THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Appeal No.18 of 2018

Deepen Pradhan,
S/o Late Indra Bahadur Pradhan,
R/o Duga, Kamayray busty,
P.O. & P.S. Rangpo,
East Sikkim.

At present:
State Jail at Rongyek,
East Sikkim.

.... Appellant

Versus

State of Sikkim. .... Respondent

Application under Section 374 (2) of the Code of Criminal Procedure, 1973.

Appearance:

Mr. R. C. Sharma, Legal Aid Counsel for the Appellant.

Mr. Thupden Youngda, Additional Public Prosecutor for the State-Respondent.

Date of hearing : 21.11.2019

Date of judgment: 30.11.2019

J U D G M E N T

Bhaskar Raj Pradhan, J

1. P.W.1 lodged First Information Report (for short 'the FIR') (exhibit-1) before the Sadar Police Station, Gangtok on 17.05.2014 complaining that her sister i.e. the victim (P.W.12)

was burnt and "bitten" by the appellant in front of Sneha Gurung (referred to as the 'eye witness') at approximately 2 p.m. The FIR stated that the victim was at the STNM hospital. (for short 'the hospital').

2. Sadar Police Station Case No. 146/2014 dated 17.05.2014 under Section 307 of the Indian Penal Code, 1860 (for short 'the IPC') was registered against the appellant and case endorsed to Umesh Pradhan (P.W.14) for investigation.

3. On completion of the investigation charge-sheet was filed. On 10.08.2015 the learned Sessions Judge, East Sikkim at Gangtok (for short 'the learned Sessions Judge') framed a charge under Section 307 IPC and on the plea of "not guilty" the trial commenced.

4. During the trial fourteen prosecution witnesses were examined. The learned Sessions Judge examined the appellant under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') on 20.11.2017. The appellant either denied the material against him as false or took the plea that he did not know about it. When asked to explain the evidence of the victim (P.W.12) that on 17.05.2014 she was with the appellant and the eyewitness in her house, the appellant stated that it was false. The appellant also stated that the evidence of the victim (P.W.12) that the appellant had picked up the kerosene jar, poured kerosene oil over her and

burnt her with the match box was also false. The appellant desired and examined P. Dewan (D.W.1) as his defence witness.

5. On 27.12.2017 the learned Sessions Judge delivered the impugned judgment holding the appellant guilty as charged. On the same day an order of sentence was passed sentencing the appellant to undergo simple imprisonment for three years and to pay a fine of Rs.5000/-. In default of payment of fine appellant was required to undergo further simple imprisonment for a period of two months. The learned Sessions Judge directed that the amount of fine, if recovered, shall be made over to the victim as compensation and further that an amount of Rs.1 lakh be paid to the victim under the Sikkim Compensation to Victim's (Amendment) Schemes, 2013.

6. The learned Sessions Judge held that the statement of the victim (exhibit-3) recorded as the dying declaration by the Sub-Divisional Magistrate-Karma Loday Lepcha (P.W.3) in the presence of Dr. D. B. Bista (P.W.4) has no relevance as she survived and deposed before the Court. She found evidence to show that the victim and the appellant were together that day. She held that if the cumulative effect of the injuries endangers a human life it would amount to an offence under Section 307 IPC. She held that intention coupled with overt is sufficient for conviction. She found evidence to establish that the victim had

sustained burn injuries on her body and taken to the hospital. She found evidence that even the appellant had sustained scratch marks on his antero chest wall. She found evidence that the victim's sister i.e. P.W.1 had seen her at the hospital and noticed the severe burn injuries all over the body after which she had lodged the FIR. The learned Sessions Judge held that the evidence of the victim was reliable. She rejected the defence version and questioned the truthfulness of the statement made by the eyewitness in the disciplinary proceedings. She held that the appellant would have had the knowledge that such an act committed by him would cause death of the victim and therefore, liable under Section 307 IPC.

7. The present appeal challenges the conviction and sentence.

8. Heard Mr. R. C. Sharma, learned Counsel for the appellant and Mr. Thupden Youngda, learned Additional Public Prosecutor for the State-respondent.

9. The victim gave a detailed account of what transpired on 17.05.2014. According to her, the appellant, who she was in live in relationship with, had a fight with her at her rented accommodation. Thereafter, he started damaging the furniture with a *"bamphok"* in her house after which she called the police. The appellant picked up the kerosene jar, poured kerosene oil over her and burnt her after lighting a match box.

The eyewitness tried to douse the fire by putting water and thereafter took the victim to hospital. The appellant told them that they should say that the victim got injured when the stove burst. The eyewitness requested the appellant to come along but he did not. However, he reached 10-15 minutes after they reached the hospital. At the hospital the victim was treated and the police came and made inquiries. According to the victim, her face, hands, legs and upper part of her body over her waist had been burnt. During her cross-examination the defence alleged that she had pressurised the appellant to marry him and so they had a discussion and in a fit of anger, poured kerosene upon herself, lighted a matchbox and set herself on fire. The suggestion was however, denied by the victim.

10. The fact that the victim and the appellant were known to each other and living together at the place where the incident took place has been established by her sisters-P.W.1 and P.W.5 and her landlord-P.W.8.

11. Dr. Simmi Rasaily (P.W.13) who examined the victim on the same day at the hospital found burn injuries on her hands, back, abdomen, inner thigh and face and accordingly made her medico-legal-examination report (exhibit-19) in which she recorded that there was kerosene smell on her body. This corroborates the victim's deposition that she suffered burn injuries on her face, hands, legs and upper part of her body as

a result of the incident. The learned Counsel for the appellant drew attention of this Court to the admission made by Dr. Simmi Rasaily (P.W.13) that she had not mentioned the nature of injury sustained in her examination report (exhibit-19). The learned Additional Public Prosecutor submitted that it is of no consequence. In re: ***State of Madhya Pradesh v. Kanha***[1] the Supreme Court held that proof of grievous or life threatening hurt is not a *sine qua non* for the offence under Section 307 IPC and that intention of the appellant can be ascertained from the actual injury, if any, as well as from surrounding circumstances. As rightly contended by the learned Additional Public Prosecutor the failure to mention the nature of injuries does not obliterate the injuries sustained.

12. Dr. Kaden Zangmu (P.W.6) who examined the appellant the next day also found scratch marks on the appellant's antero chest wall. Sub-Inspector Anupa Gurung (P.W.11) confirmed that the victim had in fact called the police station after she was beaten by the appellant and had sought police assistance on 17.05.2014. The victim's landlord (P.W.8) and her sister (P.W.5) proved the seizure of the broken laptop which was lying on the floor at the place of occurrence as well as the *"bamphok"* vide seizure memo (exhibit-7) on 18.05.2014. The Investigating Officer (P.W.14) confirmed the seizure of the laptop in a broken condition and with the

[1] **(2019) 3 SCC 605**

imprint of a shoe on the back cover at the relevant time as well as the *"bamphok"* from the bedroom. These evidences corroborate the evidence of the victim about their fight.

13. The victim's landlord (P.W.8) and her sister (P.W.5) also proved the seizure of her burnt and wet clothes, transparent bottle with 'happy dent' written on it containing 25 ml of blue coloured liquid, grey coloured jar containing approximately 200 ml of blue coloured liquid, red coloured bed sheet/carpet partially wet found on the floor of the victim's house and the cotton pieces dabbed on the floor of the kitchen and the bathroom from the place of occurrence. The seizure took place on 18.05.2014. Seizure memos (exhibit-6) and (exhibit-7) were accordingly prepared by the Investigating Officer (P.W.14).

14. Deo Kumar Basnet (P.W.2) proved the seizure of the uniform of the appellant on 18.05.2014 at the Sadar Thana. The seizure Memo (exhibit-2) has been proved by the Investigating Officer (P.W.14).

15. Sangay Doma Bhutia (P.W.7) the Analyst–cum-Assistant Examiner in the chemistry division of the Regional Forensic Science Laboratory (RFSL), Saramsa examined the seized articles. The victim's burnt and wet wearing apparels, the appellant's uniform, the jar and the bottle both containing blue coloured liquid and the bed sheet/carpet gave positive test for presence of kerosene. Traces of kerosene were found in the

cotton pieces obtained from the floor of the place of occurrence.

16. P.W.1-the victim's elder sister proved that she had lodged the FIR after she had visited the victim at the hospital where she witnessed the burn injuries on her body and learnt that the appellant was responsible for it.

17. At this juncture it would be relevant to examine the statement of the victim (exhibit-3) recorded by the Sub-Divisional Magistrate, Karma Loday Bhutia (P.W.3) in the presence of Dr. D.B. Bista (P.W.4). The learned Sessions Judge has held that it has no relevance as she survived and deposed before the Court. In re: ***Gentela Vijayavardhan Rao v. State of A.P.***[2] the Supreme Court held :

> ***"17.*** *Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony in court under Section 157 of the Evidence Act which permits such use, being a statement made by the witness "before any authority legally competent to investigate". The word 'investigate' has been used in the section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Section 164(1) would cover such a statement also. Vide Maqsoodan v. State of U.P. [(1983) 1 SCC 218 : 1983 SCC (Cri) 176 : AIR 1983 SC 126] However, such a statement, so long as its maker remains alive, cannot be used as*

[2] **(1996) 6 SCC 241**

substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker."

18. In re: ***Ranjit Singh v. State of M.P.***[3] the Supreme Court held that in such an eventuality the statement so recorded has to be treated as of a superior quality/high decree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under Section 157 of the Indian Evidence Act, 1872.

19. The statement (exhibit-3) made by the victim on 17.05.2014 at the hospital could have been used to corroborate or contradict the deposition of the victim and in the manner provided under Section 157 of the Indian Evidence Act, 1872 but for the fact that she admitted in cross-examination that the Sub-Divisional Magistrate did not take her statement about this case.

20. During investigation the learned Chief Judicial Magistrate (P.W.9) had recorded the statement of the eyewitness under Section 164 Cr.P.C. (exhibit-14) on 21.05.2014. The prosecution seeks to rely upon it. The statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of the truth of the facts. It may be used for contradiction or corroboration of the witness who made it but not for contradicting other witnesses. As the prosecution could not produce the eyewitness the statement could not be used by the prosecution to prove the facts stated therein. The fact that

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[3] **(2011) 4 SCC 336**

the statement of the eyewitness was recorded under Section 164 Cr.P.C. had been proved by the learned Chief Judicial Magistrate (P.W.9) who recorded the statement. The truth or veracity of the statement made by the witness before him cannot be considered in the present trial.

21. The deposition of the victim is however, adequately corroborated by both oral and material evidence save on the aspect of whether it was the appellant who was responsible for the act alleged or it was the victim who tried to immolate herself. It is evident that the victim suffered multiple burn injuries due to the burning of the kerosene poured on her body. The discrepancies pointed out by the appellant are minor and does not shake the foundational facts. The admission made by Deo Kumar Basnet (P.W.2) that he could not smell kerosene on the wearing apparels of the appellant cannot demolish the fact that Sangay Doma Bhutia (P.W.7), the expert, did find evidence of kerosene in them. The failure of P.W.1 to give certain details about her visit to see the victim at the hospital does not also dislodge the fact that she had lodged the FIR after visiting the victim. The inability of P.W.5 to say whether the articles were tampered during the night would also not help the defence as there is no evidence of its possibility. The only issue raised by the learned Counsel for the appellant which requires examination is the alleged failure of the prosecution to produce the eyewitness.

22. It is the prosecution's case the appellant poured kerosene on the victim in the presence of the eyewitness. Out of the three persons who would know what transpired on 17.05.2014 the appellant was an accused and exercised his right of silence. The victim deposed before the Court and supported the prosecution case. The eyewitness was cited as a prosecution witness in the charge-sheet filed on 20.10.2014 but was subsequently dropped.

23. In a criminal trial an accused person is considered innocent until proven guilty. It is for the prosecution to establish its case beyond all reasonable doubt. However, the appellant has chosen to lead defence evidence. The question therefore, is whether the evidence led by the defence makes probable his innocence. Has the defence been able to create enough doubt in the mind of the Court to defeat the prosecution case?

24. The appellant is a police officer. The appellant had produced the eyewitness before the disciplinary authority but chose not to produce her as his defence witness. The appellant produced P. Dewan (D.W.1) in his defence.

25. P. Dewan (D.W.1) was examined as the sole defence witness. According to him he was posted as SDPO, Pakyong when he received a letter from the department to conduct a departmental inquiry against the appellant. During the course

of the inquiry he examined the eyewitness and recorded her statement (exhibit-D) dated 08.12.2014. He identified his signature and the signatures of the eyewitness and the appellant in the said statement (exhibit-D). According to P. Dewan (D.W.1) the eyewitness had stated that on 17.05.2014 the victim (P.W.12) had discussion with the appellant; after which she had set herself on fire; this was witnessed by her and thereafter the victim was evacuated to the hospital by her and the appellant. During his cross-examination P. Dewan (D.W.1) admitted that the eyewitness was the only witness who had given her statement before him for the appellant. He also admitted that during the departmental inquiry the appellant was on bail.

26. The statement of the eyewitness (exhibit-D) reflects that the department did not cross-examine her. Opportunity to cross-examine her was offered by P. Dewan (D.W.1) only to the appellant and not to the department. No other witness was examined by P. Dewan (D.W.1) in the departmental inquiry.

27. Admittedly, there was one eyewitness to the incident. The eyewitness was dropped by the prosecution after obtaining permission from the learned Sessions Judge as they failed to locate her. The appellant also gave his no objection for dropping the eyewitness.

28. In re: ***Mitthulal & Anr. v. The State of Madhya Pradesh***[4] the Supreme Court held that it is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. The Supreme Court further held that even in civil cases it could not be done unless the party agree that the evidence in one case may be treated as evidence in the other but in criminal cases it would be impermissible.

29. The deposition of P. Dewan (D.W.1) that he had recorded the statement of the eyewitness during the departmental inquiry must be given credence. The fact that P. Dewan (D.W.1) recorded the statement of the eyewitness in which she stated that the victim had tried to immolate herself must also be given credence. However, whether what P. Dewan (D.W.1) heard and the eyewitness stated before P. Dewan (D.W.1) in her statement (exhibit-D) was the truth could have been found only if she had been produced as a witness and subjected to cross-examination. The evidence of P. Dewan (P.W.1) is therefore hearsay to that extent. In the given facts it cannot be saved within its exceptions as well. The statement of the eyewitness (exhibit-D) regarding what actually transpired on that day cannot be used by the appellant is his favour as it was not recorded in the criminal trial. Therefore, there is no credible evidence led by the defence to create enough doubt in

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[4] **(1975) 3 SCC 529**

the mind of the Court to defeat the prosecution case. Hearsay statement cannot be pressed by an accused to create doubt about the prosecution story. This Court is therefore, of the view that the defence evidence does not make probable his innocence in view of the overwhelming evidence led by the prosecution. The learned Sessions Judge was right in rejecting the defence evidence in the facts and circumstances of this case.

30. The deposition of the victim cannot be doubted. She is an injured victim. Her testimony has its own significance. It is vital and more reliable than an injured witness. It has to be relied upon unless there is compelling reasons for rejecting it. The prosecution has been able to establish its case that it was the appellant and the appellant alone who had poured kerosene over the victim, lit a matchstick and burnt her with the knowledge that if he by that act caused death, he would be guilty of murder and consequently, by such an act, the victim was hurt. Being a police officer the appellant would have known the consequence of his act. There is no evidence whatsoever to reject the testimony of the victim as unreliable.

31. The appeal is therefore, rejected. Resultantly, the judgment of conviction and order on sentence both dated 27.12.2017 passed by the learned Sessions Judge, East Sikkim are upheld.

32. Certified copies of the judgment shall be furnished free of cost to the appellant and also sent to the Court of the learned Sessions Judge, East Sikkim at Gangtok. The lower Court records may be sent back.

(Bhaskar Raj Pradhan)
Judge
30.11.2019

Approved for reporting: yes.
Internet: yes.
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