IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Crl. A. No. 04 of 2020

Mani Kumar Rai @ Tere Naam
Upper Wok,
South Sikkim,
at present State Central Prisons,
Rongyek, East 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 : Ms. Gita Bista, Advocate (Legal Aid Counsel)

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

Date of hearing : 09.10.2020

Date of judgment : 09.11.2020

JUDGMENT

(*Arup Kumar Goswami, CJ*)

This appeal is directed against the judgement dated 28.11.2019 passed by the learned Sessions Judge, South, Namchi in S.T Case No.05/2017 convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life and to pay a fine of Rs.10,000/-. By the judgement under appeal, compensation of Rs.50,000/- was also directed to be paid to the wife of the deceased under Sikkim Compensation to Victims or his Dependants Scheme, 2016 by the Sikkim State legal Service Authority.

2. On 15.06.2017, Kinga T. Bhutia (PW-25), who at the relevant point of time was posted as Station House Officer (SHO), Jorethang Police Station (P.S), registered Jorethang P.S U.D case No.07/2017 under Section 174

Cr.P.C on the basis of a complaint made by Kharga Maya Manger (PW-13), Ward Panchayat, Upper Wok to the effect that one Krishna Prasad Rai was found lying dead with face downwards at Forest Area, Upper Wok and he endorsed the U.D Case to Sub-Inspector Prashant Rai (PW-20). PW-20 had proceeded to the place of occurrence (P.O) and had started investigation. However, as it was about 09.00 pm, being dark, no further investigation could be carried out on that day. P.O was cordoned-off and inquest was conducted over the dead body of the deceased on the morning of 16.06.2017 in presence of Kharka Maya Manger (PW-13) and Mani Kumar Subba. Inquest Report (Exhibit-5) was prepared indicating the injuries noticed. A rough sketch map (Exhibit-17) was drawn. Blood stains found in the *kutcha* foot path and some items found near the P.O were seized vide Exhibit-16 in presence of Prakash Manger (PW-15) and Dhan Bahadur Rai (PW-18). After inquest was done, PW-20 forwarded the dead body for post-mortem examination, initially to District Hospital Namchi and later on, to STNM Hospital Gangtok because of non-availability of Medico Legal Specialist at District Hospital, Namchi. Post-mortem on the deceased was conducted on 16.06.2017 by Dr. O.T Lepcha (PW-09) and Medico Legal Autopsy Report (Exhibit-10) was prepared by him and he had also handed over to the Investigating Officer (I) clothing (ii) blood in filter paper (iii) hair and (iv) nail clippings of the deceased to the Investigating Officer.

3. Coming to the conclusion that cause of death of Krishna Prasad Rai was unnatural and homicidal, an FIR (Exhibit-18) was lodged by PW-20 before the SHO, Jorethang P.S stating the above facts. Accordingly, Jorethang P.S case No.30/2017 under Section 302 IPC was registered against unknown persons and the case was endorsed to Jigmee W. Bhutia (PW-24). PW-20 handed over the seized articles and the related documents to SHO, Jorethang P.S and charge of investigation was taken over by PW-24.

He examined witnesses and based on the revelations made the appellant was arrested vide Exhibit-31 on 16.06.2017 at 06.50 p.m.

4. After arrest, the accused was examined under Police custody on 16.06.2017 by Dr. Anand Subba (PW-7), the Medical Officer of Jorethang PHC. No injury was noticed on his body by him and he had prepared a Medical Report (Exhibit-8). Accused was also taken to Namchi District Hospital on 21.06.2017 for psychiatric evaluation and one Dr. C.L Pradhan (PW-6), who examined him, found no past or present history of mental illness and he noted that the accused had given a history of alcohol addiction for the past 15 years. On 22.06.2017, the accused was brought to Jorethang CHC and his blood sample was collected in presence of Om Prakash Gupta (PW-8), who had gone there for his own treatment and Rinku Rai (PW-19), who had gone for treatment of his ailing son.

5. Based on a statement, stated to be a Disclosure Statement (Exhibit-25) made by the accused under Section 27 of the Evidence Act in presence of Rajesh Sarkar (PW-21) and Pravesh Lohagan (PW-22), the weapon of offence, a *khukuri* (a kind of knife)*,* was seized by PW-24 on 18.06.2017 under Seizure Memo (Exhibit-22). Certain items like vests, etc., details of which will be noted in a subsequent part of the judgment, were also seized by him in presence of PW-21 and PW-22. On 17.06.2017, the Sr. Superintendent of Police had passed an order transferring investigation of the case with immediate effect to PW-25 and thereafter, on 20.06.2017, PW-24 handed over papers and documents of the case to PW-25, who then took charge of investigation. On 25.07.2017, PW-25 forwarded the case exhibits to RFSL Kolkata for forensic expert opinion and analysis (Exhibit-39) and on the basis of his application dated 31.07.2017, statement of Sarika Rai (PW-12) and Himalaya Rai (PW-13) and Laxuman Thapa (PW-14) were recorded by the Magistrate under Section 164 Cr.P.C.

6. On completion of investigation, PW-25 had submitted a Charge Sheet on 06.09.2017. After receipt of RFSL report dated 17.09.2017, he had also submitted a supplementary charge sheet.

7. In the Court of learned Sessions Judge, South, S.T Case No.05/2017 was registered. On consideration of materials on record, charge was framed against the appellant under Section 302 IPC. The same being read over and explained to the appellant, he pleaded not guilty and claimed to be tried.

8. During trial, prosecution examined 25 witnesses and after closure of the evidence of the prosecution, statement of the accused was recorded under Section 313 Cr.P.C where he had taken a plea of denial. However, no witness was examined on his behalf.

9. The learned Sessions Judge opined that the circumstantial evidence produced by the prosecution in the form of evidence of PW-1, PW-9, PW-10, PW-11, PW-12, Pw-14, PW-19 and PW-21 unerringly pointed out that it was the accused who had committed the crime with pre-mediation, intention and knowledge. The learned Trial Court noted that the evidence of PW-11, PW-12 and PW-14 proved that the deceased and the accused were with them at a labour camp in the evening of the day before the discovery of the body of the deceased. It was also recorded that it is proved by PW-21 that accused had confessed in his presence as well as in the presence of PW-24 and another witness that he had stabbed the deceased with his *khukuri* (MO-VI). Reliance was also placed on the Disclosure Statement (Exhibit-25). Accordingly, the learned Trial Court held that the offence punishable under Section 302 IPC was established against the appellant beyond reasonable doubt.

10. Ms. Gita Bista, learned Legal Aid Counsel appearing for the appellant submits that the learned Trial Court was not correct in holding that

evidence on record clearly proved that it was the accused who had killed the deceased. She submits that the evidence of PW-1 and PW-10, upon which much reliance was placed by the learned Trial Court, suffers from gross contradictions. She submits that according to PW-5 dead body was first noticed by Suresh Chettri but he was not examined without any explanation. Similarly, *Bari*, in whose residence the accused was working as a helper was not examined. Such non-examination of material witnesses casts doubt about the prosecution case, she contends. It is submitted that approximate time of death of the deceased was also not indicated in the Autopsy Report, Exhibit-10 and therefore, in any view of the matter, last seen theory sought to be projected by the prosecution has no legs to stand. It is submitted by her that though in the remarks column of Exhibit-22, the Seizure Memo, it is indicated that one *khukuri* was recovered from the kitchen of the accused as per his Disclosure Statement recorded under Section 27 of the Evidence Act, such recovery is belied by the evidence of PW-22 and therefore, no reliance can be placed on the said so-called Discovery Statement, more so, when it was impossible for the accused to have pointed out the place where the *khukuri* was kept as the hands of the appellant was tied from behind by a rope. She has placed reliance on the judgment in the case of ***Pulkuri Kotayya and others vs. The King Emperor***, reported in ***AIR 1947 PC 67***.

11. Dr.Doma T. Bhutia, learned Public Prosecutor submits that evidence of PW-1 and PW-10 goes to show that the appellant had made an ominous statement two days before the deceased was found dead that they would have to observe religious rites and the evidence of PW-1 further goes to show that the appellant had stated before her that he would eliminate a person who had annoyed him. Such utterances, as the events unfolded, are pointer to the fact that the appellant was contemplating to murder the deceased, she submits. It is contended by her that the evidence of PW-3,

PW-4, PW-11, PW-12 and PW-14 establishes beyond reasonable doubt that the accused was in the company of the deceased before his death. She asserts discovery of *khukuri* (MO-VI) at the instance of the accused is firmly established on the evidence on record and therefore, the learned Trial Court was justified in convicting the appellant. She has placed reliance on the judgements in the cases of ***Sahoo vs State of U.P*** reported in ***AIR 1963 SC 40***, ***Himachal Pradesh Administration vs. Om Prakash,*** reported in ***AIR 1972 SC 975, Kishore Bhadke vs. State of Maharashtra***, reported in ***AIR 2017 SC 279 and Gajoo vs. State of Uttarakhand***, reported in ***2012 (9) SCC 532***.

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

13. That the deceased had died a homicidal death is not in dispute. PW-9, who conducted autopsy, had found the following ante-mortem injuries on the deceased:

> *"1. Incised chop wound (16 x4cms x spinal cord over the right side of neck). The death of the cut was more over the right side.*
>
> *2. Chop wound (19x4x3cms placed 4 cm below the left earlobe).*
>
> *3. Reddish abraded contusion (6x3 cms over the left temple).*
>
> *4. Abraded contusion (3x2 cms over the right forehead)."*

According to him, the cause of death was due to hypovolaemic shock as a result of incision of the carotid artery due to chop wound, which is homicidal in nature.

14. Evidence of PW-1, who is the sister of the deceased, goes to show that the deceased had left for his work at a work site on 14.06.2017 but he did not return home and in the morning of 15.06.2017 at 08:00 am the accused had come to their house searching for the wife of the deceased, PW-

10, who was then in the kitchen. According to her, the accused told PW-10 in her presence, the English translation of which is something to the effect that after about two days, the family members would have to observe "*Chhak Barnu*" (death rites). On being asked by him she called her brother thrice but his mobile was switched off and then the accused started laughing. On being asked the accused told her that he had met her missing brother the previous day but he had returned home and slept. It is stated by her that three days prior to the aforesaid visit, the accused had also visited their house and had told her that a man had made him angry and he would eliminate him in seven days. She stated that on 15.06.2017 the dead body of her brother was recovered about 100 feet above their house. It is to be noted that in her statement under section 164 Cr.P.C (Exhibibt-1) recorded on 04.08.2017, she had stated in similar lines.

In cross-examination, however, she admitted that she was not present in the kitchen but was present in another room adjacent to the kitchen.

15. PW-10, the wife of the deceased, had stated in her evidence that the accused had told PW-1 that they have to observe death rituals in two days. According to her, the accused failed to notice her as she was in the extreme corner of the kitchen and she had heard the accused asking PW-1 about her whereabouts. She stated that as the accused and her husband used to be together on previous occasions, PW-1 had asked the accused the whereabouts of her husband and as stated by PW-1, she also deposed that PW-1 had made telephone calls but the phone was found to be switched off. PW-10, in her statement under Section 164 Cr.P.C (Exhibit-12), had given the same version.

16. PW-2 stated that the accused used to work in her household as a domestic helper earlier and the deceased used to go to his house taking the

foot path in front of her house. She stated that on his last visit to her house the deceased was accompanied by four friends from Rabangla but the accused was not with them though, subsequently, the accused had come and left after some time.

17. PW-3, who is a petty contractor, deposed that the deceased was working as a petty contractor at a different site under a different contractor. The evidence of PW-3 is to the effect that on 14.06.2017 he had met and talked with the deceased, who is also known as Dilay. He had gone to the house of one *Bari* (Aunt) and the accused had also come there after about 5 minutes. He did not know where the deceased had gone and was also not aware after how much time the accused had left the house of *Bari*.

In his cross-examination, he stated that the accused used to stay in the house of *Bari*.

18. PW-4 is also a petty contractor who had taken the work of construction of a retaining wall of a newly constructed road along with PW-3, PW-16 and three others. He deposed that all of them used to go to the house of *Bari* for tea/milk after work. The deceased was also a petty contractor in respect of a different site one kilometre away and his labour camp was on the way to the house of *Bari*. On 14.06.2017, the deceased had accompanied him to the house of *Bari* and on being asked to return a measuring tape which he had taken earlier, the deceased had left the house of *Bari* but he did know where the deceased had gone. He deposed that after about 5-6 minutes the accused came to the house of *Bari* and had left again after 5 minutes.

He also deposed in cross-examination that the accused was staying in the house of *Bari*.

19. PW-5 deposed that on 14.06.2017, at about 2.00-3.00 pm, he had received a call from Prakash Rai, brother of the deceased, informing him

about the recovery of the dead body of his brother and requesting him to accompany Jorethang police to the P.O as he resided in Jorethang. According to him, he had reached the P.O on his own as the police had already left. He had remained in the P.O with police the whole night and he was a witness to Inquest Report, Exhibit-5. He stated that he came to learn at the P.O that one Suraj Chettri, who was residing with the family, had seen some blood stains on the foot path and he discovered the dead body after following the trail of blood stains.

20. PW-11 stated that he had taken a contract along with PW-12 and deceased from PW-14 for construction of a retaining wall of a new road and while he and PW-12 used to stay in the labour shed, the deceased used to work from his house which is located at a distance of 20 minutes. On the relevant day at around 04.30 to 5.00 pm, PW-14 had brought some meat and liquor and at around 05.30 pm, the accused had come and had some food. After 15-20 minutes of the deceased having left the shed, the accused had also left. Thereafter, they had taken meal and had gone to the house of the accused, where there were four other labourers also. While he along with PW-12 went inside, PW-14 left for his house. But neither the accused nor the deceased was present in the house of the accused. On the evening of the following day they learnt from *Bari,* the owner of the house where the accused used to reside during the relevant time, that the deceased died as a result of a fall from a height.

21. In cross-examination, PW-11 stated that in the kitchen of *Bari* they used to play carrom and charge mobile phones. There are two houses and a separate kitchen of *Bari* and an old man used to reside in the wooden house where the accused also resided. He stated that the house of the deceased was located below the house of the accused and house of PW-14 is located below the house of deceased and all of them have to take the same road to

go to their respective houses. He stated that PW-14 had left the shed after the deceased had left.

22. PW-12 deposed in similar lines as PW-11. He further stated that when he had reached the house of *Bari,* neither the deceased nor the accused was present there. He also deposed that PW-14 had left the house by the same route after the deceased had left for his house.

23. As noted earlier, PW-13 is a witness to the Inquest Report (Exhibit-5). According to her, on 14.06.2017, in the afternoon some boys of the village and Sukbir Rai, father of the deceased, had informed her regarding recovery of the dead body of the deceased.

24. PW-14 is a contractor who had hired the deceased, PW-11 and PW-12. According to him, on 14.06.2017 he had snacks with PW-11, PW-12 and the deceased and they were joined by the accused later on. When some workers from another work site came, the deceased left with them. When requested to stay for dinner he said that he would come back again. Immediately after the deceased had left the accused also left and proceeded in the same direction in which the deceased had gone. They waited for the deceased till 08.30 pm but since he did not come they had dinner and then had left for their respective homes.

He stated in his cross-examination that he left for his house at around 09.00 pm. While PW-11 and PW-12 stated that after around 15-20 minutes of the deceased having left the shed the accused also left, PW 14 stated the accused had left almost immediately.

25. PW-16 had come to work with his brother about 6-7 months ago. His evidence does not throw any light on the prosecution case and his cross-examination was declined.

26. PW-17 is a cook and he had come for a short visit to join his uncle who is a petty contractor. Name of the uncle is, however, not indicated. His evidence does not throw any light and therefore, his cross-examination also declined.

27. PW-21 deposed that in the month of June 2017 there was a fight between the accused and deceased at Wok Chemchey and that he had confessed in his presence as well as in presence of PW-24 and another witness that he had stabbed the deceased with his *khukuri* which was carried by him and that he had also stated that he can show the place where he had kept the weapon of offence. Accordingly, he along with another witness and PW-24, accompanied by the accused, had gone to the house of the accused where he used to live and on reaching there the accused pointed out the place in the kitchen where he had kept the *khukuri*. Accordingly, the *khukuri* was recovered and seized and he had affixed his signature in the Seizure Memo (Exhibit-22). He had identified the *khukuri*. He had also stated that on search being made in the house of the accused the police recovered the blood stained clothes of the accused, i.e. blue coloured track paint, cream coloured vest, orange coloured vest, bed cover, pillow covers under Seizure Memo (Exhibit-23) to which he was a witness. He also identified the material objects seized vide Exhibit-23. He stated that after the Disclosure Statement (Exhibit-25) was recorded, they had recovered materials objects including the *khukuri*.

In cross-examination he admitted that when the accused was taken to P.O his hand was tied with rope from behind.

28. PW-22 had also accompanied PW-24 and PW-21 along with the accused to the house of the accused. He stated that the accused showed them the weapon of offence which was kept by him above the '*chulha*' inside

the kitchen. He was also witness to Exhibit-22 and Exhibit-23. He had also identified the material objects seized by the Police.

In cross-examination he stated that he went to Jorethang Police station to stand as witness on being called by his brother-in-law. He stated that PW-24 and his brother-in-law had told him that the accused had killed a boy. He stated that Exhibit-25 was prepared after completion of search and seizure and that he had signed in Exhibit-25 after the recovery of alleged weapon of offence at Chemchey. He stated that the hand of the accused was tied with a rope when he was taken to his residence. He also stated that accused used to stay in the house as a helper.

29. PW-23 is a Junior Scientific Officer working in the Central Forensic Science Laboratory, Kolkata. On the basis of result of examination of specimen, it was concluded by her as follows:

> *"1.The human blood stains present on exhibit B2/MO-XI*
>
> *(vest) belongs to Mr. Mani kumar Rai.*
>
> *2.The human blood stains present on exhibit D/MO-XXIII(Blood stained mud),exhibit G/MO-XIX (coll)(Nail clipping) and exhibit H/MO-XXI (coll.)(Hair) belongs to the deceased.*
>
> *3.Human blood present on exhibit B5/MO-XII(Quilt cover) is from another male individual.*
>
> *4.The genetic profile could not be developed from exhibit A/MO-VI, B1/MO-IX, B3/MO-X, B4/MO-XIV and E/MO-XXV. But presence of 'XY' peak shows male individual(s)."*

30. From the conclusion as indicated above, it appears that blood of the deceased was not detected in any of the aforesaid items belonging to the accused. Though blood stain of the accused is found in Exhibit-B2/MO-11, it is to be noticed that when the accused was examined on 16.06.2017 by PW-

,, no injury was detected on his body and therefore, blood-stain in Exhibit-B2/MO-11 is not of any consequence.

31. In ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, the following observations were made:

> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
>
> *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. The evidence adduced by the prosecution is circumstantial in nature with no direct proof of the perpetration of the alleged offence by the appellant. It is no longer *res integra* that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability.

33. A careful analysis of the evidence of PW-3, PW-4, PW-11, PW-12 and PW-14 would indicate that though at some point of time along with them the deceased and the accused were present, their evidence does not even remotely suggest that both of them were seen together alone in the evening of 14.06.2017 or any point of time thereafter. The accused leaving them after the deceased had left cannot lead to an inference that the accused had followed the deceased, more so, when there is contradiction with regard to time that had separated their respective departures. While PW-11 and PW-12 had stated that the accused left after 15-20 minutes of departure of the deceased, PW-14 stated that the accused had left almost immediately. Having regard to the evidence on record, the theory of "last seen together" as an incriminating factor qua the appellant is, thus, of no avail to the prosecution.

34. PW-3, PW-4, PW-11, PW-12 and PW-14 had not deposed that there was any fight or ill feeling between the deceased and the accused. They were most likely persons who could have known if there was a fight

between the accused and the deceased. However, PW-21 referred to a fight without amplifying whether he had witnessed the fight. He did not depose that he was at Chemchey on the day when there was a fight. PW-21 is a resident of Jorethang and distance between Jorethang and the P.O. is 38 kms. Even PW-1 and PW-10 did not say that there was enmity between the accused and deceased. Therefore, in absence of any corroboration we are not inclined to place any reliance with regard to the fight as deposed by PW-21, who, for reasons not known, was called to the Police Station to stand witness by PW-24.

35. The Disclosure Statement, Exhibit-25, reads as follows.

> *"This is my true statement that on 14/06/2017 at evening time at around 07.30, there had been an argument between me and Krishna Prasad Rai just below my house. I took out the 'khukhuri' (knife) that had been strapped on my waist and attacked Krishna Prasad Rai on his neck. That ''khukhuri' (knife) I have kept in a corner of the wooden kitchen, which is just beside my house; and I can show the place where I have kept the 'khukhuri' (knife)."*

36. In the celebrated decision of ***Pulukuri Kottaya*** (supra), the scope and ambit of Section 27 of the Evidence Act had been stated and the relevant portion of the same is extracted herein below:

> *"it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I*

will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

37. The Apex Court in ***Anter Singh vs. State of Rajasthan***, reported in ***(2004) 10 SCC 657***, summed up various requirements of Section 27 of Evidence Act as follows: -

"(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible. (2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act. (4) The person giving the information must be accused of any offence. (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

38. The policy underlying Section 25 and 26 of the Evidence Act is to make it a substantive rule of law that confession whenever and wherever made to the police or while in the custody of the police to any person whosoever, unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the circumstances mentioned in Section 24 and therefore, inadmissible, except so far as provided by Section 27 of the Act. Section 27 of the Indian Evidence Act is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence.

39. The only portion of the Disclosure Statement which is admissible under Section 27 of the Evidence Act is the statement of appellant that he had kept the "*khukuri*" in the corner of the kitchen, which is beside his house and he can show the place where he had kept the "*khukuri*". The rest of the Disclosure Statement is inadmissible, being confessional and prohibited by Section 25 and 26 of the Evidence Act.

40. The Disclosure Statement, Exhibit-25, which is reduced to in the form of a Memorandum shows that the place of Memorandum is Jorethang Police Station and the time shown as 11.20 am. Under the heading 'details of further Memorandum', at Sl. No. 8 ,recording the time as 3.40 pm, it is stated that as per the Disclosure Statement recorded under Section 27 of the Evidence Act, one *khukuri*, with description indicated therein, was recovered from the wooden kitchen of the accused. In the Seizure List (Exhibit-22) also time was shown as 3.40 pm of 18.06.2017. In Sl. No. 13 of Exhibit-22, under the heading 'remarks of Investigating Officer', it is noted that the seized exhibit i.e. the *khukuri* was disclosed and recovered as per the Disclosure Statement recorded under Section 27 of the Evidence Act. However, evidence of PW-22 goes to show that Exhibit-25 was prepared after completion of search and seizure which negates that recovery was

made after recording of Disclosure Statement. It is also seen from the evidence of PW-22 that he had signed in Exhibit-25 after recovery of the alleged weapon of offence at Chemchey, though the Memorandum was written at Jorethang Police Station. Evidence of PW-22 casts a serious doubt about the Disclosure Statement and the alleged discovery of the *khukuri*. It is also surprising that two witnesses had been taken by PW-24 to a distance of 38 kms, as if there would be no witness available there. It is also to be noted that genetic profile could not be detected from Exhibit-A, the *khukuri*.

41. PW-3, PW-4 and PW-11 had all stated that the accused was staying in the house of *Bari*. The accused in his statement under Section 313 Cr.P.C stated that the *khukuri* belongs to his landlady (*Bari*) and that the police took out the *khukuri* of his landlady from the kitchen. It is to be stated that *khukuri* is a very common household implement in these areas. It is surprising that *Bari* was not even cited as a witness in the Charge-Sheet. PW-3, PW-4, PW-7, PW-10, PW-11, PW-12 and PW-14 have all referred to regularly going to the house of *Bari*. It appears that PW-2 is the daughter-in-law of *Bari'*, whose name is Nar Maya Mangar. PW-2 deposed that the accused used to work in her house as domestic help and after he had left their house, he had started working as a labourer. From her evidence it does not appear whether she was residing with the *Bari* or living separately. In the circumstances of the case, it is also very surprising that Suraj Chettri, who had discovered the dead body was not examined as a witness.

42. In ***Gajoo*** (supra), the Hon'ble Supreme Court had observed that while in case of defective investigation the Court has to be circumspect while evaluating the evidence it would not be right in acquitting an accused person solely on account of defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

43. 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-10 fall into the category of a confessional soliloquy. We are unable to accept the aforesaid contention. There is a serious contradiction in the evidence of PW-1 and PW-10. While PW-1 stated that the statement was made to PW-10, PW-10, on the contrary, stated that accused was talking to PW-1 and the accused had not even noticed her. It is not possible to reconcile such a contradiction. It is also established that PW-1 and PW-10 were not in the same room. Furthermore, it is also noticed that PW-1 and PW-10 did not refer to any conversation between them consequent upon the statement allegedly made by the accused that they have to perform death ritual which would have been the normal course of conduct if the statement was really alarming. Moreover, the statement, even if accepted on face value, is not an admission of guilt.

44. In ***Omprakash*** (supra), the Hon'ble Supreme Court had observed that benefit of doubt to which the accused is entitled is reasonable doubt — the doubt which rational thinking men will reasonably, honestly and conscientiously entertain. It is further held that it does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the crime. If that were so the law would fail to protect society as in no case such a possibility can be excluded .It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt.

45. On due appreciation of the evidence on record, we are of the opinion that that the prosecution has not been able to establish the guilt of the

accused beyond reasonable doubt and in the given facts and circumstances of the case, the appellant is entitled to benefit of doubt.

46. Resultantly, the appeal is allowed. The impugned conviction and sentence is set aside. The appellant is set at liberty.

47. Lower Court record be sent back.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Jk/Avi