(2012) 03 SIK CK 0003

Sikkim High Court

Case No: Criminal A. No. 9 of 2011

Shri Man Bahadur Subba		APPELLANT
	Vs	
State of Sikkim		RESPONDENT

Date of Decision: March 12, 2012

Citation: (2012) CriLJ 2122

Hon'ble Judges: Sonam Phintso Wangdi, J; Permod Kohli, J

Bench: Division Bench

Judgement

Kohli, CJ

1. Appellant before us has been convicted u/s 302 IPC for committing murder of his wife and awarded sentence to undergo life imprisonment by the Ld. Sessions Judge (Spl. Div.-I), Sikkim at Gangtok vide Judgment dated 31.05.2011 passed in Sessions Trial Case No. 31 of 2010. Conviction and sentence are under challenge before us.

2. Mr. B. Sharma, ld. Sr. Advocate appearing on behalf of the appellant has challenged the Judgment passed by the Ld. Sessions Judge (Spl. Div.-I), Sikkim at Gangtok primarily on following grounds:-

I. Discovery allegedly made u/s 27 of the Evidence Act has not been established according to law;

II. Alleged Dying Declaration of the accused/appellant is in fact inadmissible in evidence and reliance placed on such Dying Declaration is contrary to the established principles of law; and

III. Statement of eye witness is not reliable, she being a child witness and her statement has not been corroborated by any other witness.

3. Prosecution story as emerged from the records is that on 01.12.2007 at about 10:00 p.m. Dichen Subba, aged about 13 years, a resident of Martam along with her maternal uncle Karchung Bhutia and his friend Nim Tseten approached the In-charge, Singtam Police Station, East Sikkim and reported that Man Bahadur Subba, father of Dichen Subba, assaulted her mother Karma Doma Subba with a Khukuri on her chest and killed her. She also reported that after assaulting her mother, Man Bahadur Subba also stabbed himself in abdomen with a knife and requested for taking legal action. On this information being received, the Head Constable Lakpa Tshering Bhutia, PW-1 after making an entry in Police Station proceeded to the place of occurrence along with the complainant where they found the victim had already died and the accused was found lying next to the deceased in the same bed with an injury in his abdomen. A Case No. 58 of 2007 u/s 302 IPC was registered against the appellant on 01.12.2007. During the investigation the police recorded statements of as many as 23 witnesses including that of the Investigating Officer. Accused/appellant also made a disclosure statement Exbt. 5 on 02.12.2007 in respect to Khukuri used in commission of offence and iron rod used to injure himself. Pursuant to the disclosure statement made by the accused, a Khukuri slightly blood stained with a wooden broken handle measuring 9" in length (Blade portion-6" and Handle portion-3" respectively) along with a wooden small scabbard measuring approx. 7" tied with white lace and one blood stained iron rod measuring 2" 7" were seized at the instance of the accused. The Dying Declaration u/s 32 IPC was also recorded on 02.12.2007 by the District Magistrate, East at Gangtok, Sikkim pursuant to a request made by the investigating agency in presence of PW-13 and PW-18.

4. Referring to the disclosure statement Exbt. 5, it is contended that the disclosure statement of accused was recorded on 02.12.2007 at 12:30 hrs. whereas he was arrested only at 05:00 a.m. next morning. To support his contention reliance is placed on the Exbt. 24, wherein the time and date of arrest of the accused/appellant is mentioned as 02.12.2007 at 0005 hrs. It is accordingly submitted that since the accused was not in custody when the alleged disclosure statement was made, Section 27 of the Evidence Act is not attracted and so called disclosure statement is not admissible in law nor it can be relied upon. It is further submitted that at the time of commission of offence and thereafter accused was not in his senses, hence he could not have voluntarily made any disclosure statement. Regarding the state of consciousness of the accused reference is made to the deposition of Witness No. 6 Karma Bhutia before Meenakshi M. Rai, Sessions Judge, East and North Sikkim. During cross examination, this witness stated that when he reached the place of occurrence at 9 p.m. on the same night, he saw the accused at the place of occurrence, who was not in a position to speak at the relevant time. Further submission is regarding the admissibility of disclosure statement allegedly made by the accused/appellant in respect to the recovery of the Khukuri, the weapon of offence as also Exbt.-6 and Exbt.-8, i.e. seizure memo in respect of Khukuri and seizure memo of wooden scabbard and blood stained iron rod respectively. The seizure memos (Exbt.-6 & 8) were prepared in presence of Witness No. 2 Sonam Palzor and Witness No. 3 Nim Tseten Bhutia. Sonam Palzor (P.W.-2) in cross-examination stated that the

accused did not go to the kholcha with them, which is about a distance of 50 to 60 feet from the house of the accused wherefrom the Khukuri was recovered. His further statement is that he did not witness the accused affixing his thumb impression on Exbt. 5. He also stated that the P.W.-3 Nim Tseten Bhutia did not sign in his presence; however the Police called both of them in turn to affix signature on the exhibits. In the light of the statement of this witness, it is sought to be argued that since the recovery of the Khukuri had been made in absence of the accused from the kholcha which was nearly a distance of 50 to 60 feet from the house of the accused and the place of occurrence, such recovery could not be construed to be at the instance of the accused to make it admissible in law.

5. We have carefully considered the statements of the witnesses No. 2 and 3 to Exbt.-5, the disclosure statement, Exbt.-6 seizure memo of Khukuri recovered from kholcha and Exbt.-8 seizure memo of wooden scabbard and blood stained iron rod recovered from the bedroom of the house of the accused. We have also gone through the statement of the Witness No. 23 Mr. Bishal Rai, I.O. All the witnesses specifically and categorically stated about the disclosure made by the accused/appellant in their presence regarding throwing the Khukuri from the window of the house and keeping the scabbard and the iron rod in bedroom of the house. They have also specifically stated that the Khukuri was recovered by the Police in their presence from the kholcha and the scabbard and iron rod from the bedroom of the accused at his instance and disclosure. They even denied the suggestion made by the defence that these recoveries were not made in their presence. The statement of I.O. is fully corroborated by these two witnesses. Mr. Sharma has not even challenged the credibility of these two witnesses in any manner. His contention is that the Khukuri, the weapon of offence, having not been recovered in presence of the accused, the disclosure statement and the recovery of Khukuri cannot be read against the accused as a piece of evidence to sustain the conviction and sentence of life imprisonment. According to Mr. Sharma, only such a recovery can be taken into consideration u/s 27 of the Evidence Act, which is made in presence of accused at his instance.

6. At the first place, we are not impressed by the argument made by the ld. Sr. Counsel. There is no contradiction in the statement of the I.O. and the eye witnesses in respect to the disclosure statement made by the accused/appellant and the seizure of the Khukuri, scabbard and iron rod, which has been fully established by the prosecution. Merely because the accused/appellant did not accompany Police and eye witnesses to the place disclosed by him at the time of recovery of the Khukuri does not render the recovery of Khukuri illegal or inadmissible u/s 27 of the Evidence Act. Section 27 of this Act reads as under:

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.

From the bare reading of this Section it is evident that it is a discovery of a fact which is relevant and not only the discovery of the object. The fact discovered in the present case is the place where the Khukuri was thrown and the bedroom where scabbard and iron rod had been kept by the accused/appellant. The accused in his disclosure statement made before the witnesses identified the place where the Khukuri had been thrown and also the bedroom where scabbard and iron rod had been kept by him. It is now established proposition of law that facts discovered as a consequence of information received from accused in Police custody are relevant and admissible u/s 27 of the Evidence Act and not only discovery of the object. In the leading Judgment on the subject reported as Pulukuri Kottaya and others v. Emperor : AIR 1947 Privy Council 67 while interpreting the provisions of Section 27 of the Evidence Act, their Lordships of the Privy Council observed as under:

[10] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be 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; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. ...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.

This view has been reiterated by the Hon''ble Supreme Court in Aftab Ahmad Anasari Vs. State of Uttaranchal, with the following observations :

40. Thus, the part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible u/s 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the

appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits.

As regard the state of mind of accused is concerned, Exbt.-16 is the report of medical examination of the accused conducted on 02.12.2007. He was found conscious, alive to time, place and person at the time of examination. As regards the controversy regarding the time of arrest of the accused is concerned, it is admitted case of the parties that the accused was taken into custody when the police reached the place of occurrence immediately after lodging the report by the witness No. 7, Dichen Subba. The report was lodged at 10.00 p.m. at night and the police immediately proceeded on spot and took accused into custody. Whether he was formally arrested at that time or thereafter is irrelevant. Section 27 only speaks of police custody and not the formal arrest of the accused for the purpose of making voluntary disclosure statement. Hence the controversy sought to be raised in this regard is irrelevant.

7. In view of the factual and legal position referred to above, the contention of the accused/appellant in this regard is not sustainable in law. Discovery of facts relating to Khukuri, scabbard and iron rod has been made in accordance with mandate of Section 27 of the Evidence Act and accused was in a fit statement of mind at the time he made disclosure statement.

8. Next contention of Mr. Sharma is that the Dying Declaration made by the accused/appellant cannot be read against him as the Dying Declaration becomes admissible only if the person making dies after the declaration and not where the person making declaration survives and defeats the death. It is admitted fact that the accused/appellant injured himself after causing injury to his wife who eventually died. Accused/appellant was hospitalized for treatment of self imposed injuries and it was in that situation the statement of the accused was recorded at the instance of the investigating agency. In his statement the accused/appellant admitted having injured his deceased wife with the Khukuri which caused her death and also admitted having injured himself with a knife and iron rod. It is a different matter that the accused survived after having made this statement. The nature of the statement made by the accused may not be construed to be a Dying Declaration in the present circumstances, however, such statement cannot be ignored and is admissible in evidence under other provisions of the Evidence Act.

9. Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor, appearing on behalf of the State, has disputed the preposition of law sought to be put forward on behalf of the accused/appellant. Mr. Namgyal has relied upon State of U.P. Vs. Veer Singh and Others, . While considering the evidentiary value of statement purported to be made as a dying declaration, where the maker thereof survives, it has been held that though such a statement is not admissible u/s 32 of the Indian Evidence Act, 1872 but is a statement in terms of Section 164 of the Code of Cr.P.C., if made before a Magistrate, and can be

used u/s 157 of the Evidence Act for the purpose of corroboration and u/s 155 of the Evidence Act for the purpose of contradiction. This view has been reiterated by the Apex Court in Ranjit Singh and Others Vs. State of Madhya Pradesh, . While taking note of earlier Judgments reported in Sunil Kumar and others Vs. State of Madhya Pradesh, ; Maqsoodan and Others Vs. State of Uttar Pradesh, and Ramprasad Vs. State of Maharashtra, , the Apex Court observed as under:

32. Thus, in view of the above, it can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high degree than that of a statement recorded u/s 161 CrPC and can be used as provided u/s 157 of the 1872 Act.

10. Thus the settled law is that the statement made in expectation of death where the injured survives though inadmissible u/s 32 of the Evidence Act, is admissible u/s 157 of the Evidence Act. The contention of the appellant thus fails on this ground as well.

11. Now, coming to the crucial arguments raised by the appellant in regard to the credibility of the sole eye witness, Dichen Subba whose statement has been heavily relied upon by trial Court to sustain the conviction. It is relevant to note that this child witness was aged about 12/13 years at the time of the occurrence. The occurrence took place in her presence in her house. She was the one who went to the Police Station to lodge the report about the incident. Her statement was recorded after two years of the occurrence. There is no material contradiction in her statement. Mr. B. Sharma, ld. Sr. Counsel, appearing on behalf of the accused/appellant, has attempted to point out only one contradiction in her statement. When her statement was recorded on 22.12.2007 by the Judicial Magistrate, First Class, East and North Sikkim at Gangtok, she stated : "When my mother refused he took out a Khukuri (sharp edged weapon) and attacked my mother twice." It is argued on behalf of the appellant that while making statement before the Magistrate, she referred to two assaults upon the victim by the appellant which is not established by prosecution as it is at variance with the autopsy report which discloses that the deceased had only one injury with the weapon of offence. From the perusal of the record we find that this witness lodged the report with the Police Station at about 10 p.m. on 01.12.2007. Exbt. 3 is the report lodged by her in presence of Witness No. 4 Karchung Bhutia, her maternal uncle and his friend Nim Tseten, Witness No. 3 and she referred to only one stab on the chest of victim. Statement referred by Mr. Sharma was, in fact, an initial statement recorded before the Judicial Magistrate, First Class, East and North Sikkim at Gangtok where he referred to two attacks. However, in her statement before the ld. Sessions Judge recorded on 11.02.2009, she made following statement:

Thereafter, my father and mother quarreled amongst themselves where upon my father excreted in the room itself and asked my mother to clean it up which she refused. My father then took out a "khukuri" and assaulted my mother on the chest once.

No question has been put to the witness in cross-examination regarding two injuries, nor the witness was confronted with her earlier statement. Not only this in the Autopsy Report

(Exbt. 21) apart from abrasion and scratch only one deep wound is reported which seems to be the cause of the death. We are of considered view that there has been no material contradiction in respect to the number of injuries so as to suspect the prosecution story in any manner.

12. Lastly Mr. Sharma has questioned the veracity and reliability of the statement of the sole eye witness. It is submitted that it is dangerous to rely upon the testimony of sole eye witness who happens to be a minor and there is every possibility that she might have been tutored to depose against the accused. It is true that Dichen Subba is the sole eye witness produced in the case though her minor brother, namely, Sunil was also present at the time of occurrence. Dichen Subba was aged 12/13 years at the time of occurrence and 14/15 years at the time of making statement before the Court. The Magistrate as also the Sessions Judge took all precautionary measures to find out the mental status of the witness before recording her statement as eye witness. From the perusal of her statement, it appears that her statement is natural sequence of events. She denied a specific suggestion that she was tutored by the Police to make a statement before this Court. She has been subject to lengthy cross-examination but without any success as regards her credibility. She had been consistent in making her statement regarding the incident. From the reading of the statement of this child witness it can be conveniently inferred that her mental faculties had been adequately developed and she was alive to the situation and circumstances around her. Her statement needs no corroboration by any independent witness as there was none except another minor child who was much younger than her. The circumstantial evidence produced by the prosecution, particularly the statement of the accused himself sufficiently corroborates the testimony of this witness. In any case, this witness is equally related to the accused as to the victim. In such a case, there is always a possibility of witness siding with the accused who is to take her care after the death of her mother. It is settled law that the question whether the testimony of a child witness should be accepted or ignored solely depends upon the wisdom of the trial Court who has primarily noticed the demeanor and bahaviour of the witness to find out whether the witness has been tutored or making a natural statement. In Golla Yelugu Govindu Vs. State of Andhra Pradesh, , while considering the question of reliance to be placed upon a child witness, Hon''ble Supreme Court held as under :

9. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to the influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the

Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

From the reading of the statement of Dichen Subba, we are of the considered opinion that there is nothing abnormal in her statement which seems to have been made in normal sequence of events and inspires confidence of the Court. We do not find any reason to disbelieve her statement, merely on account of her tender age, particularly when she is related to the appellant as well.

13. It has been finally argued by Mr. Sharma that the circumstances leading to the commission of offence do not suggest a premeditated mind of the accused/appellant to kill his wife. It is accordingly contended that it was spontaneous and in the heat of anger that the appellant caused injury to his wife which eventually proved to be fatal. He has prayed that the offence u/s 302 IPC be converted to one u/s 304, Part II IPC. This contention is seriously opposed by Mr. Namgyal, ld. Addl. Public Prosecutor.

14. It is contended on behalf of the ld. Addl. Public Prosecutor that the accused/appellant caused a fatal injury at the vital part of the body of deceased with sharp edged weapon penetrating into the atrium of the heart which caused her death and thus, offence u/s 302 IPC is clearly made out. He has relied upon Mariadasan and Others Vs. State of Tamil Nadu, . In this case, the accused assaulted the victim with knife on several part of body and one injury was caused on the chest cutting a part of thoracic aorta, with the main portion of the heart and also fracturing 8th and 9th ribs on the right side of the chest. According to medical evidence this injury is sufficient in the ordinary course of nature to cause death. It has been held by the Apex Court that having regard to the nature of the injury and the vital and delicate part of the body at which it has been aimed that the accused/appellant is not entitled to benefit of Section 304, Part I or Part II IPC. In the case before us only one assault was made by accused.

15. In case of AIR 1983 185 (SC) , only one blow was struck by the accused in heat of altercation between the deceased and the accused which was preceded by provoking remarks of the deceased. It has been held that it does not appear that there was any intention to kill. Hon''ble Supreme Court accordingly converted the conviction u/s 302 IPC to that under the second part of Section 304. In Sanjay Subba Vs. State of Sikkim, , conviction and offence u/s 302 IPC was converted into one u/s 304, Part II IPC on appreciation of the evidence wherein it was noticed that the accused inflicted a single injury with the knife in a sudden fight in the heat of passion without any premeditation. A Division Bench of this Court held that the accused had no intention to kill and to cause such bodily injury which is likely to cause death. Similar views have been expressed by this Court in Crl. Appeal No. 03 of 2010 decided on 13.08.2010 and in Crl. Appeal No. 3 of 2009 decided on 17.03.2010.

16. In the present case, it has been found from the evidence of eye witness Dichen Subba that on the fateful day her parents had gone to the 49 days death rituals in the

village in a congenial mood. They were talking to each other and laughing. She further stated that both her parents had together taken alcoholic drinks and both were equally drunk but her father was a little more drunk than her mother. She further stated that on their return there was a quarrel between her parents and there was hot discussion amongst them. Her father farted at the face of her mother who asked him to shit at her face. She has further stated that her father excreted in the room and asked her mother to clean it, she refused to do so and also pushed him and thereafter, her father took out the Khukuri and assaulted her mother on the chest once. This version of the eye witness does not lead to the conclusion that the accused/appellant had any premeditated intention to kill his wife. The fact is that both of them went together to their relative''s house in a happy jolly mood, talking to each other and laughing, both of them drunk together. It seems that there was a sudden fight though on the same issue of victim''s relation with Karma Loday Bhutia and in the heat of anger and under the influence of liquor, the appellant even excreted in the room and asked the victim to clean it. She refused to do so and pushed the appellant whereupon the appellant took out the Khukuri and caused a single blow on the chest of the deceased which eventually caused her death. All these circumstances suggest a spontaneous action and reaction and no premeditation to kill the deceased. The fact that quarrel took place in the presence of the children also suggests that the appellant had no intention to kill her. Had the appellant any premeditated mind to kill her, he could have conveniently killed her during night or at any other place where there may not be any witness as the appellant had ample opportunity to take his wife to any other place or kill her during the night when the children were asleep. There was no occasion for him to kill her in presence of their children. We are of considered view that the above circumstances do not suggest a premeditated intention to kill and the offence seems to have been committed spontaneously and in the heat of anger and under the influence of liquor. It is a fit case to hold that offence u/s 304, Part-II IPC is made out. Accordingly, we convert the charge against the accused/appellant from Section 302 IPC to that of Section 304, Part II IPC and sentence him to undergo rigorous imprisonment for a period of 10 years. Period undergone shall be set off in computing the sentence.