IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Crl. A. No. 28 of 2018

State of Sikkim.

… Appellant

Versus

Tenzing Bhutia,
S/o- late Phu Tshering Bhutia
R/o Ben, Nambong, South Sikkim

… Respondent

BEFORE

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

For the appellant : Mr. Vivek Kohli, Public Prosecutor, Sikkim

For the respondent: Ms. Gita Bista, Advocate (Legal Aid Counsel)

Date of hearing : 04.11.2020

Date of judgment : 12.11.2020

J U D G M E N T

(*Arup Kumar Goswami, CJ*)

This appeal by the State is against the judgment dated 30.11.2017 passed by the learned Sessions Judge, South Sikkim at Namchi, acquitting the accused of the offences under Section 302/449 IPC on benefit of doubt.

2. Sonam W. Bhutia (PW-1), Ward Panchayat of 02-Nambong Ward had lodged a first information report (FIR)before the Station House Officer, Temi Police Station on 13.08.2016 stating that she had received information to the effect that wife of Santosh Rai (PW-16) was murdered. Accordingly, Temi Police Case No.20(8)/16 under Section 302 IPC was registered.

3. Evidence on record discloses that the deceased, namely, Durga Rai was found dead in the courtyard of her house with blood all over her body. A sickle was found near the dead body.

4. Evidence of PW-14 goes to show that the accused was living with him since four months prior to the date of the incident. After returning from a Ben *Gompa*, PW-14 was watching TV along with the accused. The accused had gone out to the nearby jungle to collect fodder. However, after few minutes he came back running in a nervous state and told him that wife of Santosh Rai (PW-16) was lying in a pool of blood and the people from *Gompa* had gathered there. The house of the PW-14 is located below the house of PW-16.

5. The accused came to be arrested on 17.08.2016.

6. It is relevant to note at this juncture that the Investigating Officer, (PW-18), in her cross-examination had admitted that apart from the disclosure statement, Exhibit-10, there is no other evidence or material to connect the accused with the offence.

7. The learned Trial Court had held that Exhibit-10 was not recorded in presence of PW-5 and PW-6, who were witnesses to Exhibit-10. It was held that when the disclosure statement was recorded the accused was not in the custody of the police, he having not been arrested and therefore, requirement of Section 27 of the Evidence Act being not satisfied, Exhibit-1 was inadmissible in evidence. The learned Trial Court further held that prosecution failed to prove that Material Objects (MO)s were recovered as per the disclosure statement and at the instance of the accused from his house. Such conclusion was derived on appreciation of the evidence of PW-5 and PW-6 who were also witnesses to Exhibit-11, a Seizure Memo, by which (i) green slipper with blood stains (MO-VII), (ii) white T-shirt (checked) with blood-stains (MO-VIII), (iii) green and black full shirt with blood- stains (MO-VI) and (iv) blood sample were stated to be recovered at the instance of the accused from his house. It was also held that there was

no evidence that the seized slippers and wearing apparels belonged to the accused.

8. Mr. Vivek Kohli, learned Public Prosecutor, Sikkim has submitted that the learned Trial Court was not correct in holding that Exhibit-10 is not admissible in evidence on the ground that the accused was not in police custody when he had made the disclosure statement. It is submitted that it is not necessary that an accused must be under arrest when a disclosure statement is made. He had drawn the attention of the Court to the cross-examination of PW-5 to contend that PW-5 was asked by PW-18 to ask the accused about the incident in Bhutia language and when so asked, the accused had confessed about the incident and therefore, even if it is accepted that Exhibit-10 was prepared, as held by the learned Trial Court, before PW-5 had reached the police station, he signed as a witness only after he had asked the accused about the incident and therefore, there is no infirmity in Exhibiit-10.

9. Mr. Kohli submits that even if Exhibit -10 is discarded, then also, seized articles under Exhibit-11 having being recovered from the house of the accused, in terms of Section 106 of the Evidence Act, it was his burden to discharge how his clothes had blood-stain of the deceased but the accused had not been able to offer any explanation. In this connection, he relies on a decision of the Hon'ble Supreme Court in the case of ***Ranjit Kumar Haldar vs. State of Sikkim***, reported in ***(2019) 7 SCC 684.*** He submits that the learned Trial Court failed to appreciate the evidence in its correct perspective in coming to the conclusion that prosecution witnesses failed to prove seizure of articles under Exhibit-11 and that such articles belong to the accused and that the same were seized from the house of the accused. On the above premises, he contends that the appeal deserves to be allowed. In support of his submissions, learned counsel places reliance on

the following judgments: ***Niranjan Singh and Anr. Prabhakar Rajram Kharote and Ors.***, reported in ***(1980) 2 SCC 559*** and (ii) ***Sundeep Kumar Bafna vs. State of Maharashtra and Anr.,*** reported in ***(2014) 16 SCC 623*** .

10. Ms. Gita Bista, learned Legal Aid Counsel submits that the learned Trial Court was justified in holding that the prosecution miserably failed to prove the case against the accused. It is submitted that there is no infirmity in the impugned judgment and therefore, the appeal deserves to be dismissed.

11. We have considered the submissions of the learned Counsel for the parties and have perused the materials on record.

12. At the outset, it will be appropriate to consider as to whether Exhibit-10 is inadmissible as held by the learned Trial Court. It is also required to be noted at this juncture that though the same was held to be inadmissible, the learned Trial Court had considered the evidence of PW-5 and 6 qua Exhibit-10.

13. Section 27 of the Evidence Act, reads as follows:

> *"27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".*

14. A perusal of the provision goes to show that that the person from whom the information is received has to be an accused of any offence and he has to be in the custody of a police officer.

15. In ***Niranjan Singh*** (supra), in the context of Section 439 Cr.P.C, which provides "that any person accused of any offence and in custody be released on bail.....", the Hon'ble Supreme Court held that he who is under control of the court or in the physical hold of a police officer with coercive power can be said to be in police custody.

16. In ***Sandeep Kumar Bhatna*** (supra), after considering various dictionaries to appreciate the contours of the terms 'custody', 'detention' or 'arrest' in ordinary and legal parlance and also considering various decisions, the Hon'ble Supreme Court held that 'custody', 'detention' and 'arrest' are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then not preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against the suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. Reliance was placed on an earlier decision in the case of ***Directorate of Enforcement v. Deepak Mahajan***, reported in ***(1994) SCC 3 SCC 440,*** wherein it was held that in every arrest, there is custody but not vice- versa and that the words 'custody' and 'arrest' are not synonymous terms.

17. In this context, it is also relevant to take note of the decision of Hon'ble Supreme Court in the case of ***Vikram Singh and ors. vs. State of Punjab***, reported in ***(2010) 2 SCC 56***, wherein the Hon'ble Supreme Court in the context of Section 27 of the Evidence Act, at paragraph 39, held that for the application of Section 27 of the Evidence Act, it is not essential that such an accused must be under formal arrest. The aforesaid judgment in

Vikram Singh (supra) was referred to in ***Chandra Prakash vs. State of Rajasthan***, reported in ***(2014) 8 SCC 340.***

18. Thus, merely because a person was not under arrest while making a disclosure statement under Section 27 of the Evidence Act will not render such disclosure statement inadmissible in evidence and to that extent the learned Trial Court was not correct in holding otherwise. That the accused was in the custody of the police is not in dispute. Immediately after 10 minutes of making of the said disclosure statement, the accused came to be arrested.

19. If Exhibit-10 passes judicial scrutiny, the only portion that would be admissible under Section 27 of the Evidence Act is the portion where he stated that he could show the things which he was wearing on the date of the occurrence and the checked shirt that he had used to swipe blood and that they were kept in his house.

20. It is deposed by PW-5 in his evidence-in-chief that the accused had made the disclosure statement in his presence and his statement was recorded by the Officer-In-Charge of Temi Police Station and accordingly, he had signed as a witness in Exhibit-10. After Exhibit-10 was recorded, they were taken to the place of occurrence (P.O) where the accused showed his blood-stained wearing apparels. In cross-examination, he conceded that Exhibit-10 was already prepared by the police before he had reached the police station. The alleged confession made in Bhutia language by the accused to PW-5 cannot be proved against him as the accused was in custody of the police and thus, hit by Section 26 of Evidence Act. PW-6, the other witness in Exhibit-10, even in his examination-in-chief stated that he did not know if the accused had made any statement regarding the incident to police and that Exhibit-10 was already prepared before he had signed on it. He further stated that he signed on the same as PW-1 and PW-5 had told

him that Exhibit-10 was prepared in their presence as per the version of the accused. In view of such evidence of PW-5 and PW-6 as noted above, it is manifest that disclosure statement was not recorded in their presence and therefore, no reliance can be placed on Exhibit-10.

21. So far as recovery of the slipper and wearing apparels etc under Exhibit-11 is concerned, it appears from the cross-examination of PW-5 that the police had already recovered the MOs before he had reached the P.O. What is significant is that he had also stated that police had told him about the place in the house where they were to go and where the MOs could be found. Even in Exhibit-10, the place where wearing apparels were kept was not mentioned. PW-6 also stated that police had already recovered the MOs under Exhibit-11 before he had reached the P.O. In the background of the above testimony, the learned Trial Court came to the conclusion that the seizure witnesses had failed to establish that the MOs were recovered at the instance of the accused as shown by the accused and that they were actually recovered from the house of the accused. Furthermore, the learned Trial Court rightly noted that there is no evidence that the seized slippers and wearing apparels belong to the accused. In this context, it will be apposite to note that PW-5 had stated that he did not know to whom the MOs belong. In the circumstances as noted above, Section 106 of the Evidence Act, on which reliance was placed by Mr. Kohli, is not attracted.

22. PW-18 stated that during inspection of the house of the accused, some blood-stain (MO-XXV) was found near the door of the house and the same was lifted by him after scrapping it and he had seized the same under Seizure Memo, Exhibit-11. Therefore, the blood sample referred to in Exhibit-11 is blood-stain. He also stated that he had sent the blood-stain scrapped from the wall of the house of the accused to Regional Forensic Science Laboratory (RFSL), Saramsa. PW-5 stated that blood–stain was

found on the stairs of the house of the accused. He did not say about any blood-stain having been collected from the wall of the house. PW-6 did not say that any blood-stain was found near the stairs but he stated that blood-stains found on the wall of the house of the accused were scrapped and lifted and MO-IX was, accordingly, prepared. But there is no evidence under which Seizure Memo it was seized. In his evidence, PW-18 also did not say that he had seized any blood-stain found on the wall of the house of the accused. From the evidence of PW-16, Deputy Director-cum-Assistant Chemical Examiner, Tripura State Forensic Science Laboratory (FSL), it appears that one plastic pouch which contained some dust like particles said to be the blood-stain specimen (MO-XXV) from the house of the accused was received by him. Thus, two blood-stain samples, MO-IX and MO-XXV, were sent to two different FSLs. However, there is no evidence regarding collection of two blood-stain samples and even in respect of seizure of one sample of blood-stain referred to in the evidence, there are glaring contradictions in the deposition of witnesses. That apart, as already noted both PW-5 and PW-6 had stated that the MOs under Exhibit-11 had been recovered before they had reached P.O.

23. The green shirt (MO-VI) and the slippers (MO-VII) indicated presence of human female origin as deposed by PW-16. PW-13 deposed that blood-stain (MO-XIV), white shirt (MO-VIII) and vaginal swab, necklace and the vest of the deceased gave positive test for blood group-O. The FSL reports as deposed by PW-13 and PW-16 have no meaning when prosecution has failed to prove that above MOs along with other MOs under Exhibit-11 were recovered from the house of the accused and that wearing apparels belonged to the accused.

24. In the case of ***Ghurey Lal vs. State of U.P***, reported in ***(2008) 10 SCC 450,*** the Hon'ble Supreme Court enunciated the following principles in

respect of scope of exercise of power by the Appellate Court against a judgment of acquittal under 378 and 386 Cr.P.C.:-

"69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "

"very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused."

25. In view of our above discussion, we find no infirmity in the judgment of the learned Trial Court and accordingly, there being no merit in the appeal, the same is dismissed.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Avi