

Sikkim High Court Dil Bahadur Tamang vs State Of Sikkim on 5 July, 2002
Equivalent citations: 2005 CriLJ 786 Author: R Dayal Bench: R Dayal
JUDGMENT Ripusudan Dayal, C.J. 1. This appeal is directed against the judgment dated 18-8-2001 by the learned Sessions Judge, East and North Sikkim rendered in Criminal Case No. 4 of 1998 whereby the appellant Dil Bahadur Tamang was convicted under Sections 302 and 449 of the Indian Penal Code and the order dated 3-9-2001 whereby he was sentenced to rigorous imprisonment for life and a fine of Rs. 5,000/- and in default of payment of fine to undergo further rigorous imprisonment for six months for the offence under Section 302 of the Indian Penal Code and also to undergo rigorous imprisonment for a period of four years with a fine of Rs. 1,000/- and in default of payment of fine to undergo further rigorous imprisonment for two months under Section 449 of the Indian Penal Code. Both the sentences were directed to run concurrently. 2. The deceased A. K. Shrestha was at the time of the occurrence posted as Director, Fire Services and was in the rank of Deputy Inspector General in the Sikkim Police. The appellant was posted as driver under the deceased and was under suspension at that time. The prosecution case, in brief, is that on 8-9-1996 in the morning at about 11 a.m., the appellant committed house trespass by entering into the house of the deceased A. K. Shrestha at Development Area, Gangtok in order to commit his murder and stabbed the deceased in the abdomen, which resulted in his death at the hospital and he thereby committed the offences under Sections 302 and 449 of the Indian Penal Code. F.I.R. No. 164(9)96 (Ext. P-19) was recorded at the Sadar Police Station on 8-9-1996 at 11.40 hrs. under Sections 452/307 on having received telephonic information from Mrs. Ganga Pradhan PW-4 of Development Area to the effect that her uncle A. K. Shrestha had been stabbed in his abdomen by driver Dil Bahadur Tamang of the Sikkim Fire Service at his residence and had been brought to STNM Hospital in a very critical condition. Ganga Pradhan PW-4 is the niece of the deceased and resided in a house adjacent to the house of the deceased. The Officer-in-Charge, Sadar Police Station, Shri Sonam Bhutia. PW-20 endorsed the case for investigation to Sub-Inspector D. T. Simick, PW-22 who, on taking up the investigation proceeded to the S.T.N.M. Hospital Gangtok to see the victim. At the hospital he found amongst others the Superintendent of Police, East, Mr. S. D. Negi who gave verbal direction to the former to hand over investigation of the case to the S.D.P.O. Mr. Prabin Gurung, PW-19. Thereupon, Prabin Gurung took up the investigation. When he took up the investigation, the deceased had already expired and the case was, therefore, converted into one under Sections 449/302, I.P.C. He conducted inquest on the body of the deceased. Thereafter, he proceeded to the residence of the deceased. There he seized one bed sheet stained with blood and several other articles. He also seized the dagger (P-II) with one side saw-edge measuring about 10" in length with ivory handle stained with blood from the door step of the lounge of residence of the deceased. The appellant was arrested on the same day and he volunteered to disclose that he had thrown the scabbard of the weapon of offence near Sukha Pool near the residence of L. B. Chettri at Sichey Busty. Accordingly, his statement (Ext.

P-2) under Section 27 of the Evidence Act was recorded and the scabbard (Ext.P-1) was recovered and seized vide Exhibit P-3. Thereafter, confessional statement (Ext.P-13) was made by the appellant under Section 164 of the Code of Criminal Procedure on 26-9-1996 before Shri P. W. Paljor, the then Judicial Magistrate, PW-16. Dying declaration of the deceased was recorded by the District Magistrate, East, Shri Govind Mohan PW-18 and the same is Exhibit P10. Test identification parade was conducted on 24-9-96 by the then Judicial Magistrate, Shri P. W. Paljor, PW-16 wherein Jabardhan Rai PW-3 and Jagat Bandhu Pradhan PW-5 identified the appellant. Twenty two witnesses in all were produced by the prosecution during the trial including Dr. S. D. Sharma, PW-14 who was the Senior Medico Legal Consultant at the S.T.N.M. Hospital and who conducted post mortem examination on the body of the deceased on 8-9-1996. His report is Exhibit P4. According to his report, the autopsy started at 16.40 hrs. and concluded at 17.30 hrs. He found the following antemortem injuries on the body of the deceased :

“1. Repaired incised penetrating wound with clean cut margins 3 cms. long horizontally placed over the right lumbar region of the abdomen, 10 cms. below the right costal margin in the anterior axillary line and 18 cms. right of the midline. The track going backwards, upwards and medially resecting the anterior abdominal muscles, causing incised rent of the ascending colon 2 cms. long, completely dividing the right kidney transversely into two halves and causing lateral incised rent of inferior vena cava. The track ending at the antero-lateral right border of the 2nd lumbar inter vertebral disc causing incised wound 1 cm. long to the disc, and incised incomplete resection of the paravertebral muscles in the area. There was haemoperitonium of about 2 Lts.” According to his opinion, death had occurred one to four hours prior to the post mortem examination and the cause of death was shock as a result of internal haemorrhage following antemortem incised stab injury in the abdomen causing multiple visceral injuries sufficient to cause death in the ordinary course of nature. 3. The learned Sessions Judge took note of the fact that there was no direct evidence as to the occurrence but by the evidence on record the following circumstances had been established : “(a) deceased A. K. Shrestha, at the relevant time stated that he had been stabbed and requested to be taken to the hospital; (b) the deceased succumbed to his injuries at the S.T.N.M. hospital and the doctor (PW-14) was of the opinion that the deceased died due to shock as a result of internal haemorrhage following ante-mortem incised stab injury in the abdomen; (c) the accused was seen moving near the house of the deceased on the day of incident; (d) that the accused asked PW-3 as to whether the deceased was inside his house. He also enquired as to whether the wife of the deceased was also inside the house; (e) after the incident deceased has made the dying declarations before PWs-1, 2, 4, 5, 15 and 18; (f) soon after the incident accused was seen running out of the house of the deceased towards Yuksom building; (g) disclosure statement of the accused that he had thrown the scabbard of the knife in the Jhora and consequent recovery of the same at the, instance of the accused, and; (h) statement by the accused Under Section 164, Cr.P.C.” In the opinion of the learned Sessions Judge the

above circumstances indicate that the appellant has been guilty of the offences with which he has been charged as the totality of the circumstances and the facts that there were unequivocal statements of the witnesses regarding dying declaration, confessional statements, disclosure statement and presence of the appellant immediately before and after the incident in the vicinity of the place of occurrence coupled with the medical report conclusively proved beyond reasonable doubt that it was the appellant and appellant alone who could be held responsible for the commission of the crime. He, in particular, noted that witnesses Jabardhan Rai PW-3, Jagat Bandhu Pradhan PW-5, Pratap Pradhan PW-15 and Pravin Gurung PW-19 had corroborated each other that the incident took place inside the house of the deceased. He also dealt with the plea of alibi taken by the learned defence counsel which was put to the Investigating Officer, PW-19 by suggesting that the appellant had gone to the house of his parents at Rangpo to seek financial assistance and also in his statement under Section 313 of the Code of Criminal Procedure to that effect, observing that the same was not acceptable since there was evidence on record regarding the commission of crime by the appellant and that no evidence had been adduced by the defence to prove his plea of alibi and that the burden of proving that plea rested on him. One argument put by the defence counsel was that most of the prosecution witnesses were untrustworthy being related to the deceased and were influential since the deceased himself was holding the post of Deputy Inspector General at the relevant time and his brother was a Minister, his niece Ganga Pradhan PW-4 was Sub-Divisional Magistrate and his nephew Jagat Bandhu Pradhan PW-5 was Assistant Government Advocate. The learned Sessions Judge did not find any merit in the submission for the reason that the District Magistrate and Judicial Magistrate could not be said to be biased and nothing had been brought on record to show any reasons to make the witnesses give false evidence against the appellant. Another submission made on behalf of the appellant before the learned Sessions Judge was that the prosecution had suppressed material witnesses, namely, Shivalal, Dr. Yodok, Dr. Passang and Dr. Wangchuk which created doubt on the prosecution case. The learned Sessions Judge observed that Dr. Yodok, Dr. Passang and Dr. Wangchuk were not cited as witnesses and it is for the prosecution to choose whom to examine and it is not the quantity but the quality of evidence which counts and nothing prevented the defence to examine these persons as defence witnesses. Another contention made by the defence counsel was that one Mr. Bansal who was a tenant running travel agency in the rented rooms of the deceased was not examined creating doubt in the prosecution case. Dealing with this submission, the learned Sessions Judge observed that as the incident took place inside the premises under actual occupation of the deceased it was quite natural that Mr. Bansal might have noticed nothing and that the prosecution had not arrayed him as one of the witnesses. 4. Shri B. Sharma, Legal Aid Counsel who had appeared on behalf of the appellant, has submitted that the disclosure statement purported to have been recorded under Section 27 of the Evidence Act is discrepant in vital respects and, consequently, the alleged seizure of the scabbard in pursuance thereof is of no value. He has further

submitted that S.I., D. K. Pradhan who allegedly received the telephonic call from Mrs. Ganga Pradhan (PW-4) on the basis of which FIR was recorded has not been examined which casts doubt on the prosecution case. Further, it is submitted that the evidence on record suffers from several discrepancies and, as such, the prosecution has failed to prove its case against appellant beyond reasonable doubt. 5. Before analysing the evidence on record to show whether the prosecution has been able to establish facts which prove beyond reasonable doubt the commission of the offences of which the appellant has been convicted by the learned Sessions Judge, I would consider the specific objections taken by the learned counsel for the appellant. As to the disclosure statement, the same is Exhibit P-2 and it, in material portion, states:- "On 8-9-1996, morning at about 11/11-30 a.m. I went to DIG Sahib (A. K. Shrestha) house with the knife that I had purchased. I went there with a intention to kill D.I.G. (A. K. Shrestha), I stabbed him on the right side of the stomach. After stabbing him with the knife, I left the knife exactly where I had stabbed him in the stomach and from there, I ran away towards Sichey, Sukhapool. Just below Sichey Sukhapool I threw the red colour scabbard." It purports to have been signed by the appellant and also Pravin Gurung, the Investigating Officer (P.W. 19). It is also signed by the witnesses Simon Moktan P.W. 12 and Prem Kumar Rai P.W. 13. Pravin Gurung has stated in his examination-in-chief that when the appellant was brought to the Sadar Police Station he interrogated him and after two days of interrogation, he volunteered to disclose that he had thrown the scabbard of the weapon of offence somewhere near Sukhapool below the house of L.B. Chettri at Sichey busty and accordingly he recorded his statement under Section 27 of the Evidence Act in the presence of witnesses Simon Moktan of Tibet Road, Gangtok and Prem Kumar Rai of Baluwakhani, Gangtok. He has further deposed that after recording the statement of the appellant, he along with the witnesses P.I. Sonam Bhutia and other constables proceeded to Sukhapool at Sichey busty and there the accused pointed out the scabbard hanging on a bush which was seized vide seizure memo Exhibit P3. However, in the cross-examination, he admitted that he himself did not record the disclosure statement Exhibit P2 and he had directed the lady S.I. Chewang Lhamu to record the said statement and the said statement was taken under his direction. He also stated that he was not aware at that time that the witnesses Simon Moktan and Prem Kumar Rai were stock witnesses of the police department but subsequently came to know that they were prosecution witnesses in a number of prosecution cases. He also admitted that the signature of S.I. Chewang Lhamu does not find place in the disclosure statement Exhibit P2. He also admitted that there was no endorsement to the effect that the statement was read over to the appellant and he accepted the same. Further, he admitted that Simon Moktan did not live near Sukhapool, Sichey busty and that he took him to sukhapool busty purposely. Similarly, he admitted that Prem Kumar Rai does not live near Sukhapool, Sichey busty and he took him there purposely. S.I. Chewang Lhamu has been examined as P.W. 21. She has stated that she was present with the Investigating Officer when some of the statements of witnesses were recorded during investigation.

She did not specifically state anything in her examination-in-chief about the recording of the disclosure statement Exhibit P-2. In the cross-examination, she admitted that she did not record the statement Exhibit P-2 and thus directly contradicted the I.O. P.W. 19. She further stated that she was not sure whether S.D.P.O. Praviri Gurung P.W. 19 was present when the statement Exhibit P-2 was recorded. It is also worth mentioning that no date has been mentioned below any of the signatures in Exhibit P-2 and this has been so admitted by Simon Moktan, P.W. 12 in his cross-examination. Prem Kumar Rai P.W. 13 the other witness has stated in his cross-examination that he did not remember whether the appellant had stated anything in the Police Station when he saw him. He admitted that he did not know the contents of Exhibit P-2. He also expressed ignorance as to who had signed Exhibit P-2 saying that nobody had signed the same in his presence. It is beyond comprehension as to why the Investigating Officer himself should not have recorded the disclosure statement. The evidence produced by the prosecution on this aspect of the case is utterly unsatisfactory and there is merit in the submission made by the learned defence counsel that no reliance can be placed on the disclosure statement Exhibit P-2 and also upon the alleged seizure of the scabbard pursuant thereto. 6. The other submission made by the learned counsel for the appellant is that S.I., D. K. Pradhan was not produced by the prosecution. On this aspect of the case Sonam Bhutia P.W. 20 who was the Officer-in-Charge of the Sadar Police Station has deposed that on 8-9-1996, S.I., D. K. Pradhan received a telephonic call from Mrs. Ganga Pradhan P.W. 4 to the effect that her uncle, the deceased, had been stabbed with a dagger by his driver Dil Bahadur Tamang of Sikkim Fire Service and the deceased had been brought to the STNM hospital in a very critical condition. On the basis of that telephonic information received by S.I., D. K. Pradhan and recorded in the General Diary as Entry No. 151, the Sadar Police Station case No. 164(9)96 dated 8-9-1996 under Sections 452/307, IPC was registered suo motu against the appellant. He admitted in cross-examination that he was not present at Gangtok Sadar Police Station on 8-9-1996 at the relevant hour when the telephone call was received. S.I., D. K. Pradhan has not been produced in evidence. Ganga Pradhan P.W. 4 has deposed that she saw the deceased standing outside his house at the door step with profuse bleeding and on her enquiry the deceased told her that the suspended driver of the Fire Department Dil Bahadur Tamang had stabbed him with knife and thereafter her brother Jagat Bhandu Pradhan P.W. 5 took her uncle the deceased to the hospital in a Government vehicle and she also followed the said vehicle and after reaching the hospital she informed Sadar Police Station about the incident over telephone. Thus Ganga Pradhan P.W. 4 has testified about the contents of the General Diary entry pursuant to which the formal FIR was registered. In the circumstances, I see no reason why the non-production of S.I., D. K. Pradhan would cause any doubt about the prosecution case. As stated earlier, the FIR was recorded soon after the incident at about 11.40 hrs before the deceased had died and the same names the appellant. 7. Now I proceed to analyze the prosecution evidence to find as to whether the prosecution has been

able to establish facts sufficient to prove the charges of which the appellant has been convicted by the learned trial Court. The first circumstance which the prosecution has tried to establish is that shortly before the stabbing of the deceased, the appellant had enquired of Jabardhan Rai P.W. 3 who was posted as Home Guard orderly at the residence of the deceased as to whether the deceased was in the house and also that Jagat Bhandu Pradhan P.W. 5 saw the appellant running out of the house of the deceased soon after the stabbing. Thus the prosecution has tried to establish that the appellant was present at the scene of occurrence immediately prior to the stabbing and also immediately after the stabbing. In this connection, Jabardhan Rai P.W. 3 has stated that in the month of September, 1996 around 12 noon when he was carrying sand in a tray for the fowls and when he reached just in front of the house of the deceased, he met with a stoutly built normal height man. The man asked him as to where the witness was staying whereupon the witness replied that he was staying with the deceased. Then the man asked the witness as to whether the deceased was inside the house, to which the witness replied in the affirmative. Thereafter, the man further asked as to whether the wife of the deceased was also inside the house, to which he replied in the negative. Then, the witness left the sand on the spot and went to cut grass of the fowls. While cutting grass, he heard the deceased shouting 'ayu ayu' (groaning in pain). Thereupon he went to the house of the deceased where he saw the latter coming out of the gate of his residence holding his right side stomach with his hand from where blood was oozing out. The deceased ordered him to get the vehicle ready. The witness has further deposed that thereafter the deceased was driven to the hospital by Jagat Bhandu Pradhan P.W. 5 and he and Home Guard Shivalall also accompanied the deceased to the hospital. Further, he has deposed that after some days he was taken to the Sikkim Jail along with Home Guard Shivalall and Jagat Bhandu Pradhan P.W. 5. There, one judicial officer asked him to identify the person whom he had met on the day of the occurrence in front of the house of the deceased while he was carrying sand in the tray, Further, he has deposed that in the jail he could recognize and identify the said person and the same person was present in the dock, that is, the appellant. In the cross-examination, he stated that all the three persons, namely, he, Jagat Bhandu Pradhan and Shivalall informed the judicial officer concerned that the person who was responsible for the occurrence was inside the room. At the same time he has also said that they did not specifically point out to the judicial officer which amongst the inmates in the room was the person he had seen in front of the residence of the deceased on the day the incident occurred. He further stated that he could not remember the exact number of inmates who were inside the room. He also stated that some of the persons were short and some were tall and there was a mixture of all sorts of built and height. Further, he stated that before the police he had nowhere stated that he met the accused before he entered the residence of the deceased on 8-9-1996 at about 11 a.m. It is no doubt true that he did not state to the police that he had met the accused but he definitely made statement under Section 161 of the Code of Criminal Procedure that when he was carrying sand one tall and young man

wearing green coloured vest met him and asked him where he (witness) stayed, whereupon the witness replied that he stayed with the deceased. Again that man asked the witness whether the deceased was inside the house to which he replied in the affirmative. Thus there is no discrepancy in the statement made by him in the examination-in-chief and also in the cross-examination regarding his meeting the appellant on the date of the occurrence and it appears that whatever minor discrepancy has taken place, that has been on account of lapse of memory since the evidence was recorded more than two and a half years after the occurrence, on 29-4-1999. The other witness Jagat Bhandu Pradhan P.W. 5 is the nephew of the deceased and resided at the relevant time with his father who was a Minister in a house situated in front of the house of the deceased. His sister Ganga Pradhan P.W. 4 resided with her. husband Pratap Pradhan P.W. 15 in a house adjoining the house of the deceased. Jagat Bhandu Pradhan P.W. 5 has deposed that in the month of September. 1996 on Sunday at about 10.30 or 11-00 a.m., in the morning after having his lunch at his sister's place he was standing at the entrance of his sister's house and was facing towards the road when he saw the appellant running out of his uncle's house towards Yoksum Building. Immediately thereafter he heard a screaming sound from the deceased's house, whereupon he went towards the deceased's house and when he reached the entrance, he saw the deceased coming down and holding his stomach with both his hands and bleeding profusely. Thereafter, he went to his sister Ganga Pradhan's house and asked his brother-in-law Pratap Pradhan P.W. 15 for the keys of his Gypsy vehicle. Thereafter, he took the deceased in the vehicle to the STNM Hospital. At the hospital, he asked the deceased as to who had stabbed him, whereupon the deceased told him that Dil Bahadur Tamang suspended driver of the Fire Department had stabbed him. Thereafter, the District Magistrate, Shri Govind Mohan recorded the statement of the deceased in the presence of doctors and hospital staff. He has further deposed that he was required subsequently to go to the jail premises for identification of the appellant and during the course of the identification parade he could identify the person who on the day of the incident was running away from the house of the deceased. In his cross-examination, he stated that the entrance door of his sister's house at the road level is about four feet wide and he himself was standing there. He denied that from the road to his sister's entrance there is an enclosed fencing about ten feet high. The learned counsel for the appellant has submitted that the evidence of this witness is not reliable in view of the statement made by Pravin Gurung P.W. 19 the Investigating Officer in his cross-examination that if one is standing at the door way which is two or three feet inside the grilled entrance of Mrs. Ganga Pradhan's building, one cannot see the" entrance of the deceased's building. On the basis of this statement, the learned counsel has submitted that it was not possible for the witness P.W. 5 to see the appellant running from the house of the deceased. In this connection reference may be made to another part of the cross-examination of P.W. 19 where he stated that it is not a fact that from the entrance of the house of Ganga Pradhan the entrance of the house of the deceased could not be seen. Thus the evidence of P.W. 19 is that one

cannot see the entrance of the deceased's house if one stands on the door way which is two/three feet inside the grilled entrance of Mrs. Ganga Pradhan's house, but one can see the entrance of the deceased's house if one is standing at the entrance of the house of Ganga Pradhan. It may be noted that P.W. 5 stated in his examination-in-chief that he was standing at the entrance of his sister's house and not that he was standing at the door way which was two to three foot inside the grilled entrance of that house. I, therefore, see no reason to disbelieve the evidence of Jagat Bandhu Pradhan. Evidence of witnesses P.W. 3 and P.W. 5 as to the identity of the appellant is corroborated by the evidence of Shri P.W. Paljor P.W. 16 who was the Judicial Magistrate at the relevant time. On 24-9-1996 he conducted the Test Identification parade at the Sikkim State Jail on a petition filed by DSP Pravin Gurung, the Investigating Officer P.W. 19, after taking due precaution as provided in Section 9 of the Evidence Act. According to his evidence, 9 jail inmates were selected having built and features similar to those of the appellant and were mixed with the appellant for the T.I. Parade. Before any questions were put to the witnesses, namely, P.W. 3 and P.W. 5, they were called by the judicial magistrate one by one to identify the appellant by peeping through one corner of the curtain after which both identified the appellant. Their answers were recorded separately and each of them was sent back to the main gate of the jail without allowing any opportunity to them to meet. He has further deposed that after the identification of the first witness was completed, the accused was mixed with the inmates and made to stand in a different place. Further, he deposed that in the test identification parade, the witnesses Jabardhan Rai and Jagat Bandhu Pradhan identified the accused Dil Bahadur Tamang in his presence. The memorandum prepared of the test identification parade by him is Exhibit P-8 and is in accord with the statement made by him on oath. I have no reason to doubt that the identification parade was conducted in a proper manner and in that identification parade P.W. 3 and P.W. 5 identified the appellant. Shri B. Sharma, learned counsel for the appellant, has submitted that the identification parade was held after a gap of 15 days from the date of arrest of the appellant and so no reliance should be placed upon it. In this connection, he has referred to *Bali Ahir v. State of Bihar*, AIR 1983 SC 289 and *Hari Nath v. State of U. P.*, AIR 1988 SC 345. In the former case reference has been made to paragraph 11 which states : "11. Even the identification parade appears to be suspicious, as will be evident from the deposition of Shri Yogendra Nath Jha, Assistant Settlement Officer (Consolidation) who conducted the identification parade on 8th May, 1968. He stated that constable Moinuddin Khan at the time of identification of the suspects had twice moved forward and backward seeing them. Shri S. M. Mukherjee, P.W. 6 in his deposition said that he did not mark if the witnesses were at the jail gate or not at the time when he arrived at the jail. This indicates that all was not well with the identification. The fact that the appellants belong to the neighbouring village at a distance of less than a mile, that the witnesses who came to identify the appellants had seen the accused from behind while escaping, that P.W. 2 had known Bali Ahir from before yet he did not name him in the first information report and

went to identify him when he fully knew Bali Ahir, that the identification of the two of the appellants took place after a gap of four days after their arrest, without explaining the cause for the delay, speaks for itself.” It would appear that in that case identification as a result of the identification parade was held to be suspicious on the facts of the case and not merely because of the delay in holding the identification parade. In that case one factor which entered the decision making was that at the time of the identification of the suspects Constable Moinuddin Khan had twice moved forward and backward. The second factor was that P.W. 6 who had conducted the identification parade stated that he did not mark if the witnesses were at the jail gate or not at the time he arrived at the jail. And, the third factor was that the witnesses who came to identify the appellants had seen the accused from behind while escaping and that P.W. 2 had known Bali Ahir from before, yet he did not name him in the first information report and went to identify him when he fully knew Bali Ahir. In *Hari Nath v. State of U.P.*, (1983 Cri LJ 434) it was held that the “conduct of an identification parade belongs to the realm and is part of the investigation. The evidence of the test identification is admissible under Section 9, Evidence Act. But the value of the test identification, apart altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test”. In that case, test identification parade was held after unexplained delay of four months after the arrest of the accused. It was held that the benefit of the wholly unexplained lack of promptitude in holding the test identification ensured to the accused and so the evidence of test Identification lacked the requisite element of reassurance to support the conviction. However, in the present case delay is much less. It would have been better if the identification had been held soon after the arrest of the appellant. But the delay of 15 days in the facts and circumstances of the case cannot be said to be unpardonable. There is no reason to doubt that P.W. 3 and P.W. 5 did not know the appellant from before. There is also no reason to doubt that they had no interest in falsely implicating the appellant in the criminal case. Interest of both the witnesses was merely to see that only the true culprit was brought to book. Both the witnesses P.W. 3 and P.W. 5 identified the appellant as the person seen by them on the date of the occurrence in the Court. The evidence of identification merely corroborates and strengthens the oral testimony in Court which alone is the primary and substantive evidence as to identity. The purpose of test identification is to test the oral evidence, the safe rule being that the sworn testimony of the witness in Court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. (*Hasib v. State of Bihar*, AIR 1972 SC 283. There is no reason to doubt that both the witnesses P.W. 3 and P.W. 5 were able to identify the appellant as the person seen by them on the date of the occurrence 15 days prior to the date of the identification parade. There is also no reason to doubt

that both these witnesses correctly identified on their own the appellant on the date their evidence was recorded in the Court. 8. Another piece of evidence on this aspect of the case is the confessional statement of the appellant recorded by P.W. Paljor P.W. 16 the then Judicial Magistrate under Section 164, Cr. P.C. His statement is inculpatory in one portion and exculpatory in the other. Inculpatory portion gives the motive of his going with a dagger into the house of the deceased on the day of the occurrence and the exculpatory portion is to the effect that he did not stab the deceased but left the dagger in the house of the deceased. The statement is Exhibit P-13 and was recorded on 26-9-1996 and It states : "I was residing with my family consisting of my wife and two children aged 5 and 3 years above Sukhapool below P.N.G. Girl's School, Gangtok, That on 8-9-1996, on Sunday as usual I got up and came out of the house around 7 a.m. towards Paljor Stadium to the shop of one Didi who runs a tea-stall and also sell local drinks. I reached the shop of said Didi, which is at a distance of about 5 minutes walk from my house. I asked for a glass of local drink from said Didi and drank it. In the meantime I proposed to sell a drawer/showcase to her. She told me she is interested to buy the same and would see the show case. After I had my drink I proceeded towards the Fire Brigade Office opposite General Post Office to the official residence of A.S.I. Suren Pradhan, Sikkim Fire Brigade. As It was Sunday, I asked for some loan to do shopping Shri Suren Pradhan lent me Rs. 100/- Prior to that I had sold my T. V. (Black and White) and a drawer to him for Rs. 4000/- in order to repay debt of my mother-in-law. After I received Rs. 100/- from Shri Suren Pradhan I returned to my residence and on the way again went to the shop of above said Didi. She was not in the shop I asked for half bottle of local drink and one stick of cigarette. When I was drinking the Didi appeared in the shop who had gone to see the showcase in my house which I had earlier proposed to sell her. She came and (old me that she had seen the showcase and shall pay me Rs. 750/- but I bargain to sell for Rs. 800/- accordingly, she agreed and paid Rs. 800/ . Thereafter I paid the Didi for the drinks I had there and with her I proceeded to my residence and handed over the showcase. Out of Rs. 800/- I gave Rs. 400/- to my wife for household purchase and kept Rs. 400/- with me to repay one of my friend from whom I had earlier borrowed Rs, 800/-. When I reached home with that Didi the friend of mine also had come to ask for repayment of loan I had taken from him. Along with him I went to his house which is below my residence. I met his wife and pay her Rs. 400/- and also made a request that I shall repay the balance amount of Rs. 400/- later. Thereafter I returned to my house but my friend followed me. and insisted that I should ret urn the entire amount of Rs. 800/-. When my friend keep on insisting my wife also got angry and told me that I should repay his loan. Thereafter I told my friend that I shall try and request for some loan from A.S.I. Suren Pradhan of our Department and I shall repay him. When my wife heard all these conversation she was annoyed and said that she would go to her mother, at Nepal. However, I did not take it seriously. I along with my friend came out of the house and again went to the shop of the Didi and ordered for one bottle of local drink. I offered half bottle to my friend and I consume half

bottle. As I was entering the shop of Didi I also noticed my wife coming out of the house carrying one plastic bag and the child. Suddenly, after I finished my drink I realized that my wife might have left for Nepal to her mother's house, and rushed towards S.N.T. Bus stop above P.N.G. School. However, I could not find her in the bus stand. Then I seriously started thinking of what my wife and earlier said in the house. I started thinking that my wife has also left me alone. However, since I had lot of loans to repay I thought in a way it will be better for my wife and the child if they live with her mother. Since I felt helpless and could do nothing I started loitering around the bus stand and moved towards Development Area. I started thinking of incident when the deceased D.I.G. A.K. Shrestha had asked me about the age of my wife and to sent her to his place after office time and he shall look into my service matter for which I was worried. Around 27th August, 96 I had gone to the Office of the deceased D.I.G. to talk to him about my service matter as I was under suspension since last 6, 7 months. I told the deceased D.I.G. to look into my service matter as he is the head of the Deptt. However, he shouted at me saying that I don't perform my duty properly and only at the time of difficulty I go to him, with such request. However, he enquired about my family members and specifically asked about the age of my wife. I told him my wife is aged about 22 years. Then he told me that I should sent my wife to his residence around 5 p.m. after office hours. When I think about what the deceased D.I.G. enquired and said about my wife I was very much hurt however, I did not tell this to any of my friend or even my wife. That on 8-9-1996 when I could not find my wife and child in the bus stop and I started loitering in the bus stop I again started thinking of what the deceased D.I.G. had told me about my wife. As I was under suspension and that I could not find my wife and child in the bus stop and that continuously I was thinking of what the deceased D.I.G. told me about my wife I was under tremendous mental tension and pressure. On the way to Dev. Area from the bus stop I suddenly started thinking of going to the deceased D.I.G.'s residence and wanted to know from him as to what does he meant to say by telling me to send my wife to his residence and that I should not worry for my service matter. Slowly I proceeded towards the residence of the D.I.G. from near Sangram Cinema Hall. When I reached near his house I saw one boy standing in front of his residence. I enquired as to who are in the house the boy told me that only the deceased D.I.G. is at home and his wife has gone out. I had also worked as official driver of the deceased D.I.G. and I knew the entrance, rooms of his residence. After I enquired from the said boy I slowly entered into his residence and went straight his bedroom. Before I entered and took off my slipper and quietly entered and saw the deceased D.I.G. lying on his bed. I reached close to his bed and suddenly he turned and shouted at me. He abused me saying 'Gadha' why I am entered into his house with a knife in my hand. I got nervous as he was trying to get out of his bed I dropped the knife from my hand and ran out of the room. From his bedroom I ran down the staircase and I heard him shouting 'Ama' however, I kept on running down, from his residence I ran towards left hand side shortcut of his residence and reached Sichey Busty, Sukhapool and hurriedly entered into my house. I had

left my slipper in the house of the deceased as such I was bare footed. I put on my shoes and ran towards Indira Bye Pass which is down below my house. Via Indira Bye Pass I came to Amdo Golai, National Highway where I boarded on Taxi jeep and reached Rangpoo. My parents live at Rangpoo, I thought I would meet them and seek financial help and return to Gangtok. It was around 1 p.m. and my parents were still in the Church attending the Sunday mass. As such I went to my brother's restaurant at Rangpoo Bazar. My sister-in-law offered me lunch and when I was having my lunch I was arrested by Police at Rangpoo and was brought straight to Sadar P.S. in the same afternoon. I also would like to state as to how I have been suspended from my service and had to face many difficulties. Before I joined Police in the year Jan., 1994 I was a very sober person not used to drinking, smoking. After I joined police I slowly caught these habits and one day when I was on night duty my friend, another driver of Fire Brigade invited me for drink. Accordingly we ran away from the duty and consumed enough drinks later my friend Indra told me that we will go for a drive towards Pakyong where he will also see his family members. However, as I was under influence of alcohol and was driving in a high speed we met with an accident at Tadong. As a result of the incident both of us were suspended, from service. Some time in the 1st of August '96 I received summon from the Court in connection with the case. Thereafter around last week of August I met the deceased D.I.G. in his office to talk about my service matter. The deceased D.I.G. then enquired about my wife as stated above. As such I was badly hurt. "I have explained to accused (Dil Bahadur Tamang) that he is not bound to make a confession and that, if he does so, any confession he may make be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him." The following material facts emerge from the statement : (i) Appellant joined the police in January, 1994. One day when he was on night duty, his friend another driver of the fire brigade invited him for drink and then both of them ran away from duty and consumed enough drinks. Later, his friend Indra told him that they would go for a drive towards Pakyong where he would also see his family members. At that time he was under influence of alcohol and was driving at high speed and they met with an accident at Tadong, as a result of which both were suspended from service. (ii) On 27-8-1998 he went to the office of the deceased to talk to him about his service matter as he had been under suspension for six to seven months, whereupon the deceased shouted at the appellant saying that the latter did not perform his duty properly and only at the time of difficulty he went to the deceased with such request. At the same time, the deceased enquired of the appellant about the age of his wife. The appellant replied that his wife was aged 22 years. Then the deceased asked him to send his wife to his residence around 5 p.m. after office hours, causing him much hurt. (iii) The appellant drank heavily in the morning of 8-9-1996. He gave vivid details of his tremendous mental torture that morning making him recall what the deceased had told him about his wife on 27-8-1996 and setting him proceed towards

the house of the deceased. On reaching the house of the deceased, he saw one boy standing in front of the house. He enquired of the boy as to who were in the house, whereupon the boy told him that only the deceased was at home. Thereafter, the appellant slowly entered into the residence of the deceased and went straight to his bed room after taking off his slipper. He saw the deceased lying on his bed. When he reached close to the bed of the deceased, the latter turned and shouted at him and abused him saying 'gadha' why he had entered into his house with a knife in his hand. Thereupon, he got nervous and appellant dropped the knife from his hand and ran out of the room towards the staircase. He heard the deceased shouting 'Ama'. From the deceased's residence he ran towards the left hand side and reached Sichey Dusty and hurriedly entered inside the house. He left his slipper in the house of the deceased.

9. Thus the statement of the appellant is inculpatory to the extent that it gives motive for his entering into the house of the deceased on the day of the occurrence and also that he actually entered into the bed room of the deceased on that day and also that he left the dagger in the house of the deceased. It is exculpatory to the extent that he left the house of the deceased without stabbing him. The legal position is well established that where the confessional statement consists of exculpatory and inculpatory portions, the whole of the statement has to be tendered in evidence and reliance may be placed only on the inculpatory portion, if there is evidence on the record to justify such a course. The Supreme Court held in *A. Nagesia v. State of Bihar*, AIR 1966 SC 119 that confessional statement includes not only admission of the offence but also other admissions of incriminating facts relevant to the offence such as motive, preparation, absence of provocation, concealment of weapon and subsequent conduct which throw light upon the gravity of the offence and the intention and knowledge of the accused. The Court also observed that each and every admission of incriminating fact contained in the confessional statement is part of the confession. This decision was referred to in *Prakash Dhawal Khairnar v. State of Maharashtra*, (AIR 2002 SC 340). The Supreme Court observed in *Bhagwan Singh v. State of Haryana*, AIR 1976 SC 1797."6. The law on the point has however been laid down by this Court in *Nishi Kant Jha v. State of Bihar*, (1969) 2 SCR 1033 : (AIR 1969 SC 422) in which the two cases cited by Mr. Ramamurthy have been considered. After referring to Taylor's Law of Evidence and Roscoe's Criminal Evidence this Court has held that it is permissible to believe one part of a confessional statement, and to disbelieve another, and that it is enough if the whole of the confession is tendered in evidence so that it may be open to the Court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness." 10. In the instant case, inculpatory part insofar as it relates to the motive of the crime, his going to the house of the deceased and entering into the bed room of the deceased and leaving the dagger in the house of the deceased is worthy of acceptance as the same finds corroboration from the other evidence on record. That evidence consists of the statements of Jabardhan Rai P.W. 3 and Jagat Bandhu Pradhan P.W. 5. Further, there is voluminous evidence regarding the dying declarations made by the deceased

implicating the appellant. The fact that the exculpatory portion relating to his running away from the bed room of the deceased without stabbing the deceased is proved to be false from the other evidence will be discussed in the later part of the judgment. The confessional statement Exhibit P-13 was recorded by Shri P.W. Paljor P.W. 16 after giving due warning and after giving sufficient time to the appellant to reflect whether he wanted to make it and was made voluntarily and was not the result of duress or coercion by the police. The Investigating Officer P.W. 19 had made an application Exhibit P-11 before Shri Paljor for recording the confessional statement on 23-9-1996 stating that during interrogation, it had been learnt that the appellant was willing to volunteer to confess to the crime. The application further stated that the accused had been remanded to judicial custody for a period of 14 days with effect from 22-9-1996. The appellant was then directed to be produced before him on 25-9-1996. On 25-9-1996, the appellant was so produced and Shri Paljor then explained to him the provisions of Section 164, Cr. P.C. including that if he made the statement, it would be taken down and used against him as evidence. This was done vide annexure P-12. Thereafter, Shri Paljor gave the appellant 24 hours for reflection and remanded him to judicial custody to be produced on the next day. Accordingly, the appellant was produced before him on 26-9-1996 when his statement under Section 164 Exhibit P. 13 was recorded. The statement having been made voluntarily and not being the result of any duress or coercion by the police and having been recorded after due warning and after giving him sufficient time to reflect whether he wanted to make it. the inculpatory part deserves to be accepted and the exculpatory part deserves to be rejected being found unreliable by the evidence on record. 11. Thus the evidence of Jabardhan Rai P.W. 3, Jagat Bandhu Pradhan P.W. 5, P.W. Paljor P.W. 16 the then Judicial Magistrate and the confessional statement Exhibit P. 13 establish that the appellant came to the house of the deceased on the day of the occurrence in the morning shortly prior to the occurrence and enquired of Jabardhan Rai as to whether the deceased was inside the house and thereafter he entered into the bed room and subsequently immediately after the deceased had been stabbed he was found running away from the house of the deceased by Jagat Bandhu Pradhan P.W. 5. Dying declaration : The appellant made dying declaration Exhibit P. 10 on 8-9-1996 at 12.05 p.m. before Shri Govind Mohan P.W. 18 who was then the District Magistrate, East District in the form of question and answer and reads as under :- "STATEMENT MADE BY SRI A.K. SHRESTHA, D.I.G. Venue : STNM Hospital Date : 8 September, 1996 Time : 12.05 p.m. Question : Who was responsible for the stabbing? Answer : Suspended driver D. B. Tamang Fire Department. X.....X.....X The above statement given to me verified as correct. Sd/- 8.9.96 DM (EAST)" Doctor Sangita Pradhan PW-8 who had been attached to the S.T.N.M. Hospital as Medical Officer has deposed that on 8-9-1996 she was present with the District Magistrate, Shri Govind Mohan, when he recorded the dying declaration made by the deceased and the deceased was conscious, well oriented with time, place and person and was mentally fit to give the statement at

that time. She recorded her finding Exhibit P-1 to the effect that the patient was mentally fit when he was giving his statement to the District Magistrate. Besides, there is the evidence of PW-1, PW-2, PW-4, PW-5 and PW-15 to the effect that the deceased had made declarations that he had been stabbed by the appellant. PW-1 Ranmaya Pradhan is the mother of the deceased. At the time of the occurrence, she was watching TV on the upper floor. She has deposed that on the day of the occurrence at about 12 noon the deceased came suddenly with his hand holding his stomach on the right side from where blood was oozing out and saying "Amma malay fire ko driver Tamanglay marayo" meaning thereby that he had been stabbed by the appellant. She has further deposed that immediately thereafter, the deceased turned back and went down stairs and then she became unconscious. PW-2 is Ranjana Rai who was working as maid servant in the house of the deceased. She was also at the time of the occurrence watching TV on the upper floor along with PW-1. She has deposed that while PW-1 and she were watching T. V., the deceased came screaming "Amma Amma malay Tamang driver lay marayo" meaning that he had been stabbed by the appellant. She also saw the deceased holding his stomach on the right side from where blood was oozing. She has also deposed that in the meanwhile knife fell from his body and thereafter blood started oozing out profusely from the right side of the stomach. PW-4 is Ganga Pradhan, the niece of the deceased, who had her residence adjacent to the house of the deceased. She has deposed that on 8-9-1996 at about 11 or 11.15 a.m., when she was in the quarter of her father which is situated opposite to the house of the deceased, she heard a loud shouting 'maryo maryo' and came out running from the quarter to see what had happened. She then saw the deceased standing at the door steps of his house with profuse bleeding. On enquiry as to what had happened, the deceased told her that the suspended driver of the Fire Department Dil Bahadur Tamang had stabbed him with a knife. She has further deposed that at that time, her brother Jagat Bandhu Pradhan and other persons from the nearby area gathered and Jagat Bandhu Pradhan took the deceased to the hospital in a government vehicle. She also followed that vehicle and from the hospital she informed the Sadai Police Station about the incident over telephone on the basis of which the F.I.R. was registered. Jagat Bandhu Pradhan PW-5 has deposed that in the hospital the sisters gave the deceased saline and medical aid. At that time the deceased was conscious and speaking. The witness asked the deceased as to who had stabbed him whereupon the deceased told him that Dil Bahadur Tamang suspended driver of the Fire Department had stabbed him. He has further deposed that thereafter, the District Magistrate, Shri Govind Mohan recorded the statement of the deceased in the presence of the hospital staff. PW-15 is Pratap Pradhan, the husband of Ganga Pradhan PW-4. He has deposed that on 8-9-96 at about 11.00. to 11.30 a.m., he heard a loud sound coming from the house of the deceased, whereupon he immediately came to the road and saw the deceased coming out of his house holding his abdomen with his hand which was splattered with blood. He has further deposed that the deceased stated that he had been stabbed by a knife in the stomach

by suspended driver Dil Bahadur Tamang of the Sikkim Fire Service. All these witnesses were the most natural ones and I have no reason to disbelieve them. The Supreme Court held in *Lallubhai v. State of Gujarat*, AIR 1972 SC 1776. “9.....The law with regard to dying declarations is very clear. A dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case bearing in mind on the one hand, that the statement is by a person who has not been examined in Court on oath and on the other hand that the dying man is normally not likely to implicate innocent persons falsely.” Further, it was held in *K. R. Reddy v. Public Prosecutor*, AIR 1976 SC 1994 that once that Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. On a close examination of the dying declarations made by the deceased before the witnesses Ranmaya Pradhan PW-1, Ranjana Rai PW-2, Ganga Pradhan PW-4, Jagat Bandhu Pradhan PW-5, Pratap Pradhan PW-15 and Govind Mohan PW-18, I find no reason for any of them to falsely implicate the appellant. They were the most natural witnesses before whom the dying declaration could have been made. I am satisfied that the dying declaration Exhibit P-10 recorded by Shri Govind Mohan PW-18, the District Magistrate, contained the true account of what the deceased declared and the declaration was made by the deceased voluntarily while he was in a fit state of mind to make the declaration. I find the dying declaration, Exhibit P-10 to be truthful and reliable. I also find that dying declarations were also truly made by the deceased before PW-1, PW-2, PW-4, PW-5 and PW-15 as deposed to by them implicating the appellant with stabbing. 12. The appellant, stated in his statement recorded under Section 313 of the Code of Criminal Procedure that he had not gone to the house of the deceased. This statement is found to be untruthful from the evidence on record. He even denied that Shri P. W. Paljor, PW-16 had conducted T. I. Parade and also recorded his statement. He also denied that his confessional statement Exhibit P-13 was recorded on 26-9-1996 by the learned Judicial Magistrate, To most of the questions, his answer has been either of denial or of no knowledge. He has thus failed to avail the opportunity of explaining as to why the evidence of the T.I. parade should not be accepted or his confessional statement should not be believed insofar as it implicates him. 13. On appreciation of the entire evidence on record, I am satisfied that the appellant went, on the date of the occurrence, to the house of the deceased with a dagger and before entering the bed room of the deceased he had asked Jabardhan Rai PW-3 as to whether the deceased was inside the house and that after the deceased had been stabbed. Jagat Bandhu Pradhan PW-5 saw the appellant running out of the house of the deceased. I am also satisfied that the confessional statement Exhibit P-13 recorded by Shri P. W. Paljor, the then Judicial Magistrate, on 26-9-1996 so far as it gives the motive of the appellant for his entry into the bed room of the deceased with the dagger Ex. PII, his actual entry into the bed room and the shouting of the deceased ‘Ama’ is truthful and reliable. I am also satisfied that the dying declaration recorded by the District Magistrate, Shri Govind

Mohan PW-18 is truthful and the other dying declarations as deposed to by Ranmaya Pradhan PW-1, Ranjana Rai PW-2, Ganga Pradhan PW-4 Jagat Bandhu Pradhan PW-15 and Pratap Pradhan PW-15 implicating the appellant are truthful and reliable. All these facts bring home the charge of Sections 302 and 449 of the Indian Penal Code to the appellant beyond reasonable doubt. Therefore, I uphold the conviction of the appellant under Sections 302 and 449 of the Indian Penal Code as recorded by the learned trial Judge. 14. As regards the award of sentence of life imprisonment under Section 302 I.P.C., and four years' rigorous imprisonment for the offence under Section 449 I.P.C., I have no reason to differ from the Learned Sessions Judge. The learned Sessions Judge has also imposed a fine of Rs. 5,000/- under Section 302 IPC and a further fine of Rs. 1,000/- under Section 449 IPC. The learned Sessions Judge has recorded in his order of sentence that while the appellant has been in custody, his wife and mother have passed away and his minor children Ashis aged nine years and Anand aged seven years have been rendered destitute, as per the arguments advanced on behalf of the appellant. Keeping these factors in view and also that the appellant was under suspension and must have been in financial crisis, I am of the view that ends of justice will not suffer if the impugned order of sentence with regard to fine is set aside. 15. Accordingly, I dismiss the appeal as regards the conviction of the appellant Dil Bahadur Tamang under Section 302 and Section 449 of the Indian Penal Code. I also maintain the order of sentence of rigorous imprisonment of life under Section 302 IPC and rigorous imprisonment for a period of four years under Section 449 IPC. However, I set aside the order as regards fine of Rs. 5,000/- for the offence under Section 302 IPC and Rs. 1,000/- under Section 449 I.P.C. The order of sentence stands thus modified.