room where accused with her family was residing and by the time they had reached, many villagers and police had already gathered. He stated that after evacuating the deceased to Yuksom PHC along with police and villagers he had returned home and later on he came to learn that the deceased had expired at Yuksom PHC.

In his cross-examination, he stated that he had not seen the accused and deceased fight and he had not heard any abnormal or unusual sound coming from the house of the deceased.

22. PW-12, Ms. Tshering Bhutia is a Panchayat Member, who stated that at around 02.00 pm she had received a call from Gyalshing Police outpost enquiring whether Nima was from her Ward. She stated that she gave phone number of police to the relative of the deceased.

23. PW-13, Dawgay Lepcha is sister-in-law of the accused. She stated that she had received a phone call from Tshering Bhutia (PW-12) at around 02.30 am and was informed that her brother was killed by the accused whereupon she along with her family members had gone to Yuksom PHC. In her cross-examination, she stated that she was initially informed that her brother had met with an accident.

24. PW14, Damber Singh Chettri stated that hearing some noise coming from the rented house of the accused at around 09.30 pm on the fateful day he had rushed to the house of the accused and found some police personnel and villagers there. He stated that on being requested, he along with police and others took the husband of the accused to Yuksom PHC. In cross-examination, he stated that he did not know whether the deceased used to drink alcohol on a regular basis or whether he used to get involved in fights with villagers.

25. PW-15, Mingma Tshering Bhutia is a monk of Dubdi Monastery. He stated that he knows nothing about this case. In cross-examination, he stated that he had paid Rs.7,500/- to a driver, whose name he did not know, for carriage of sand.

26. PW-16, T.N.Chettri is a co-villager. He stated that one packet of rat killer poison and one fire-wood log were seized in his and one Bhim Bahadur Gurung's (PW-17) presence. He also stated that police recorded the statement of the accused (Exhibit-7) in his presence. He also deposed that material objects, namely, cover of rat killer poison (MO-I), firewood (Mo-II), tea cup (MO-III) were seized under Seizure Memo (Exhibit-8) and he had put his signature in MOs and Exhibit-8. He also deposed that bed sheet (MO-IV) and pillow cover (MO-V) were seized in his presence vide Seizure Memo (Exhibit-9) where he was a witness. It is further stated by him that he had

put his signature in the sketch map of the place of the occurrence (Exhbit-10).

In cross-examination, he, however, admitted that he did not hear the accused stating anything to police. Confronted with Exhibits-7, 8, 9 and 10, he stated that on being asked by police to sign the documents he had affixed his signature thereon but he does not know their contents and purpose.

27. PW-17, Bhim Bahdaur Gurung stated that he was called by police to the house of the accused. He deposed with regard to MO-I, MO-II, MO-III, MO-IV and MO- V and Exhibits- 7, 8, 9 and 10 in similar vein as PW-16.

In his cross-examination, he stated that MOs were taken and seized by police on their own**.**

28. PW-18, Uday Chandra Chettri stated that he had been called by police to the house of the accused and he had signed on Inquest Report (Exhibit-11).

29. PW-19, Madan Bishwakarma is a photographer and he stated that he had taken six numbers of digital photographs (Exhibit-12) of the P.O and the deceased.

30. PW-20, Om Prakash Subba, at the relevant time, was posted at Gyalshing Police Station. He stated that he had taken the body of Nima Tshering Lepcha to STNM Hospital for post-Mortem and had handed over the body after post-Mortem to the family by preparing a Memo (Exhibit-13).

31. PW-21, Dr.O.T.Lepcha is the Chief Medical Legal Consultant of STNM Hospital. He deposed that on 08.04.2018 at around 10.00 am he had conducted the post-Mortem of Nima Tshering Lepcha and had prepared Autopsy Report (Exhibit-14). He opined that approximate time since death is 12-24 hours. He had stated as follows:-

"On my examination :-

The body was identified, Rigor mortis was present, there was faint and fixed PMS over the back. There was bleeding from the face, nose/ear and a bruise 2X3 cm was present over the left eye. There was bruise 4X6 over the posterior aspect of left ear. Scalp haematonma 8X4 cm over the occipital and parietal bone situated just above and posterior to left ear with depressed comminuted fracture of the left parieto temporal bone with radiating fracture running anteriorly and involving the frontal bone and running positively along the occipital bone. The fracture also runs interiorly and involves the base of the skull. There was also presence of depressed fracture measuring 6X% cm, over the left temporoparietal bone.

(B) Head and Neck.

-Subdural Haematoma 6X5X1 cm present over the left parietal

bone, with diffuse subarachnoid haemorrhage.

(C) Chest (Thorax)-NAD

(D) Abdomen- Stomach contained around 400 ml of dark fluid.

(E) Spinal Column-NAD

(F) The sample of blood (specimens) was taken in filter paper and was handed over to the I.O."

In his cross-examination, he stated that the injuries mentioned in Exhibit-14 could be sustained as a result of a fall or if one bangs his/her head on a concrete surface/ wall; that such kind of injuries might not cause immediate death of a person ; that it is also possible that after having such kind of an injury a person can come back home and sleep. He also stated that Exhibit-14 does not suggest presence of any poison.

32. PW-22, Mahendra Pradhan is the Investigating Officer. He deposed that at around 09.25 pm , he had received a telephonic information from Padam Lall Chettri (PW-5) to the effect that Nima Tshering was found in a serious condition in his room and he had been taken to Yoksom PHC for medical treatment with the help of his wife and neighbours and on receipt of the above information, he directed SI Naresh (PW-2) to enquire into the incident and PW-2 having gone to PHC Yuksom, found that Nima Tshering was declared brought dead by Medical Officer of Yuksom PHC and accordingly, PW-2 had lodged the FIR (Exhibit-3). He stated that Inquest was conducted over the dead body in the PHC. On inspection of the P.O, (MO-I), (MO-II), (MO-III) were recovered and seized vide Exhibit-8. He also stated that he had sent (i) one black-coloured T-shirt with reddish stains of deceased, (ii) blood sample of deceased, (iii) viscera of the deceased, (iv) one empty packet of rat killer poison written as knock out rat killer cake (Suriy's) "Eats in dies out" on it, (v) one bed sheet pink white-colour with reddish stains and (i) one light white coloured pillow with cover with reddish stains to the RFSL, Ranipool for forensic analysis and expert opinion. He deposed that RFSL Report (Exhibit-17) was negative in respect of rat poison. He had also deposed with reference to Exhibit-7.

33. The evidence of PW-1 discloses that his wife (PW-7) had woken him up and told him that Rina (PW-4) had called her up to say that the appellant had committed murder of her husband and that on hearing the same he rushed to the P.O, where he found one police personnel, B.L. Bhandari. He also stated that the accused was walking around the house shouting that she had killed her husband. PW-7 had deposed that PW-4 had telephonically informed her that the appellant was shouting that she had killed her husband. In cross-examination, she admitted that she did not tell police about Rina Gurung (PW-4) telephonically informing her at around 9.30 pm regarding the accused shouting that she had killed her husband. PW-22 also

confirmed the same in his cross-examination. Though she went along with her husband to the P.O, it is not in her evidence that the accused was saying that she had killed her husband. PW-11 also referred to a telephonic call from PW-4 to his mother, PW-7, to go to the ground floor of their house and accordingly, he along with his mother, had gone down. He also did not say that the accused was shouting that she had committed the murder of her husband.

34. The evidence of PW-1, PW-7, PW-11 and PW-14 go to show that by the time they had reached the P.O, some people were already there. In cross-examination, PW-1 had stated that the accused had made the statements implicating her in presence of police personnel. PW-1 in his Section 164 Cr. PC statement had stated that the accused was saying that she had killed her husband as he was having an illicit affair with another woman and that she would kill her too. No other witnesses, who were present along with PW-1 had deposed with regard to the accused pacing up and down in the room and muttering that she had killed her husband. Therefore, we are unable to accept the testimony of PW-1.

35. In ***Heramba Brahma*** (supra) The Hon'ble Supreme Court laid down that extra-judicial confession to afford a reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and the person selected in whom confidence is reposed. In ***Sahadevan*** (supra)**,** the Hon'ble Supreme Court laid down the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. It is laid down as follows:

> *(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*
>
> *(ii) It should be made voluntarily and should be truthful.*
>
> *(iii) It should inspire confidence.*

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law

36. Who were the people who had gathered in the P.O are not known. It is also not known how other persons were already there when people residing in the same building like PW-1, PW-7, PW-11 had not even reached the P.O. They were stated to have been informed about the incident immediately and they also stated to have gone to the P.O immediately on receipt of information. Presence of police personnel, B. L. Bhandari, remains a mystery. What he was doing there at 9.00 pm in the P.O is anybody's guess. His presence at the P.O at the earliest point of time throws up many questions which the prosecution had not even attempted to meet; rather the same has been suppressed.

37. Another incriminating piece of evidence sought to be highlighted by the prosecution is the telephonic call stated to have been made by the accused to PW-3. On this aspect, less said is the better. In his cross-examination, PW-3 had admitted that he could not say whether the person who made the phone call was actually the accused or not. It is very surprising that he did not even note down the phone number from which he had received the call. In his cross-examination, PW-5 admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him. In cross-examination, PW-6 admitted that in his

statement before police he did not state that Padam Lall Chettri (PW-5) had told him that the appellant had committed murder of her husband. PW-22, on the other hand, had deposed that Padam Lall Chettri (PW-5) had telephonically informed him to the effect that Nima Tshering was found in a serious condition in his room. Though PW-10 had stated that he was told by Tenzing Bhutia (PW-6) that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under section 161 Cr.P.C. In view of above, no credence can be placed on the so-called telephone call received by PW-3 that it was the accused, who had made the call and had informed him that she had committed the murder of her husband. Therefore, evidence of PW-3, PW-5 and PW-6 with regard to the information received by PW-3 that the accused had committed the murder of her husband is of no consequence.

38. PW-7, PW-8, who is the next door neighbour, and PW-11, in their cross-examination, had stated that the deceased and the accused was a loving couple and they had not seen them fight. It is seen from the evidence on record that the room occupied by the accused and the deceased was a *kutcha* wooden house and all other rooms were so close to each other that any kind of noise, shout or talk could easily be over heard by the neighbours. Their evidence does not indicate that the accused and the deceased had an estranged relationship over some extra-marital affairs of the deceased and that the accused had a motive to murder her husband. In ***Hakam Singh*** (supra), the Hon'ble Supreme Court held that it is well established that motive is a relevant factor, whether based on the testimony of ocular evidence of occurrence or circumstantial evidence. However, when the participation of an accused is established by evidence of an eyewitness, absence of motive becomes insignificant. Absence of motive, however, puts the courts on guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.

39. Though Dr. Doma T. Bhutia has submitted that the accused having not gone to the hospital along with the injured husband is also a circumstance to show that she was the perpetrator of the crime is difficult to accept. Even if a wife does not accompany the husband when her husband was taken to hospital in a seriously injured condition, the same cannot be an incriminating piece of evidence pointing to the guilt of the accused. Factually also, the submission is not correct as PW-22 had stated that the injured was taken to the Yuksom PHC for medical treatment with the help of his wife and neighbours.

40. PW-8, in her cross-examination, had clarified that she could not say whether the accused was saying "*daju moryo*" (her husband was dead) or "*daju mare*" (she had killed her husband) as her child was crying. Therefore, it cannot be said that there was any extra-judicial confession by the accused in presence of PW-8. Her evidence goes to show that the accused along with her brother had returned back at about 9.30 pm and they had first come to her room and had enquired about her well-being. Just 2-3 minutes after they had left her place the accused had screamed and started crying uncontrollably. She also stated that she did not find any unnatural behaviour on the part of the accused on that day. She did not say in her evidence that she had knocked on the door of PW-4 and had told her that the accused had telephonically informed the police that she had committed the murder of her husband. PW-8 was categorical that she did not visit the room of the accused after hearing "*daju moryo*" (her husband was dead) or "*daju mare*" (she had killed her husband) as she was unwell. It appears that PW-4 had stated before police that PW-8 had knocked on her door and had told her that the appellant had telephonically informed police that she had committed murder of her husband. However, in her statement under Section 164 Cr.P.C she changed her statement to the effect that she had heard the accused knocking at her door and saying that she had killed her husband.

41. In ***Sahoo*** (supra), the Hon'ble Supreme Court had held that a confessional soliloquy is a direct piece of evidence and Dr. Doma T. Bhutia, sought to contend that the statement made by the accused as deposed by PW-1 and PW-8 fall into the category of a confessional soliloquy. In view of our discussion supra we are unable to accept the aforesaid contention.

42. In ***Jaharlal Das*** (supra), the Hon'ble Supreme Court laid down that the circumstantial evidence in order to sustain the conviction must satisfy three conditions: (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) such circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. In ***Pattu Ranjan*** (supra), the Hon'ble Supreme Court laid down that doctrine of last seen, if proved, shifts the burden of proof onto the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish information in this regard or furnishing false information would give rise to a strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances. In the instant case ,the doctrine of last seen has not come into play.

43. PW-18 stated that he was made to sign on Exhibit -11, Inquest Report, by police at the residence of the accused. Evidently, he was not present when inquest was conducted, as deposed by PW-22, at the PHC.

44. Exhibit-7 is stated to be a Disclosure Statement. The same reads as follows:

"Exhibit-7

Identification memorandum of accused Sanchi Rai aged 30 years W/O Lt. Nim Tsh. Lepcha R/o Yangtay, Gyalshing A/P Kopchay, Yaksom recorded on 7/2/2018 in presence of two witnesses. Time 0630 hours.

My true statement is that yesterday dated 6/4/2018 my husband had gone to Dubdi for unloading sandstone on his own house truck. At that time, I lied to my house owner, Aunty Boi Maya Gurung, and purchased mouse-poisoning medicine for Rs.20. The time was around 5 pm. After sometime, my husband Nim Tsh. Lepcha returned and I mixed that mouse-poisoning medicine in a cup of tea and gave it to him, which he drank completely. At around 7 pm, he ate food and I also ate. At that time, he had started to appear a bit sick as that mouse medicine might have started to take effect. After eating food, he went to his room and I also went inside after finishing my kitchen works. He was playing with his mobile and we argued about his girlfriend and then he slapped me. After that, I went inside the kitchen and took out a wooden log from the collection and hit him two times on his head and one time on his leg with it, after this, he kept on shaking continuously. At that time, I felt that he would surely die that is why I told everything to Yoksom OP Mingma Police, and asked them to arrest me. The wooden log with which I had hit him is on my bed/bed room and the cover of mouse-poisoning medicine is on the dustbin outside which I had thrown, and the tea cup which was used was washed and kept in the kitchen; these items I can hand over to the police in the presence of witnesses.

This is my true statement."

45. The only portion which is admissible under Section 27 of the Evidence Act is the portion containing the statement that wooden log with which she had hit the deceased is on her bed/bed room, the cover of mouse-poisoning medicine is on the dustbin outside which she had thrown, and the tea cup used which was washed and kept in the kitchen, rest being confessional and prohibited by Sections 25 and 26 of the Evidence Act.

46. By Exhibit-8, one wooden log (fire wood) along with rat killer cake and tea-cup were seized. PW-16, who was witness to Exhibit-7, Disclosure Statement, Exhibit-8 and Exhibit-9 (Seizure Lists) stated that he did not know the contents of the documents and he was made to sign on these documents. In his cross-examination, he also stated that he did not know if the accused had given any statement or whether any other statement of the accused was recorded. PW-17 also stated similarly about Exhibit-7, Exhibit-8 and Exhibit-9 in his cross-examination. In his evidence-in-chief also, it is not stated by him that Exhibit-7 was prepared in his presence or the statement of the accused was recorded in his presence. In view of such evidence of PW-16 and PW-17, we are of the opinion that no reliance can be placed on Exhibit-7, Disclosure Statement, Exhibit-8 and Exhibit-9 (Seizure Lists).

47. Though other items seized by Exhibits-8 and 9 were sent to RFSL, Ranipool for forensic analysis and expert opinion, the weapon of offence, i.e., wooden log, was not sent. The size of the seized wooden log is given as measuring 2'-7" in length and 11" in radius. If the radius is 11", the diameter is 22", which is nearly 2'. We will not hazard a guess as to whether the size of that kind of log can be used by a woman for assaulting a person in the manner it has been suggested.

48. The wooden log was also not shown to PW-21. In ***Ishwar Singh*** (supra), the Hon'ble Supreme Court stated it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of offence, if

available, be shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may at times cause aberration in the course of justice. From the evidence of PW-16 and PW-17, it is seen that the wooden log was shown to them in court.

49. In his cross-examination, PW-21 stated that injuries mentioned in Exhibit-14 could be sustained as a result of a fall or if one bangs his/her head on a concrete surface/ wall and that such kind of injuries might not cause immediate death of a person and that it is also possible that after having such kind of an injury a person can come back home and sleep.

50. Dr. Doma T. Bhutia has submitted that Section 6 of the Evidence Act is attracted in the instant case and, accordingly, she has cited decisions in ***Javed Alam***(supra) and ***Krishna Kr. Malik*** (supra). Section 6 of the Evidence Act contains the doctrine of *res gestae.* Section 6 is an exception to the general rule whereunder hearsay evidence becomes admissible. Such evidence must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. The essence of the doctrine is that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction that it becomes relevant by itself. Evidence of PW-5 and PW-6 may fall in the category of hearsay evidence. However, we have already held that evidence of PW-5 and PW-6 is of no consequence with regard to the information received from PW-3 that the accused committed murder of her husband as no reliance was placed on the evidence of PW-3 itself.

51. In ***Banti alias Guddu*** (supra), the Hon'ble Supreme Court laid down that evidence of defence witness is not to be ignored by the courts. However, his evidence has also to be tested on the touchstone of reliability, credibility and trustworthiness. In ***Ram Singh*** (supra), the Hon'ble Supreme

Court laid down that the evidence tendered by defence witnesses cannot always be termed as a tainted one- the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution.

52. DW-1 is a brother-in-law of the accused being husband of the sister of the accused. He stated that on 06.04.2018 he had informed the accused that he will perform *puja* in his house as his mother-in-law was sick and therefore, the accused had come to his house with her younger brother at around 01:00-01.30 pm and had returned to Yuksom at around 06:00 to 06:30 pm. He had received a call from Kiran Rai (DW-2) that the husband of the accused and the accused had been taken to the Hospital.

53. DW-2, Kiran Rai stated that the accused is his elder sister and he used to live with the accused and his sister earlier at Yuksom. He stated that on the day of occurrence the accused and PW-4 had gone to one *'Maraw'* at 09.00 am and he had also gone there later on and stayed for about an hour. Thereafter he and the accused had started for Chota Samdong at around 10:00 am and reached there around 01:30 pm. *Shaman* was performing rites and they started for home at around 06:30 pm and reached Yuksom at around 09:30 pm. After reaching Yuksom, his sister went inside the room of Manita Rai, PW-8, who was very sick, as her child was crying very loudly, and he had waited outside. While his sister was talking with PW-8, he suddenly noticed that the door of his sister's room was open. His sister told him that her husband always does that sort of a thing and comes home without calling. Saying she has to prepare dinner, she went inside the room while he followed her. When the room light was switched on they found Nima lying on the mattress spread on the floor and they started shaking him. He was found to be unconscious and bleeding from ear and there was blood all over the pillow. His sister started screaming "Daju Moryo" "Daju

Moryo" and then people started arriving. His brother-in- law was alive till then and so police and his sister took the injured to the Hospital while he remained in the room. No suggestion was given to DW-2 in his cross-examination by the prosecution that he was not with the accused and that he was not present at the P.O.

54. Evidence of PW-8 coupled with the evidence of DW-2 establish that DW-2 was present with the accused on the day of occurrence.

55. The appellant in her statement under Section 313 Cr. P.C., while taking the plea of denial, had stated that they had returned from Chota Samdong at around 07.00 to 07.30 pm and reached home at around 09.00 to 09:30 pm and went to the house of Manita Rai (PW-8) and while she was there she saw light in her house. When she went inside the room she found her husband lying on the floor. She then called Manita Rai but she did not come. While DW-2 had stated that they discovered Nima lying on the mattress on the floor when the accused had switched on the light, the accused had stated that the light was on. DW-2 had stated about the conversation he had with the accused when he had noticed the open door of the room. In the circumstances of the case whether the light was on or off is not very significant. Evidence of PW-8, at the cost of repetition, shows that the deceased had come home after a couple of days and the accused along with her brother had returned back at about 9.30 pm. They had first come to her room and had enquired about her well-being. Just 2-3 minutes after they had left her place, the accused had screamed and started crying uncontrollably. The time-gap being only 2-3 minutes, it is more plausible that the incident had taken place before the arrival of the accused and DW-2.

56. In ***Suchand Pal*** (supra), the Hon'ble Supreme Court held that the prosecution can succeed by substantially proving the version it alleges. It

must stand on its own legs and cannot take advantage of the weakness in a defence case. In ***Sanjay Thakran*** (supra), the Hon'ble Supreme Court observed that recovery of articles from the accused in the absence of identification as belonging to the deceased does not take the prosecution case any further. In ***Harban Sahai*** (supra), the Hon'ble Supreme Court laid down that omission to send the earth from the place of occurrence for chemical examination, in the facts and circumstances of the case, had not vitiated the investigation to any extent. In ***Dhanaj Singh*** (supra), the Hon'ble Supreme Court held that when direct testimony of eye witness corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the investigation officer to send the firearms to the forensic test laboratory for comparison cannot affect the credibility of prosecution version as the report of the forensic expert would be in the nature of an expert opinion without any conclusiveness attached to it. In ***Paltan Mallah*** (supra), the Hon'ble Supreme Court laid down that even if a search is illegal the seizure of the articles is not vitiated. In a case of illegality of search the court may be inclined to examine carefully the evidence regarding the seizure. The above-referred judgments are not relevant for the purpose of the present case. In ***Manoranjan Sil*** (supra), the Calcutta High Court had held that non-examination of a Magistrate who recorded the statement under Section 164 Cr.P.C cannot be a ground for disbelieving the statement of the accused. In the instant case, statement of the accused was not recorded under Section 164 Cr.P.C.

57. In ***Lakshmi Singh*** (supra), the Hon'ble Supreme Court laid down that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the court to reject the prosecution version.

In ***Bhugdomal Gangaram*** (supra), it was held that no amount of suspicion will constitute legal evidence for sustaining a conviction. In ***Divakar Neelkantha Hegde*** (supra), the Hon'ble Supreme Court held that the principle of extending the benefit of reasonable doubt to the accused cannot be readily accepted, but should be carefully applied if certain circumstances exist and warrant the application of the principle.

58. On an overall consideration of materials on record, we are of the opinion that the prosecution has not been able to establish the guilt of the appellant beyond reasonable doubt and the appellant is entitled to benefit of doubt. Resultantly, the appeal is allowed.

59. The impugned conviction and sentence of the appellant is set aside. The appellant is set at liberty.

60. Lower court records be sent back.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

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