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Court : Sikkim

Decided On : Apr-10-2015

Judge : The Honourable Chief Justice Mr. Sunil Kumar Sinha &Amp; S.P. Wangdi

Appeal No. : Crl. A. No. 21 of 2014

Appellant : Shekhar Roy

Respondent : The State of Sikkim

Judgement :

Sunil Kumar Sinha, CJ. -

1. This Appeal is directed against the Judgment dated 31.10.2011 passed in Sessions Trial Case No. 5/2010 by the Sessions Judge, Special Division-II, East Sikkim at Gangtok. By the impugned judgment, the Appellant has been convicted u/Ss. 302 and 324 IPC and sentenced to undergo R.I. for life and to pay fine of Rs.5,000/- and S.I. for 6 months, respectively, with default sentence of S.I. for 2 months under the first count with a further direction to run the sentences concurrently.

2. The facts, briefly, stated are as under:-

2.1 Deceased-Chumla was the landlady of the Appellant. On 22.08.2006 at about 1855 hrs., the Appellant came to the house of the deceased on the pretext of some talk with her. At that time, Kalu Subba (P.W.-1), Purkey Sherpa (P.W.-2) and

Lalita (P.W.-3), maid servant of the deceased, were also present in her house. The allegations are that, firstly, the Appellant had some talk with the deceased and, thereafter, he attacked over the deceased by a sharp-edged khukuri. Purkey Sherpa (P.W.-2) resisted then he was also attacked by the Appellant. He also sustained simple injury. All this was witnessed by Kalu Subba (P.W.-1) and Purkey Sherpa (P.W.-2), who were watching television along with the deceased in her bedroom. Lalita (P.W.-3) also rushed to the place of occurrence and saw that the deceased was badly injured.

2.2 Kalu Subba (P.W.-1), Purkey Sherpa (P.W.-2) were the child witnesses. Kalu Subba (P.W.-1) immediately rushed to P.S.: Sadar, Gangtok and lodged the F.I.R. (Exbt.-15). He named the Appellant in the F.I.R. The police personnel immediately came to the place of occurrence and saw that the deceased was badly injured. She was lying in pool of blood. The deceased, then, was taken to the hospital. However, she died during the course of her treatment. The offence, then registered u/S. 307/324, was converted to Ss. 302/324 IPC.

2.3 Inquest (Exbt.-3) was prepared and the dead body was sent for post mortem. The post mortem examination was conducted by Dr. K. B. Gurung (P.W.-17). He found following injuries on the dead body of the deceased:-

(i) Incised wound 3 x 1 cms on the middle of forehead;

(ii) incised wound 7 x 3 x 2 cms starting from below left eye extending upto the upper part of the right side of angle of mandible exposing nasal cavity maxillary sinus right and cutting all the facial muscles of the area;

(iii) incised wound 3 x 2 x 1 cms starting from the right ear and moving towards downwards to the back of the neck, cutting all the muscles of the area;

(iv) incised wound 5 x 3 x 1 cms starting from the angle of the right mouth and extending upto the nape of the neck cutting all the muscles and large vessels of the area exposing cervical vertebra right side;

(v) incised wound 5 x 3 x 2 cms starting from right submandibular region running towards cervical region right side cutting and exposing all the muscles and blood

vessels;

(vi) incised wound 7 x 3 x 2 cms starting from left mandible exposing oral cavity with fracture of ramus of mandible right side;

(vii) amputated right forearm which was hanging with the help of muscles and skin tag;

(viii) incised wound 3 x 2 x 1 cms on the dorsum of lower third of forearm with fracture of radius and ulna bone;

(ix) incised wound 7 x 2 x 1 cms starting from right index finger upto the wrist joint right;

(x) incised wound 3 x 2 x 1 cms on upper third of left forearm cutting all the muscles of forearm;

(xi) incised wound 3 x 2 x 1 cms on the dorsum of left forearm;

(xii) incised wound 3 x 2 x 1 cms on the dorsum of left forearm 8 cms below would No. 12;

(xiii) surgical satured wound (vene section) on the left leg (angle joint area) inner side;

(xiv) lacerated wound 3 x 2 cms on the right temporoparietal region and

(xv) fracture of the parietal bone, brain matter was coming out from the fracture areas.

The autopsy surgeon opined that all the injuries were ante-mortem caused by a heavy sharp cutting weapon and the cause of death was shock as a result of hemorrhage due to multiple ante-mortem injuries and the death was homicidal in nature. The autopsy report is Exbt.-8.

2.4 Purkey Sherpa (P.W.-2) was examined by Dr. Ashok Tshering Sherpa (P.W.-19), who found that he had sustained L shaped incised wound on occipital region measuring about 3 cm x 0.05 cm. His injury report is Exbt.-11.

2.5 In further investigation, various articles including khukuri, were seized and sent for their chemical examination to Central Forensic Science Laboratory (CFSL), Kolkata, from where a report (Exbt.-12) was received. According to the CFSL report, human blood was found on almost all the articles including the khukuri.

2.6 Case of the prosecution was based on eye-witness account of Kalu Subba (P.W.-1) and Purkey Sherpa (P.W.-2), who were supported by the evidence of Lalita (P.W.-3). The learned Sessions Judge relied on the testimonies of these eye-witnesses and held that it was proved beyond of reasonable doubt that the Appellant had committed murder of the deceased by causing multiple injuries by khukuri, therefore, he was liable for punishment u/S.302 IPC. It was further held that the Appellant had also caused injury to Purkey Sherpa (P.W.-2) by khukuri and, therefore, he was also liable for punishment u/S.324 IPC. The Appellant thus was convicted and sentenced, as above. Hence, this Appeal.

3. Mr. Zangpo Sherpa, learned Counsel appearing on behalf of the Appellant, has argued that the testimonies of the two child witnesses were not supported by Lalita (P.W.-3), who was also present in the house of the deceased at the time of the incident, therefore, the conviction based on their testimonies cannot be sustained.

4. On the other hand, Ms. Pollin Rai, learned Assistant Public Prosecutor appearing on behalf of the Respondent, has opposed these arguments and supported the judgment passed by the Sessions Court.

5. We have heard Counsel for the parties.

6. Since the case was mainly based upon two eye-witnesses, namely, Kalu Subba (P.W.-1) and Purkey Sherpa (P.W.-2), we shall firstly look into their evidence.

7. Kalu Subba (P.W.-1) was aged about 14 years. He deposed that at the relevant time he was working as a domestic help in the residence of the deceased. Purkey Sherpa (P.W.-2) and a lady, namely, Lalita (P.W.-3) were also working in the residence of the deceased. The Appellant was well known to him. He identified the Appellant on dock. He also took his name as Shekhar Roy. According to Kalu Subba (P.W.-1), the Appellant had his watch repairing shop and a fish stall in the

rented premises of the deceased. On the date of incident, at about 6 p.m., he was present in the residence of the deceased. He was watching television along with Purkey Sherpa (P.W.-2) and the deceased in the bedroom of the deceased. Lalita (P.W.-3) was attending to the water supply on the ground floor. At that time, the Appellant came there and after some conversation, he suddenly got up from his seat and pulled out a khukuri from his waist under the shirt and attacked over the deceased on her facial region causing deep cut injuries on her cheeks etc. Flesh from the cheeks was seen hanging down and she was bleeding under injury. On seeing this, he ran downward with a view to inform the police. The main gate was locked from inside and the keys were with Lalita (P.W.-3). The Appellant also came there and asked them not to raise any alarm. When he reached near the room of Chumla (deceased), he noticed that Chumla was sitting on a wooden bench. The Appellant then asked her to move into her bedroom but when deceased refused and started running towards the passage outside her room, the Appellant followed her and assaulted her on head with the said khukuri. At that time, he (P.W.-1) managed to run away from the main door and straightway went to Sadar PS. He was also accompanied by Purkey Sherpa (P.W.-2). They reached Sadar PS within few minutes and lodged the report.

8. Purkey Sherpa (P.W.-2) was also a child witness. He was aged about 15 years. He also deposed in similar fashion with minute details.

9. Lalita (P.W.-3) was a cook in the house of the deceased. She deposed that in the evening at about 6 p.m., when the Appellant came to the house of the deceased, at that time, she was attending to the water pump near the main gate. The Appellant rang the door bell. She opened the door and had allowed the Appellant to go to the room of the deceased. About 10 to 15 minutes thereafter, the two boys (P.W.-1 and P.W.-2) came running down the staircase in a hurry and told her that deceased Chumla was cut. Before she grasped what the two boys meant, the Appellant also reached there with khukuri in his hand. The Appellant caught her hand and, thereafter, took all of them to the bedroom floor. Deceased Chumla had sustained multiple injuries over her facial region. She anyhow got free from the Appellant and ran away. However, after some time, she saw that Chumla was lying in pool of blood. There was blood all over her body and on the floor.

10. On examination of the evidence of these three witnesses, we find that their evidence was corroborating each other. These witnesses were put to lengthy cross-examination by the defence but nothing material could be elicited in their cross-examination on which either their testimonies may be discarded or it may be said that they were falsely implicating the Appellant.

11. Mr. Sherpa has argued that the child witnesses were susceptible to tutoring, therefore, only upon their evidence the conviction was not possible. He cited the judgment of State of Madhya Pradesh vs. Ramesh and Anr. : (2011) 4 SCC 786.

12. The Supreme Court, in the said judgment has referred to many earlier judgments and has laid down the principles vide paragraph 14. We would like to quote paragraphs 7 to 14 : Child witness 7. In Rameshwar v. State of Rajasthan : AIR 1952 SC 54 this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p.55, para 7) every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p.56, para 11)

11. it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.

8. In Mangoo v. State of M.P.: AIR 1995 SC 959 this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

9. In Panchhi v. State of U.P. : AIR 1998 SC 2726 this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom that of law. It cannot be held that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring (SCC p.181, para 11).

10. In Nivrutti Pandurang Kokate v. State of Maharashtra: AIR 2008 SC 1460 this Court dealing with the child witness has observed as under: (SCC pp.567-68, para 10) 10. 7. 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 the 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 that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of makebelieve. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be 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. *

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implication of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving

evidence on oath and the import of the questions that were being put to him. (Vide Himmat Sukhadeo Wahurwagh v. State of Maharashtra : AIR 2009 SC 2292.)

12. In State of U.P. v. Krishna Master : AIR 2010 SC 3071 this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide Gagan Kanojia v. State of Punjab : (2006) 13 SCC 516.)

14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment of improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

13. We have examined the evidence of the two child witnesses in light of the above broad principles. Their evidence is cogent, clinching and reliable. As stated above, nothing has been brought on record against their testimonies. Their deposition inspires confidence of this Court and there is no embellishment and improvement in the same. There is no material to show that either they were tutored or were planted by the prosecution. The evidence of the two child witnesses (P.W.-1 and P.W.-2) was duly corroborated by the evidence of Lalita (P.W.-3). The child witnesses had disclosed the incident to her, who also came to the place of occurrence and, at the first instance, found the deceased in injured condition and at the second instance, she found her lying in pool of blood having sustained multiple cut injuries.

14. The evidence of the child witnesses (P.W.-1 and P.W.-2) was further corroborated by the medical evidence of Dr. Gurung (P.W.- 17), who conducted autopsy and found multiple serious injuries on the dead body of the deceased and opined that the above injuries could have been caused by heavy cutting weapon.

15. FIR (Exbt.-15) was lodged by Kalu Subba (P.W.-1) within a few minutes of the incident, in which he mentioned the name of the Appellant. The FIR was duly proved by Kalu Subba (P.W.-1) as also by Mrs. Kalpana Dong (P.W.-6), who scribed it.

16. The khukuri and other articles were seized from the possession of the Appellant and these articles were found stained with human blood. Thus, the evidence of the eye-witnesses was also corroborated by the CFSL report.

17. Purkey Sherpa (P.W.-2) had also sustained one L shaped wound on occipital region. Thus, he was an injured eye-witness and due weightage was to be given to his evidence as his presence at the place of occurrence could hardly be doubted. Apart from the evidence of assault to the deceased, he has deposed that he was also assaulted by the Appellant and nothing adverse could be brought in his cross-examination.

18. The Appellant and these witnesses were well known to each other. Therefore, there was hardly any chance of mistaken identity. These witnesses had no reason

to falsely implicate the Appellant in such a heinous crime.

19. Mr. Sherpa, as a last resort, argued that in the facts and circumstances of the case, an offence u/S.302 IPC would not be made out and the Appellant will be liable to punishment under Part-I or Part-II of Section 304 IPC. His contention was that the Appellant had gone to the residence of the deceased with a packet of sweet. There, on account of certain dispute, he attacked over the deceased. Thus, there was no intention of the Appellant to commit murder of the deceased.

20. The argument cannot be accepted in light of the proved facts and circumstances. There is absolutely no evidence to show that there was any quarrel or even a slight altercation between the Appellant and the deceased. In the instant case, the Appellant, after talking with the deceased for a short while, took out the khukuri hidden in his waist and attacked over the deceased causing multiple serious injuries. It is not the case that the Appellant once caused injuries and ran away. In the instant case, the Appellant, after causing fatal injuries in the first round, again returned after a short while and caused more injuries to the deceased. The number and nature of injuries caused by the Appellant would clearly indicate that he had intention to commit murder of the deceased. Had there been no intention of Appellant, he would not have repeated the blows, which he gave in two installments.

21. For the foregoing reasons, we do not find any substance in this Appeal. The Appeal is liable to be dismissed and is hereby dismissed.

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